

**“THE REAL PREFERENCE OF VOTERS”:
MADISON’S IDEA OF A TOP THREE ELECTION
AND THE PRESENT NECESSITY OF REFORM**

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The core principle of Madisonian democracy is that the constitutional separation of powers provides the best hope of safeguarding liberty, the rule of law, and the republic itself from the risk of tyranny. In *The Federalist Papers*, Madison did not focus on the importance of electoral procedure as a means for preserving the separation of powers. Over the course of his career, however, Madison came to recognize the significance of electoral procedure to the structure and operation of republican government. In 1823, Madison specifically embraced the electoral principles of the French theoretician Marquis de Condorcet.

Recognizing Madison’s embrace of Condorcet’s principles is important today to restore the separation of powers that have been failed to protect the republic from the current authoritarian threat it faces. A Condorcet-based electoral system would have avoided the election of a demagogue as President. As important, or even more so, the use of Condorcet-based elections for the Senate would have enabled the Senate to perform its essential separation-of-powers functions of, first, disqualifying an impeached President whose reelection is a danger of despotism and, second, refusing to confirm irresponsible cabinet nominations.

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INTRODUCTION

Madisonian democracy, as James Madison himself propounded it, and as it has subsequently come to be practiced in the United States, has been viewed as different from the democratic theory developed by the French theoretician Marquis de Condorcet and the many scholars of social choice working in Condorcet's wake. A letter that Madison wrote late in life, however, shows that Madison comprehended and embraced Condorcet's insights on the mathematics of majority rule.¹ Recognizing the significance of this letter should shape not only our understanding of Madison's own political thought but also our ideas about the ongoing evolution of Madisonian democracy in America.

Madison's letter described a Condorcet-based electoral system that, if put into effect, would enable election results to achieve what Madison termed "the real preference of the Voters."² Adopting this electoral system, moreover, would protect Madisonian democracy from the threat of an authoritarian demagogue who is able to prevail currently by first winning a partisan primary and then by being more popular than the opposing party's nominee. Madison's Condorcet-based system, by contrast, would enable a third consensus-building candidate, who is unable to beat the authoritarian demagogue within their party's primary, to demonstrate that a majority of the whole electorate's voters prefer that third candidate to either major-party nominee.

1. See Letter from James Madison to George Hay (Aug. 23, 1823), *in* *Madison Papers*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/04-03-02-0109> [https://perma.cc/6ZGE-6MCA].

2. *Id.*

I. MADISON’S LATE-IN-LIFE INVOCATION OF
CONDORCET’S KEY POINTS

In 1823, James Madison wrote a letter to George Hay, James Monroe’s son-in-law and in his own right a notable Virginia lawyer at the time.³ Hay had written Madison and enclosed an essay by Hay on reforming the Electoral College system.⁴ In response, Madison proposed his own Electoral College reform.⁵

Madison’s proposal involved replacing the constitutional provision that applies when no candidate wins a majority of the Electoral College vote, which tasks the House of Representatives with electing the President by a special procedure in which each state’s House delegation has one vote.⁶ Madison instead proposed that, in the absence of an Electoral College majority, both chambers of Congress would elect the President by a “joint ballot” in which each member—Senator or Representative—has one vote.⁷ Madison’s reform would sharply reduce the advantage that less populous states have in the existing procedure, which gives each state an equal vote.

Crucially, as part of his proposal, Madison restricted the congressional vote for President to the two candidates who received the most votes in the antecedent Electoral College process.⁸ With this restriction, Madison assured that the winning candidate would receive a majority of the congressional votes—since whichever candidate receives more congressional votes necessarily has over fifty percent.⁹ But

3. *Id.* Hay later served as a federal district judge in Virginia. *Hay, George*, FED. JUD. CTR., <https://www.fjc.gov/node/1381966> [<https://perma.cc/39HR-ZJ4E>].

4. *See* Letter to James Madison from George Hay (Aug. 11, 1823), in *Madison Papers*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/04-03-02-0105> [<https://perma.cc/QKL3-NRDF>].

5. *See* Letter from James Madison to George Hay, *supra* note 1.

6. In relevant part, the Twelfth Amendment provides:

[I]f no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.

U.S. CONST. amend. XII.

7. Letter from James Madison to George Hay, *supra* note 1.

8. *Id.*

9. Madison made clear both in his letter to Hay and in other correspondence around the same time that he strongly believed it necessary that the winner of the election receive a majority, and not merely a plurality, of votes. *See id.*; *see also* Letter from James Madison to Henry Lee (Jan. 14, 1825), in *Madison Papers*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/04-03-02-0460> [<https://perma.cc/4EHQ-RBXY>].

Madison recognized that limiting the congressional choice to just two candidates might prevent the election of a third candidate whom a majority of voters (in this case, members of Congress) would prefer to either of the other two. As Madison put it in his letter:

It might be a question, whether the *three* instead of the *two* highest names, might not be put within the choice of Congress; inasmuch as it not unfrequently happens, that the Candidate third on the list of votes, would in a question with either of the two first, outvote him, & consequently be the real preference of the Voters.¹⁰

In making this observation, which amounted to not much more than an aside as he was explaining his proposal, Madison revealed that he understood the key insight that the French theoretician Marquis de Condorcet had developed decades earlier.¹¹ Condorcet had posited that whenever an electorate has the choice of more than two candidates, it is necessary to compare candidates two at a time to determine whom the electorate prefers.¹² If there is one candidate whom a majority of voters prefer when compared one-on-one against each alternative in this way, that candidate is the singular choice of the electorate as a whole and thus should win the election.¹³ Madison's letter to Hay embraced Condorcet's concept when he wrote that the third candidate, when compared one-on-one against each of the other two, might receive a majority of votes and thus be "the real preference of the Voters."¹⁴

Immediately after making this point, however, Madison's letter to Hay set aside his suggestion that three rather than only two candidates be submitted to Congress for its joint-ballot vote.¹⁵ Madison worried that it might be impractical to let Congress choose among three contenders: "But this advantage of opening a wider door and a better chance to merit,

10. Letter from James Madison to George Hay, *supra* note 1. On the third page of the original manuscript in the Library of Congress (in the second online "image"), one can see where Madison underlined the words "two" and "three" in this sentence. *Image 2 of James Madison to George Hay, August 23, 1823.*, LIBR. CONG., https://www.loc.gov/resource/mjm.20_0530_0532/?sp=2&st=image [<https://perma.cc/63S8-MJ3T>].

11. For Condorcet's work and its significance, see generally CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY (Iain McLean & Fiona Hewitt eds. & trans., 1994).

12. See MARQUIS DE CONDORCET, AN ESSAY ON THE APPLICATION OF PROBABILITY THEORY TO PLURALITY DECISION-MAKING (1785) [hereinafter CONDORCET, ESSAY ON PROBABILITY THEORY], *excerpt reprinted in* CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY, *supra* note 11, at 120–30.

13. *See id.*

14. Letter from James Madison to George Hay, *supra* note 1.

15. *Id.*

may be outweighed by an increased difficulty in obtaining a prompt & quiet decision by Congress, with three candidates before them, supported by three parties, no one of them making a majority of the whole.”¹⁶ This practical concern indicates that Madison also understood the other part of Condorcet’s key insight: While a candidate preferred by a majority of voters to each opponent should always win an election, not every election includes this kind of candidate.¹⁷ Instead, whenever an election involves three or more candidates, it is possible that there is a cycle similar to the game of Rock, Paper, Scissors: Scissors beats Paper, Paper beats Rock, and Rock beats Scissors. Madison evidently thought that the chance that something like this could arise when Congress is electing the President requires limiting Congress to only two candidates, so no such cycle can occur.

Although the existence of this letter has long been known, its significance for showing Madison’s familiarity with Condorcet’s important work has previously been overlooked. This is understandable, as Madison’s letter to Hay does not mention Condorcet by name. Moreover, the discussion of Condorcet’s core concepts is but a fleeting mention in the context of correspondence focused on other aspects of Electoral College reform.

Still, these sentences in the letter are significant. They demonstrate that Madison was not merely aware of Condorcet’s ideas, but instead that he had deeply internalized a comprehension of them. After all, Madison confidently asserted that “it not unfrequently happens” that a candidate who is third when voters are asked only which they like best is the one who would “outvote” each opponent head-to-head, thereby revealing that Madison had given the matter much thought and knew the situation well.¹⁸

Without considering this letter, scholars have debated whether or not Madison had read Condorcet’s writing on elections. Some have suggested that Condorcet influenced Madison’s contributions to the Constitution and *The Federalist Papers* in support of it.¹⁹ But the

16. *Id.*

17. See CONDORCET, ESSAY ON PROBABILITY THEORY, *supra* note 12, at 122–23.

18. Letter from James Madison to George Hay, *supra* note 1.

19. See Norman Schofield, *The Intellectual Contribution of Condorcet to the Founding of the US Republic, 1785-1800*, 25 SOC. CHOICE WELFARE 303, 307 (2005). Schofield, however, argued that a different aspect of Condorcet’s work—his “Jury Theorem” and not his seminal insights concerning elections involving multiple candidates—is what influenced Madison at the time of the Constitutional Convention and the publication of *The Federalist Papers*. *Id.*; see also Dennis Regis McGrath, James Madison and Social Choice Theory: The Possibility of Republicanism 2–3, 36–38, 98, 104–05 (1983) (Ph.D. dissertation, University of Maryland) (on file with author) (arguing that Madison’s “Republican theory” stemmed from his understanding of Condorcet’s work on elections).

dominant view is that, although in 1788 Madison received a copy of Condorcet's main work on the topic, his *Essai sur l'application de l'analyse à la probabilité des décisions rendues à la pluralité des voix* (1785),²⁰ Madison never showed signs of incorporating Condorcet's electoral principles into his own thinking about the design of electoral institutions.²¹

A proper appreciation of Madison's letter to Hay should change this dominant view. To be sure, because this letter was written in 1823—long after Madison's role at the Constitutional Convention of 1787 and subsequent *Federalist Papers* during the debates on ratification—it may still be true that Madison had no understanding of Condorcet's electoral

20. For an excerpt of the relevant section in English, see CONDORCET, *ESSAI ON PROBABILITY THEORY*, *supra* note 12.

21. Madison apparently received Condorcet's *Essai* from Philip Mazzei, an Italian who spent considerable time in America and corresponded with Madison and Jefferson. In a letter to Edmund Randolph (then-Governor of Virginia) in the summer of 1788 while Madison was in New York, Madison wrote:

Some of the letters herewith inclosed have been here for some time without my knowing it. The others came to hand yesterday. I have also in hand for you the Marquis Condorcet's *essai* on the probability of decisions resulting from plurality of voices, which I understand from Mazzei is a gift from the Author. I shall forward it by the first conveyance.

Letter from James Madison to Edmund Randolph (July [Aug.] 2, 1788), in *Madison Papers*, NAT'L ARCHIVES: FOUNDERS ONLINE (footnote omitted), <https://founders.archives.gov/documents/Madison/01-11-02-0148> [<https://perma.cc/N98Z-22P8>]. This letter is dated "July 2, 1788" in Madison's hand, see *Image 1 of James Madison to Edmund Randolph, August 2, 1788.*, LIBR. CONG., https://www.loc.gov/resource/mjm.03_0621_0623/?sp=1 [<https://perma.cc/PE6T-EEDX>], but it is evidently misdated and was likely instead written on August 2, as it refers to the Constitution's ratification in New York, which occurred on July 26. See *Today in History - July 26*, LIBR. CONG., <https://www.loc.gov/item/today-in-history/july-26/> [<https://perma.cc/T2FC-5QAC>].

On August 11, Madison again wrote to Randolph, this time telling him that the Condorcet work was included in a box of books he had shipped to Randolph. See Letter from James Madison to Edmund Randolph (Aug. 11, 1788), in *Madison Papers*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-11-02-0160> [<https://perma.cc/283G-JWPQ>].

Assuming that only nine days passed between Madison's two letters to Randolph, Iain McLean and Arnold Urken surmise that Madison had insufficient time to digest Condorcet's mathematical analysis of elections even if he opened it at all, since it was a gift to Randolph. See Iain McLean & Arnold B. Urken, *Did Jefferson or Madison Understand Condorcet's Theory of Social Choice?*, 73 *PUB. CHOICE* 445, 453–54 (1992); accord CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY, *supra* note 11, at 66. In a subsequent defense of the same position, McLean mistakenly writes that Jefferson rather than Mazzei sent Condorcet's *Essai* to Madison. See Iain McLean, *The Eighteenth Century Revolution in Social Science and the Dawn of Political Science in America*, 5 *EUR. POL. SCI.* 112, 118 (2006) ("Jefferson sent Madison a copy of the *Essai* (Condorcet, 1785) to pass on to Edmund Randolph, governor of Virginia. Madison had it for nine days before passing it on. It strains belief that even Madison can have taken in its lessons in that time.").

analysis when he played a principal part in the Founding. But it should now be evident to all that, at least when Madison expounded upon political ideas after completing his long career in public service (as he did to many correspondents in addition to Hay), he had a thorough comprehension of Condorcet’s core insights.

II. THE SIGNIFICANCE OF CONDORCET FOR UNDERSTANDING MADISON

This recognition is important for understanding Madison’s own political theory. Throughout his adult life, Madison wrestled with the key questions concerning how to structure government so that it best serves the overall public interest.²² Madison was thoroughly committed to popular sovereignty—what he and his generation called “republican” government and what we today call “representative democracy” or simply “democracy” (even though we do not have in mind direct popular rule of the type used in ancient Athens). As part of his commitment to republicanism, Madison understood clearly that popular election of government officials, especially those serving in the legislature, was essential for having the government act in the public interest.²³ But Madison also knew well that popular elections alone would not guarantee that the government would serve the public interest. On the contrary, a popularly elected government risked a tyranny of the majority, a problem to which Madison devoted particular attention in his most famous *Federalist 10* essay.²⁴ Given the risk that a government elected to implement the will of the majority might unfairly oppress the minority, thereby undermining the pursuit of the public welfare as a whole, Madison’s political theory relied heavily on a constitutional system of checks and balances, including federalism and the separation of powers, in order for republican government to have the best possible prospect for achieving the public good.²⁵

Madison’s understanding of Condorcet’s electoral insights necessarily must be incorporated into Madison’s theory of a republican

22. For an excellent intellectual biography of Madison that emphasizes this point, see JAY COST, *JAMES MADISON: AMERICA’S FIRST POLITICIAN* (2021).

23. See GREG WEINER, *MADISON’S METRONOME: THE CONSTITUTION, MAJORITY RULE, AND THE TEMPO OF AMERICAN POLITICS* 13 (2012). In 1821, Madison wrote: “[I]t seems indispensable that the Mass of Citizens should not be without a voice, in making the laws which they are to obey, & in chusing the Magistrates, who are to administer them.” James Madison, *Note to His Speech on the Right of Suffrage* (1821), reprinted in 3 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 450, 454 (Max Farrand ed., 1911).

24. THE FEDERALIST NO. 10 (James Madison).

25. See John Ferejohn, *Madisonian Separation of Powers*, in *JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT* 126, 126–30 (Samuel Kernell ed., 2003).

constitution. If for reasons that Condorcet identified, elections fail even to produce a government that reflects the will of the majority and instead represents the views of only one minority faction, that is all the more reason to rely on federalism and the separation of powers. The hope is that these institutional checks and balances will cause competition among factions to jostle towards results that approximate the general public good. Conversely, if Condorcet also shows that electoral procedures can be improved so that electoral results better reflect the overall public interest, then the constraints upon electoral outcomes imposed by the separation of powers can be adjusted accordingly so that these constraints do not unduly defeat the government's capacity to serve the public interest.

Madison's own political theory changed significantly in light of his own and the nation's experience during the first forty years following the adoption of the Constitution.²⁶ For example, while attending the Constitutional Convention and writing *The Federalist Papers* during the debates on the Constitution's ratification, Madison viewed political parties as antithetical to the public interest and, consequently, considered the constitutional system of checks and balances as being designed primarily to limit the capacity of political parties to inflict harm.²⁷ Yet just five years later, as the conflict over the new government's financial and foreign policies emerged between Madison and Jefferson, on the one hand, and Hamilton and Adams, on the other, Madison wrote a new set of essays extolling the role of political parties—specifically, the party that he and Jefferson were forming to defend republican values against the monarchical and oligarchical tendencies of the opposing “Federalist” party that Hamilton and Adams were organizing.²⁸ In general, as time progressed, Madison became more trusting of electoral outcomes than he had been when writing *The Federalist Papers*,²⁹ perhaps because his Republican party became so dominant electorally after 1800 that the opposing Federalist party eventually withered away by 1820.³⁰ Insofar as his understanding of Condorcet's contributions enhanced his own

26. See, e.g., *id.* at 126–55; see also DREW MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* (1989) (an indispensable study of Madison's later years).

27. See DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 59–81, 126–46, 193–99 (1984); RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM* 63–73 (1970).

28. See HOFSTADTER, *supra* note 27, at 80–86.

29. See Letter from James Madison to Unknown Regarding Majority Governments (Dec. 1834), in *Madison Papers*, NAT'L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/99-02-02-3066> [<https://perma.cc/HPK9-TDKD>] (explaining that a majoritarian representative government is no more susceptible to abuses of power than any other form of government).

30. RICHARD P. MCCORMICK, *THE SECOND AMERICAN PARTY SYSTEM: PARTY FORMATION IN THE JACKSONIAN ERA* 19–31 (1966); HOFSTADTER, *supra* note 27, at 121.

thinking on the role of elections in republican government, as reflected in his 1823 letter to Hays, Madison’s late-in-life political theory must be seen as more dependent upon the design of electoral institutions—especially relative to other elements of constitutional architecture, like federalism and separation of powers—than the young Madison’s political thought.³¹

Moreover, Madison’s late-in-life incorporation of Condorcet’s concepts into his own political theory means that his theory necessarily remained incomplete and still evolving at the end of his life. In particular, his rejection of three candidates rather than two at the final stage of the presidential election only for reasons of practicality means that if the practical obstacle could be overcome, then Madison himself would view three candidates as being preferable to two. Condorcet’s electoral insights themselves were not fixed: Subsequent scholars have built upon Condorcet’s work to show how voting procedures can be improved in order for election results to better reflect the public will.³² Indeed, subsequent refinements of Condorcet’s original analysis have solved the practical problem that so concerned Madison.³³ If Madison could have been aware of this development, he would have revised his own thinking accordingly. Thus, a fidelity to Madison’s own political theory requires

31. See Letter from James Madison to George Hay, *supra* note 1.

32. Duncan Black was the most influential figure in the twentieth century building upon Condorcet’s work. See DUNCAN BLACK, *THEORY OF COMMITTEES AND ELECTIONS* 159–80 (rev. 2d ed. 2013). Nicolaus Tideman has done important recent work evaluating which voting methods consistent with Condorcet’s principles would work best as a practical matter. See Nicolaus Tideman, *Choosing Among the Variety of Proposed Voting Reforms*, 34 *CONST. POL. ECON.* 471, 477–81 (2023) [hereinafter Tideman, *Choosing Voting Reforms*]; Nicolaus Tideman, *How Should Votes Be Cast and Counted?*, in 2 *OXFORD HANDBOOK OF PUBLIC CHOICE* 5, 10–21 (Roger D. Congleton, Bernard N. Grofman & Stefan Voigt eds., 2019) [hereinafter Tideman, *How Should Votes Be Cast*]. For some of my own earlier contributions to this literature, see Edward B. Foley, *Tournament Elections with Round-Robin Primaries: A Sports Analogy for Electoral Reform*, 2021 *WIS. L. REV.* 1187; Edward B. Foley, *Total Vote Runoff: A Majority-Maximizing Form of Ranked Choice Voting*, 21 *U.N.H. L. REV.* 323 (2023) [hereinafter Foley, *Total Vote Runoff*].

33. As Tideman observes, there are multiple practical ways to implement a Condorcet-consistent voting procedure. See generally Tideman, *Choosing Voting Reforms*, *supra* note 32; Tideman, *How Should Votes Be Cast*, *supra* note 32. If the goal is a voting procedure most similar to one already in use, Total Vote Runoff—a variation on the instant-runoff voting procedure used in many localities—is an attractive option. See Foley, *Total Vote Runoff*, *supra* note 32, at 343. By contrast, if the goal is a procedure that is most faithful to Condorcet’s basic principles, then the Minimax procedure—which I call “Maximum Convergence Voting”—is a better option. See Edward B. Foley, *Maximum Convergence Voting: Madisonian Constitutional Theory and Electoral System Design*, 76 *FLA. L. REV.* 1751, 1752 (2024) [hereinafter Foley, *Maximum Convergence Voting*]. For more on alternative Condorcet-consistent voting methods, see Edward B. Foley, *Ballot Structures*, in *ELECTORAL REFORM IN THE UNITED STATES* 25, 53–60 (Larry Diamond, Edward B. Foley & Richard H. Pildes eds., 2025) [hereinafter Foley, *Ballot Structures*].

updating it on his behalf to incorporate his proposal for three-candidate elections, a proposal he would not have set aside as impractical if he had known what we know today.

III. THE CONTEMPORARY SIGNIFICANCE OF CONDORCET FOR THE MADISONIAN CONSTITUTION

Madison's invocation of Condorcet's core electoral points in his 1823 letter to Hay is significant not merely for the historical enterprise of understanding Madison's thinking. Instead, it is crucial for our own current task as Americans of determining the best way to rescue American democracy from its present predicament. While America's existing democracy differs in many ways from the constitutional republic that Madison and his colleagues created in 1787, the United States remains a Madisonian system of separated powers in its essential features. Yet this Madisonian system suffered its second greatest failure (the first being the Civil War) with the reelection of Donald Trump following the failure to disqualify him from serving in office again because of his attempt to retain power despite losing the 2020 election, including specifically his role in the January 6 attack on Congress to thwart the certification of the 2020 election.³⁴ Unless America is going to jettison its Madisonian system and replace it with something entirely different, which is highly unlikely as well as unwise, America instead will need to repair its debilitated Madisonian democracy. Revising America's electoral procedures to conform to Condorcet's key principles is a necessary element of this repair. This is true not only because Madison himself would want that, but more importantly because we will be unable to revitalize our own Madisonian system to serve our collective welfare without doing so.

34. See *Trump v. Anderson*, 144 S. Ct. 662, 667 (2024) (per curiam) (holding states cannot use Section 3 of the Fourteenth Amendment to disqualify individuals from holding federal offices, "especially the Presidency").

*A. The Historical Development of Madisonian
Democracy in America*

If we define America's original Madisonian system as the Constitution of 1787 and *The Federalist Papers*' defense of it, we can identify four major transformations of this system in the nation's subsequent history.³⁵ Madison himself lived through, and indeed contributed to, the first of the transformations (as we have already indicated): the emergence of two-party competition, culminating in the constitutional crisis over the election of 1800, the subsequent adoption of the Twelfth Amendment, and the implicit acceptance of parties as an inevitable feature of American democracy.³⁶ Initially, the two opposing parties were the "Republicans," led by Madison and Jefferson, and the "Federalists" led by Hamilton and Adams.³⁷ After the demise of the Federalists, the second version of two-party competition was between the "Democrats," led by Andrew Jackson and Martin Van Buren, and the "Whigs," led by Henry Clay and Daniel Webster, until the Whigs collapsed and were replaced by Republicans during the crisis of the 1850s that provoked the Civil War.³⁸

Reconstruction after the Civil War produced the second major transformation of the Madisonian system.³⁹ There were three key components of this second transformation. First, the Union's military victory over the Confederacy and the return of the Southern states to the Union under the terms set by the military victors recalibrated the federal balance of power in favor of the national government. Second, Lincoln's aggressive use of presidential power to prosecute the Civil War and the Senate's failure to convict Andrew Johnson in his impeachment trial,

35. For a related but somewhat different account of America's political development, one which emphasizes the threats that American democracy has faced at various points in its history, see SUZANNE METTLER & ROBERT C. LIEBERMAN, *FOUR THREATS: THE RECURRING CRISES OF AMERICAN DEMOCRACY* (2020).

36. EDWARD B. FOLEY, *PRESIDENTIAL ELECTIONS AND MAJORITY RULE 23-45* (2020). The Twelfth Amendment implicitly recognizes the role of parties by providing separate Electoral College votes for President and Vice President. In contrast, the original Constitution made Vice President whoever was runner-up in the presidential vote. The original Constitution thus assumed that the Electoral College winner and runner-up would not be opposing nominees of two rival political parties. The Twelfth Amendment separates the Electoral College votes for President and Vice President so that a political party's nominees for both offices can run together as a ticket in opposition to the nominees for both offices of the rival political party. For an analysis of the Twelfth Amendment, its original intent, and continuing relevance, see *id.*

37. See SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY 40-71* (2006).

38. See MICHAEL F. HOLT, *POLITICAL PARTIES AND AMERICAN POLITICAL DEVELOPMENT FROM THE AGE OF JACKSON TO THE AGE OF LINCOLN 33-238* (1992).

39. ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 1-20* (2019); see also ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* (updated ed. 2014).

precipitated by Johnson's conflict with Congress over Reconstruction, left the presidency with considerably enhanced powers relative to Congress.⁴⁰ Third, and most fundamentally, the Reconstruction Amendments altered the nature of national citizenship, promising it to anyone born in the United States, and guaranteed—at least on paper—the equal right to vote in any election regardless of race.⁴¹ The failure of Reconstruction to secure this guarantee in practice for another century was a glaring deficiency of Madisonian democracy as it then existed.

This glaring deficiency was not the only one. It took the third major transformation of the system during the Progressive Era to guarantee the equal right to vote regardless of gender.⁴² This third transformation also included a fundamental change in the nature and role of the Senate, with direct popular election of Senators replacing their appointment by state legislatures.⁴³ This change, combined with the increasingly plebiscitary nature of the presidency—meaning that charismatic Presidents like Theodore Roosevelt developed a direct rapport with the American populace and thus could claim to uniquely represent and speak for the American people in a way that neither Congress nor any other institution of government could—caused the Madisonian system to lack the intermediary buffers between the people and components of the federal government that Madison and the other Framers of the Constitution originally intended.⁴⁴ Only the House of Representatives was directly elected by citizens according to the original plan. But by the end of the Progressive Era, instead of the Electoral College and state legislatures filtering the preferences of the people in the choice of Presidents and Senators, the American people expected to decide for themselves who would be the President and Senators, as well as their Representatives in Congress.

Another major transformation of the Madisonian system occurred in the middle of the twentieth century during the decades that encompassed the New Deal, World War II, the Cold War, and the civil rights movement.⁴⁵ This transformation enhanced the powers of the federal

40. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*].

41. See U.S. CONST. amends. XIII, XIV, XV.

42. See MAUREEN A. FLANAGAN, *AMERICA REFORMED: PROGRESSIVES AND PROGRESSIVISMS, 1890S–1920S* (2007).

43. See WENDY J. SCHILLER & CHARLES STEWART III, *ELECTING THE SENATE: INDIRECT DEMOCRACY BEFORE THE SEVENTEENTH AMENDMENT* (2015).

44. See Scott C. James, *Historical Institutionalism, Political Development, and the Presidency*, in *OXFORD HANDBOOK OF THE AMERICAN PRESIDENCY* 70 (George C. Edwards III & William G. Howell eds., 2010).

45. See generally ACKERMAN, *TRANSFORMATIONS*, *supra* note 40; 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014) [hereinafter ACKERMAN, *CIVIL RIGHTS REVOLUTION*]. Ackerman's historical analysis evolved over the

government in relation to the states even more than during the Civil War and Reconstruction—indeed, vastly more so, as the Supreme Court began to construe the Constitution’s Commerce Clause expansively to enable Congress to regulate virtually all aspects of America’s economy.⁴⁶ Likewise, the powers of the presidency mushroomed dramatically, as Franklin D. Roosevelt took advantage of new military technology to enable the United States to win World War II.⁴⁷ The burgeoning of presidential powers continued to accelerate during America’s Cold War competition with the Soviet Union, to the point where historians, political scientists, and other commentators began to talk of “the imperial Presidency.”⁴⁸ Post-Watergate reforms aimed to keep the presidency within constitutional bounds, so that America’s democracy did not become effectively an authoritarian regime dominated by a despotic autocrat.⁴⁹ Meanwhile, the Voting Rights Act of 1965 along with the Supreme Court’s use of the Fourteenth Amendment’s Equal Protection Clause finally caused American democracy to practice what it preached: the fundamental principle of electoral participation for all adult citizens.⁵⁰

Thus, as a result of these four major transformations, by the end of the twentieth century and into the first two decades of the twenty-first, the operation of Madisonian democracy in the United States looked very different from what Madison and his colleagues originally designed. Indeed, it was much more democratic than Madison ever intended insofar as it provided equal voting rights for all adult citizens and eliminated the intermediary buffers that he had hoped would insulate the federal government from the direct pressure of public opinion. Moreover, the federal government had become far more powerful relative to the states than originally intended, and within the institutions of the federal

course of his career, to the point where he separated the New Deal and the civil rights movement into distinct periods of constitutional transformation. *Compare* ACKERMAN, TRANSFORMATIONS, *supra* note 40, at 271 (discussing the “New Deal revolution”), *with* ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra*. I think it makes more sense to consider it one thirty-year transformative period comparable to the thirty-year period of the Progressive Era. From a constitutional perspective, this was the period in which the judicial philosophy articulated in the famous *Carolene Products* footnote four dominated the Supreme Court’s jurisprudence. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 75–76 (1980).

46. *See Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942).

47. ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY ix, 114–16, 122–26 (1973).

48. *See id.* at 127–28.

49. *See Watergate-Era Reforms 50 Years Later*, HARV. L. TODAY (June 8, 2022), <https://hls.harvard.edu/today/watergate-era-reforms-50-years-later/> [https://perma.cc/RCF4-4XDM].

50. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437. The Warren Court’s key cases interpreting the Equal Protection Clause to protect an equal right to vote are: *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966); and *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

government itself the presidency had become exponentially more potent than the “chief magistrate” that Madison and the other Framers had envisioned.⁵¹

Nonetheless, despite these profound changes, before Donald Trump first took office in 2017, America’s democracy remained Madisonian in its essential nature. The United States was still a federal system, with states retaining attributes of independent sovereignty.⁵² Indeed, although the Supreme Court narrowly upheld the main elements of President Barack Obama’s controversial health care program, the Court invalidated the program’s expansion of Medicaid for exerting undue pressure on state governments by a 7–2 vote.⁵³ Likewise, in its rulings concerning the relative powers of Congress and the President, the Supreme Court made clear that neither branch of government was omnipotent in relation to the other, but instead each existed to keep the other in check for the benefit of the American people as a whole.⁵⁴

Moreover, the Court’s own increasingly activist exercise of judicial review under the doctrine of *Marbury v. Madison*⁵⁵ was another element of the checking and balancing that form the essence of the Madisonian system and confirmed its continued existence in the early years of the twenty-first century.⁵⁶ America certainly had not become a parliamentary system along the lines of the traditional Westminster model, in which an all-powerful legislature is superior to every other institution of government within the entire nation.⁵⁷ Instead, America’s democracy was still fundamentally Madisonian because, although all government power derived from the sovereignty of the citizenry and did so ultimately through the mechanism of popular elections—as Madison himself recognized to be essential to any republic at its foundation⁵⁸—government

51. For references to the President of the United States as the “chief magistrate” of the federal government, see THE FEDERALIST NOS. 66, 68–70, at 450, 457, 463, 515 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Indeed, *Federalist 69* wonders whether, referring to the President, “that magistrate would in the aggregate, possess more or less power than the governor of New York.” THE FEDERALIST NO. 69, *supra*, at 469 (Alexander Hamilton).

52. The ongoing vitality of the federalism principle is most clearly manifest in the Supreme Court’s Tenth Amendment jurisprudence. See *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018); *Printz v. United States*, 521 U.S. 898, 919 (1997); *New York v. United States*, 505 U.S. 144, 155–59 (1992).

53. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

54. See, e.g., *NLRB v. Noel Canning*, 573 U.S. 513, 524–26 (2014); *Zivotofsky v. Kerry*, 576 U.S. 1, 17 (2015); *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2190 (2020).

55. 5 U.S. (1 Cranch) 137 (1803).

56. Some argue that the Court has gone too far in this respect. See, e.g., Mark A. Lemley, *The Imperial Court*, 136 HARV. L. REV. F. 97, 110 (2022).

57. The Westminster model, original to Britain, has been exported to Canada, Australia, and New Zealand, among other nations. See R. A. W. RHODES, JOHN WANNA & PATRICK WELLER, *COMPARING WESTMINSTER* 1, 3 (2009).

58. See WEINER, *supra* note 23, at 13, 15, 18–19.

power was not consolidated within any single institution or office but instead dispersed among multiple institutions so that the people were represented separately by several different bodies claiming authority on behalf of the public.

B. The Madisonian System’s Failure to Stop a Demagogue

In the aftermath of World War II and the civil rights movement, Americans generally were proud of their Madisonian democracy. They viewed it as a successful system of government, one worth exporting to other countries both during the Cold War and its aftermath.⁵⁹ They tended to revere the Constitution as a work of genius and thus also revere its Framers, including Madison, as greater-than-normal humans or more noble than ordinary politicians.⁶⁰

In truth, while serving the nation well over much of its history, the Madisonian system has been far from perfect even discounting its deficiencies in representational fairness prior to the enfranchisement of women and the enforcement of equal voting rights in the civil rights movement. Given the original Madisonian goal of keeping the republic intact despite the deep differences among states over slavery, the Civil War must be seen as a spectacular failure of the Madisonian system.⁶¹ Although the system was rebuilt during Reconstruction in a way consistent with its Madisonian premises, the secession of the South and the military conquest necessary to return the Confederacy to the Union inevitably demonstrate that the Madisonian system failed to enable the procedures of politics, including elections and legislative deliberations, to resolve disagreement over issues of policy and the contents of laws.⁶²

The Madisonian system has now suffered its second monumental failure with the reelection of Trump after he attempted to subvert the constitutional process for declaring the result of the 2020 election. A principal goal of the Madisonian system is to prevent a demagogue from undermining the American republic in the way that Caesar undermined the Roman Republic. The Madisonian system was designed to prevent a

59. See, e.g., JOSHUA MURAVCHIK, *EXPORTING DEMOCRACY: FULFILLING AMERICA’S DESTINY* (1992).

60. See, e.g., CATHERINE DRINKER BROWN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787* (1966). For a more measured assessment, but one that still sets the Founders apart as distinct, see GORDON S. WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* (2006). *But see* R. B. BERNSTEIN, *THE FOUNDING FATHERS RECONSIDERED* 108 (2009) (offering an antidote to the prevailing hagiography of the Founders).

61. See generally NOAH FELDMAN, *THE BROKEN CONSTITUTION: LINCOLN, SLAVERY, AND THE REFOUNDING OF AMERICA* (2021).

62. See generally DAVID M. POTTER & DON E. FEHRENBACHER, *THE IMPENDING CRISIS, 1848–1861* (1976); WILLIAM W. FREEHLING, *THE ROAD TO DISUNION II: SECESSIONISTS TRIUMPHANT, 1854–1861* (2007).

modern Caesar from gaining power in the first place.⁶³ Moreover, in the event that the Madisonian system inadvertently let a Caesar take office, its impeachment process is supposed to protect against the republic's downfall by removing the Caesar from office and barring his return to power.⁶⁴ With respect to the Caesarism of Donald Trump, the Madisonian system has so far failed at every turn.

1. The Failure in 2016

A well-functioning Madisonian system would not have elected Trump as President in 2016. He was neither the choice of any deliberative body, as the Electoral College was originally intended to be, nor the choice of a majority of America's voters, as democratic principles associated with the Madisonian system since the civil rights era and the Supreme Court's contemporaneous interpretation of the Equal Protection Clause would require. As is well known, Hillary Clinton won more votes than Trump nationwide in 2016, although she did not win a majority because of minor-party candidates also on the ballot.⁶⁵ If there had been a nationwide runoff limited only to Clinton and Trump, there is every reason to believe that Clinton would have prevailed.⁶⁶ Thus, a republic that better represented the will of its citizenry would have elected Clinton President instead of Trump.⁶⁷

63. See MICHAEL SIGNER, *DEMAGOGUE: THE FIGHT TO SAVE DEMOCRACY FROM ITS WORST ENEMIES* 31–32, 132 (2009).

64. See CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN'S GUIDE* 12 (2017); MICHAEL GERHARDT, *IMPEACHMENT: WHAT EVERYONE NEEDS TO KNOW* 2, 16 (2018).

65. *Presidential Election, 2016*, BALLOTPEDIA, https://ballotpedia.org/presidential_election,_2016 [<https://perma.cc/3K2S-UJEH>].

66. Clinton's nationwide margin ahead of Trump was 2.09 points. *Id.* The Libertarian Party candidate, Gary Johnson, got 3.27 points, and the Green Party candidate, Jill Stein, 1.06. *Id.* It is difficult to imagine that Trump would have gotten enough of Johnson's votes in a runoff to overcome Clinton's lead, especially considering Clinton likely would have received support from Stein's voters in the runoff.

67. If in 2016 there had been a Top Three election along the lines described subsequently, it is likely (although necessarily speculative) that Clinton would have won that as well. The third candidate in the Top Three election, along with Clinton and Trump, most probably would have been either another Republican besides Trump who decided upon an independent candidacy (like perhaps John Kasich) or a different independent candidate like Michael Bloomberg (who contemplated an independent bid even in the current electoral system that disfavors independent candidates), or possibly Bernie Sanders running as an independent instead of challenging Clinton for the Democratic nomination. Under any of those scenarios, the most likely outcome is Clinton winning a majority of votes against each of her two opponents. In any event, the *least* likely outcome is Trump winning a majority of votes against each opponent. Thus, under any well-designed electoral system Trump almost certainly would not have become President in 2017.

2. The Failure After 2020

The Madisonian system failed even more colossally after Trump became President. No President in American history has been so overtly and brazenly willing—even eager—to abuse power and act corruptly.⁶⁸ Not even Richard Nixon comes close.⁶⁹

It is debatable whether or not Trump should have been impeached and removed from office because of his attempt to pressure Ukrainian President Volodymyr Zelenskyy to smear Joe Biden, his then-likely and eventual opponent in the 2020 election.⁷⁰ What Trump did was undeniably improper—it was *not* “a perfect phone call”⁷¹—but removing him from the presidency and preventing him from running for reelection in 2020, as a conviction in that impeachment trial would have entailed, would have prevented the American electorate from rendering its verdict on whether or not Trump deserved a second term.⁷² Arguably, the adoption of the Twenty-Second Amendment, which limits Presidents to two terms so as to prevent a repetition of anything like FDR’s four-term reign, affects the constitutional calculus concerning the impeachment of

68. Compare DAVID FRUM, *TRUMPOCRACY: THE CORRUPTION OF THE AMERICAN REPUBLIC* 51–69 (2018) (describing corruption in the Trump administration), with James M. Banner, Jr., *A Measure of Executive Misdeeds*, in *PRESIDENTIAL MISCONDUCT: FROM GEORGE WASHINGTON TO TODAY* ix, ix–xix (James M. Banner, Jr. ed., 2019) (describing corruption in prior administrations).

69. James M. Banner, Jr., *From Nixon to Trump, the Historical Arc of Presidential Misconduct Is Deeply Troubling*, NBC NEWS: THINK (Nov. 9, 2019, 5:10 AM), <https://www.nbcnews.com/think/opinion/nixon-trump-historical-arc-presidential-misconduct-deeply-troubling-ncna1079081> [<https://perma.cc/JQX4-APHG>]; Kevin M. Kruse & Julian E. Zelizer, *Worse than Watergate*, ATLANTIC (Jan. 8, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/trumps-crimes-are-worse-watergate/579541/> [<https://perma.cc/35C6-P64U>].

70. See KEVIN SULLIVAN & MARY JORDAN, *TRUMP ON TRIAL* (Steve Luxenberg ed., 2020).

71. Donald J. Trump (@realDonaldTrump), X (Jan. 16, 2020, 2:39 PM) (emphasis omitted), <https://x.com/realDonaldTrump/status/1217909231946477575> [<https://perma.cc/EGV5-2UG9>].

72. My view on this aligns with that of then-Senator Lamar Alexander, who explained his vote against pursuing the impeachment charges against Trump:

It was inappropriate for the president to ask a foreign leader to investigate his political opponent and to withhold United States aid to encourage that investigation. . . . But the Constitution does not give the Senate the power to remove the president from office and ban him from this year’s ballot simply for actions that are inappropriate.

The question then is not whether the president did it, but whether the United States Senate or the American people should decide what to do about what he did. I believe that the Constitution provides that the people should make that decision in the presidential election that begins in Iowa on Monday.

READ: Lamar Alexander’s *Statement on Impeachment Witness Vote*, CNN (Jan. 30, 2020, 11:27 PM), <https://www.cnn.com/2020/01/30/politics/lamar-alexander-impeachment-witnesses-vote/index.html> [<https://perma.cc/FMB3-YPCS>].

a first-term President. While Madison himself and the other Framers of the original Constitution undoubtedly would have believed that Trump deserved to be disqualified from consideration for reelection by the presidential electors exercising their deliberative role in the Electoral College system, the two-term limitation of the Twenty-Second Amendment is implicit recognition that by the middle of the twentieth century the presidency had become a plebiscitary institution, and the American people were entitled to their unfettered choice for President—but only were entitled to choose the same individual twice because of the danger that a charismatic demagogue would become a tyrant. The Madisonian system had thus made an adjustment in how the Constitution's provisions would protect the republic from a tyrannical President: While the original Constitution relied upon the combination of the Electoral College's deliberations and the possibility of impeachment, the contemporary Constitution in the aftermath of the Twenty-Second Amendment relied primarily on the two-term limitation supplemented by impeachment of a first-term President if absolutely necessary. Because Trump's corrupt attempt to damage Biden failed, and because there was no reason to think that the American electorate could not make a free and fair choice between Trump and Biden in 2020, it was reasonable to conclude that the modern Madisonian system should permit America's voters to give Trump a second chance.

Trump's second impeachment trial, however, was an altogether different matter. After being given a second chance, Trump flagrantly and egregiously abused it.⁷³ He lost the 2020 election to Joe Biden.⁷⁴ His closest advisers, including Vice President Mike Pence and Attorney General Bill Barr, told him so.⁷⁵ Yet Trump tried everything he could to deny Biden's victory and instead give himself a second term he did not win. He fabricated a blatant lie that he received more valid votes than Biden in enough states to change the Electoral College outcome—a preposterous claim thoroughly and emphatically rejected by every court to consider it, including the judges he himself appointed.⁷⁶ He attempted to strong-arm state and local officials, including Georgia's Secretary of State Brad Raffensperger, to manipulate the process and declare him the

73. For my account of Trump's attempt to subvert the outcome of the 2020 election, see EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 343–79 (2d ed. 2024) [hereinafter FOLEY, *BALLOT BATTLES*].

74. *Presidential Election, 2020*, *BALLOTPEDIA*, https://ballotpedia.org/Presidential_election_2020 [<https://perma.cc/F838-UXVC>].

75. FOLEY, *BALLOT BATTLES*, *supra* note 73, at 360.

76. *Id.* at 9.

winner in the state, contrary to state law.⁷⁷ Worst of all, he rallied a mob of his supporters from around the country to travel to the Capitol on January 6, the day Congress would officially confirm Biden’s victory, with the hope and expectation that the mob’s presence would prevent Congress from doing its constitutional duty and, instead, keep him in office—an outcome that, if successful, would have amounted to a coup against the Constitution itself.⁷⁸ Given this most direct attack upon republican self-government that the Constitution exists to effectuate, no conception of the nation’s Madisonian system could tolerate letting Donald Trump anywhere near the Oval Office ever again, as Representative Liz Cheney aptly and repeatedly put it.⁷⁹ Trump had proved himself to be too dangerous to be permitted a second term. Notwithstanding the Twenty-Second Amendment’s requirement that Trump could not hold the presidency beyond another four years, Trump’s evident willingness to destroy the Constitution itself in order to retain power meant that his seditious misconduct necessarily disqualified him from even beginning another term in office. If he ever got his hands on power again, who knows how horrifically he might abuse it to the permanent destruction of the Constitution and its Madisonian system of popular sovereignty.

Yet Trump was acquitted in his second impeachment trial, the one that would have held him responsible for his efforts to subvert the peaceful transfer of power after losing the 2020 election.⁸⁰ This acquittal was an abject and utter failure of the Madisonian system to protect itself from a proven would-be tyrant. The failure occurred specifically because, although seven Republican Senators were willing to join all fifty Democrats in the Senate to convict Trump in this impeachment trial, the Constitution requires sixty-seven Senators for a conviction, and

77. Michael D. Shear & Stephanie Saul, *Trump, in Taped Call, Pressured Georgia Official To ‘Find’ Votes To Overturn Election*, N.Y. TIMES, <https://www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html> (May 26, 2021).

78. Charlie Savage, *Incitement To Riot? What Trump Told Supporters Before Mob Stormed Capitol*, N.Y. TIMES, <https://www.nytimes.com/2021/01/10/us/trump-speech-riot.html> (Jan. 12, 2021).

79. LIZ CHENEY, OATH AND HONOR: A MEMOIR AND A WARNING 5 (2023). For a sample of Cheney’s many public statements on this point, see The 92nd Street Y, New York, *Liz Cheney Says Donald Trump Can’t Be Anywhere Near the Oval Office Again*, YOUTUBE (Oct. 30, 2023), <https://www.youtube.com/watch?v=JVbhaGjxC74> [<https://perma.cc/K72K-YT22>]; CNBC Television, *Cheney Vows To Never Let Trump Near the Oval Office Again*, YOUTUBE, at 01:02 (Aug. 18, 2022), <https://www.youtube.com/watch?v=stg4gydY0oU> [<https://perma.cc/8VDD-8GFM>]; Guardian News, *Liz Cheney Committed To Ensure ‘Trump Never Gets Near the Oval Office Again,’* YOUTUBE, at 00:44 (May 12, 2021), <https://www.youtube.com/watch?v=y4O3sUEYvI4> [<https://perma.cc/3XV7-ZH7Y>].

80. *Impeachment Trial: Trump Is Acquitted by the Senate*, N.Y. TIMES (Feb. 17, 2021), <https://www.nytimes.com/live/2021/02/13/us/impeachment-trial>.

Republican Majority Leader Mitch McConnell was unable (or unwilling) to muster ten additional Republicans to protect the republic from Trump.⁸¹ In the early days after the January 6 insurrection at the Capitol, it seemed as if McConnell might be able to corral enough Republican Senators for Trump’s conviction—Senator Lindsey Graham, for example, famously proclaimed he was done with Trump.⁸² But then the Trump-loyal base of the Republican party made it clear that these MAGA voters were not done with Trump and, fearing a primary challenge from a Trump-endorsed candidate supported by these voters, Graham and other Republican Senators, including McConnell, fell back in line.⁸³

It is unquestionable that the nation’s existing electoral system, with its partisan primaries followed by a “first past the post” (plurality-winner) general election,⁸⁴ is what caused the impeachment procedure to fail. It is well-known in Washington, D.C., that Republican Senators are, in the words of a prominent longtime political observer, “absolutely terrified of a primary challenge.”⁸⁵ This fear of being primaried, and putting their own political career over the fate of the country, stopped the impeachment process from working. According to the fundamental philosophical premise of the Madisonian system, ambition is supposed to check ambition in a way that overall safeguards the republic from a demagogue like Trump.⁸⁶ Yet the evolution of partisanship in ways not originally anticipated, along with the development of partisan primaries

81. Historians will debate, as journalists do, whether McConnell would have been successful if he had tried to convince enough Republican Senators to convict Trump. *See also* Rachael Bade & Karoun Demirjian, ‘Unchecked’ Book Excerpt: Inside McConnell’s Decision Not To Convict Trump, WASH. POST (Sept. 21, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/09/21/mcconnell-trump-impeachment-book/> (“McConnell stopped short of perhaps the one thing that may have made a difference: He never actually encouraged his colleagues to convict.”); Michael Tackett, *Mitch McConnell’s Worst Political Miscalculation*, ATLANTIC (Oct. 27, 2024), <https://www.theatlantic.com/politics/archive/2024/10/mitch-mcconnell-trump-worst-political-miscalculation/680412/> [<https://perma.cc/BEU8-RFU2>] (“McConnell, in part to preserve his position with the Republican members and mindful of what had happened to senators such as Mitt Romney, who had become an outcast to many in his party for simply standing firm on principle, decided against voting to convict.”).

82. Josh Dawsey, *Lindsey Graham Said ‘Count Me Out’ After the Capitol Riot. But He’s All in with Trump Again.*, WASH. POST (Feb. 20, 2021, 3:27 PM), https://www.washingtonpost.com/politics/lindsey-graham-donald-trump/2021/02/20/178afc0a-72ca-11eb-a4eb-44012a612cf9_story.html.

83. *Id.*

84. *See* Hannah Chinn, Emily Kwong, Rachel Carlson & Rebecca Ramirez, *The Voting System We Use Can Determine the Winner. Here’s How*, NPR (Nov. 5, 2024, 3:00 AM), <https://www.npr.org/2024/11/04/1257825207/election-2024-vote-results-voting-system-winners> [<https://perma.cc/E9QK-5U67>].

85. *Why Trump Won the Election—and Why He Now Better Act Quickly*, WALL ST. J. (Dec. 12, 2024, 1:21 PM), <https://www.wsj.com/politics/elections/charlie-cook-why-trump-won-ed7122c4>.

86. THE FEDERALIST NO. 51, *supra* note 51, at 349 (James Madison).

as an element of the electoral process, has entirely undermined this premise. The political ambitions of Senators are no longer capable of acting as a counterweight by using the impeachment process to thwart an exceedingly dangerous President. By acquitting Trump in 2021, the current version of the Madisonian system failed in its most essential purpose (protecting its ongoing existence from a despot who would potentially destroy it) and according to its most basic premises (that its mechanisms of checks and balances will forestall tyranny).

3. The Failure in 2024

If this debacle were not enough, the Madisonian system's failure continued with Trump's reelection in 2024. This continued failure was not merely a matter of letting Trump be on the ballot—as the U.S. Supreme Court did despite Section 3 of the Fourteenth Amendment,⁸⁷ which bars a return to office of any officeholder who, having sworn to uphold the Constitution, engaged in an insurrection against it.⁸⁸ Instead, the problem is much more fundamental than that and relates to *both* the pernicious role that partisan primaries currently play in undermining the Madisonian system *and* Madison's own Condorcet-based recognition in his 1823 letter to Hay that "the real preference of the Voters" very well might be a third candidate rather than the two ostensibly most popular ones.

The key facts about the 2024 presidential election were, *first*, Trump was overwhelmingly the favorite candidate of the Republican party's primary voters, and, *second*, because of inflation and other perceived policy failures of President Biden's administration (like immigration), America's voters narrowly favored the Republican nominee to be the next term's President rather than the Democrat.⁸⁹ But this preference for a Republican over a Democrat in the November general election did not mean that Trump was the most preferred candidate of America's voters among all the candidates who ran for President in 2024. On the contrary, there was at least one candidate who ran in the Republican primaries and

87. Section 3 of the Fourteenth Amendment states:

No person shall . . . hold any office, civil or military, under the United States, . . . who, having previously taken an oath . . . as an officer of the United States . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.

U.S. CONST. amend. XIV, § 3.

88. See *Trump v. Anderson*, 144 S. Ct. 662, 667 (2024).

89. See Shane Goldmacher, *Voters Doubt Biden's Leadership and Favor Trump*, *Times/Siena Poll Finds*, N.Y. TIMES (Mar. 2, 2024), <https://www.nytimes.com/2024/03/02/us/politics/biden-trump-times-siena-poll.html>.

who, although much less popular among Republican voters than Trump, was more popular than him among America's voters as a whole.⁹⁰

Recall that in the Republican primaries Nikki Haley endeavored to present herself as an alternative to both Trump and Biden.⁹¹ At the time, Biden was running for reelection and cruising towards renomination by the Democratic Party, unopposed by any other major Democrat. (Only Dean Phillips, a little-known Representative, was challenging Biden, essentially as a stand-in pleading for some other more significant Democrat to enter the race in his place.⁹²) Haley was hoping to convince Republican primary voters that she would be the better nominee against Biden, as polls at the time showed her to have more of a lead against Biden than Trump did.⁹³ Haley understood that in November some voters would vote for her who would not vote for Trump. Indeed, even after she abandoned her campaign while the primaries were still underway, she continued to receive a substantial number of "ghost" votes from a cohort of "never-Trumpers."⁹⁴ Her support was never going to be enough to capture the Republican nomination away from Trump, given his MAGA movement's ascendancy within the party. But based on all the evidence available during the primaries, there is every reason to believe that Haley would have won in November by an even wider margin than Trump did. (Of course, as events unfolded, Haley would have been running against Kamala Harris, not Biden, after Harris replaced Biden as the Democratic party's nominee following Biden's disastrous debate performance.⁹⁵)

In fact, Nikki Haley is precisely the kind of third candidate that Madison was contemplating in his 1823 letter to Hay. Of all the

90. Anthony Salvanto, Fred Backus, Kabir Khanna & Jennifer De Pinto, *Haley Fares Best Against Biden as Republican Contenders Hold National Leads*, CBS NEWS (Jan. 14, 2024, 9:30 AM), <https://www.cbsnews.com/news/nikki-haley-fares-best-against-biden-2024-presidential-election-poll/> [<https://perma.cc/8MWF-JF5X>].

91. Tara Suter, *Haley Says She Is 'Last, Best Hope' To Stop 'Trump-Biden Nightmare'*, THE HILL (Jan. 16, 2024, 9:13 AM), <https://thehill.com/homenews/campaign/4410866-haley-last-best-hope-stop-trump-biden/>.

92. Holly Otterbein, *Dean Phillips Drops Out*, POLITICO (Mar. 6, 2024, 1:15 PM), <https://www.politico.com/news/2024/03/06/dean-phillips-drops-out-00145403>.

93. Christine Zhu, *New Wisconsin Poll Shows Trump Tied with Biden, Haley Ahead by 15 Points*, POLITICO (Feb. 7, 2024, 3:49 PM), <https://www.politico.com/news/2024/02/07/haley-biden-trump-wisconsin-poll-00140200>.

94. Isabella Volmert, *Haley Won 1 in 5 Indiana Republican Voters in the Presidential Primary. She Left the Race in March*, AP, <https://apnews.com/article/nikki-haley-presidential-primary-election-indiana-8b73a23568e054ce33163e2ca23b8fb3> (May 8, 2024, 3:02 PM).

95. Colleen Long, Zeke Miller & Darlene Superville, *Biden Drops Out of 2024 Race After Disastrous Debate Inflamed Age Concerns. VP Harris Gets His Nod*, AP (July 21, 2024), <https://www.ap.org/news-highlights/elections/2024/biden-drops-out-of-2024-race-after-disastrous-debate-inflamed-age-concerns-vp-harris-gets-his-nod/> [<https://perma.cc/S7FX-2T9U>].

presidential candidates who ran in 2024, Haley was “third on the list” behind Trump and Biden (and then Harris) in terms of the number of voters who preferred each candidate above all the others. But one-on-one against each of the other two, Haley would “outvote” each.⁹⁶ We have already recalled that among all the nation’s voters, and not just Republicans, Haley was more popular against Biden than Trump was. In November, she presumably would have gotten all (or virtually all) the votes Trump did, plus the votes of the extra cohort willing to support her but not Trump. Conversely, Haley would have prevailed one-on-one between her and Trump as the Republican whom Democrats and Independents would have viewed as less objectionable.⁹⁷

Thus, in Madisonian terms, Haley was the “real preference of the Voters” in the 2024 election.⁹⁸ A well-designed Madisonian system—especially one with a plebiscitary President, where the Electoral College no longer functions as a deliberative check on the public’s susceptibility to a demagogue—would include an electoral process that produces a winner who is “the real preference of the Voters” rather than employing an electoral process that enables a political party to block this real preference from winning. Even worse from a Madisonian perspective is when, in blocking the election of the candidate who is the real preference, the political party nominates exactly the kind of candidate who presents the greatest risk of tyranny, and circumstances are such that for economic or other policy reasons, the public prefers this risky candidate to the other major party’s nominee.

If Haley had been elected in November instead of Trump, the nation would have escaped the authoritarian threat posed by a second Trump term.⁹⁹ In this way, by electing the candidate who was in fact “the real preference of the Voters,” the Madisonian system could have redeemed

96. Letter from James Madison to George Hay, *supra* note 1.

97. In January of 2024, Gallup polled Americans on whether they viewed each presidential candidate favorably or unfavorably. Trump’s net favorability was minus-15 points (42-57), while Haley’s was essentially even (33-34). Lydia Saad, *Biden and Trump Evenly Matched in U.S. Favorable Ratings*, GALLUP (Jan. 9, 2024), <https://news.gallup.com/poll/548138/american-presidential-candidates-2024-election-favorable-ratings.aspx> [<https://perma.cc/EJ4Z-U7WC>].

Furthermore, Harris presumably would have urged her voters to support Haley over Trump, as between just the two of them, for the same reason that Harris and Liz Cheney campaigned together—their shared view that Trump was categorically more dangerous to democracy than any traditional Republican. See Colleen Long & Chris Megerian, *Liz Cheney Campaigns with Harris in Pennsylvania, Painting Trump as a Dangerous Choice*, PBS (Oct. 21, 2024, 1:52 PM), <https://www.pbs.org/newshour/politics/liz-cheney-campaigns-with-harris-in-pennsylvania-painting-trump-as-a-dangerous-choice> [<https://perma.cc/9KQQ-BUAR>].

98. Letter from James Madison to George Hay, *supra* note 1.

99. Robert Kagan, Opinion, *The Trump Dictatorship: How To Stop It*, WASH. POST (Dec. 7, 2023), <https://www.washingtonpost.com/opinions/2023/12/07/robert-kagan-trump-dictatorship-how-to-stop/>.

its failure to disqualify Trump for having attempted to subvert the system itself. But the Madisonian system did not redeem itself in this way. Instead, it compounded its previous grievous error by failing to elect the candidate whom voters preferred most when compared to each alternative. By operating a flawed electoral process, the nation's existing Madisonian system has left itself vulnerable to the return of the Oval Office's most dangerous occupant ever.

It remains to be seen whether the Madisonian system can survive the series of enormous blunders that have led to Trump's second term.

C. Repairing, Not Replacing, Madisonian Democracy

Assuming that American democracy withstands the dangers of Trump's second term—and one should not be unduly pessimistic despite the real and serious threat he poses in wishing to convert the country to something like the authoritarianism of Victor Orbán's Hungary—the question becomes what to do to protect the nation from being in the same peril again.¹⁰⁰ Given the poor performance of the Madisonian system in coping with the current crisis posed by Trump's ascendancy, one might reasonably wonder whether America's system should be replaced with an altogether different kind of democracy. Perhaps, for example, America should convert to a parliamentary system along the lines of other nations that inherited their political and legal system from the United Kingdom, including Canada, Australia, and New Zealand.¹⁰¹ Doing so would entail eliminating the office of the presidency and the separation of the executive from the legislative branch of government and, instead, making the executive completely subordinate to the legislature in the form of a Prime Minister and Cabinet appointed by the legislature.

Such a profound change would of course require a constitutional amendment. Indeed, it would seemingly require a whole new constitutional convention, as presumably there would need to be much deliberation among convention delegates on exactly what form an entirely new parliamentary system for the United States should take. Would the legislature have one chamber or two? If the latter, what would be the role and power of the second house? Would legislative representation be district-based or proportional or some mixture? Would the Prime Minister or Cabinet have any protection or powers against the legislature? Would the judiciary have the power to invalidate legislation as unconstitutional, and who would appoint the judges and for what length of term and with what protections against removal from office? And what would be the role of federalism in this new parliamentary

100. See Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 549–50 (2018) (describing Hungary's descent into authoritarianism under Orbán).

101. See RHODES, WANNA & WELLER, *supra* note 57.

system? Would states have any independence and sovereignty protected from encroachment by the national legislature?

Although a new constitutional convention is by no means impossible—some say that one already should have been called under the terms set forth in Article V of the existing Constitution¹⁰²—it seems improbable that a constitutional convention will actually be called into existence in the reasonably near future.¹⁰³ Moreover, and more importantly, even if a new constitutional convention came into being, it seems highly unlikely that the delegates would seriously consider abandoning the basic structures of the Madisonian system in favor of a Westminster-style parliamentary system. Americans have become culturally attached to the institution of the presidency and, to a great extent, the personalities of their Presidents. As the technologies of communications have developed over the decades—from telegraph to radio to television to internet—Americans have perceived themselves to be on increasingly intimate terms with *their* chosen leader.¹⁰⁴ Various recent efforts by nonprofit organizations to model the results of a new constitutional convention have all assumed the continued existence of a separate presidency, even if its powers in relation to Congress should be curtailed considerably.¹⁰⁵ Likewise, it is extremely difficult to imagine

102. See Heather Knight & Kate Selig, *A Constitutional Convention? Some Democrats Fear It's Coming.*, N.Y. TIMES (Dec. 16, 2024), <https://www.nytimes.com/2024/12/16/us/a-constitutional-convention-some-democrats-fear-its-coming.html>. Article V states:

The Congress, . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which . . . shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof

U.S. CONST. art. V.

103. See Knight & Selig, *supra* note 102.

104. See JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY 186–88* (new ed. 2017).

105. The three new constitutions proposed by different ideological groups as part of a National Constitution Center project all retained a presidency roughly comparable to the current one. See CAROLINE FREDRICKSON, JAMAL GREENE & MELISSA MURRAY, NAT'L CONST. CTR., *THE PROGRESSIVE CONSTITUTION*, art. II (n.d.), https://constitutioncenter.org/media/files/The_Progressive_Constitution.pdf [<https://perma.cc/8DPL-3EQ2>]; ROBERT P. GEORGE, MICHAEL W. MCCONNELL, COLLEEN A. SHEEHAN & ILAN WURMAN, NAT'L CONST. CTR., *THE CONSERVATIVE CONSTITUTION*, art. II (n.d.), https://constitutioncenter.org/media/files/The_Conservative_Constitution.pdf [<https://perma.cc/8CQA-TQK9>]; ILYA SHAPIRO, TIMOTHY SANDEFUR & CHRISTINA MULLIGAN, NAT'L CONST. CTR., *THE LIBERTARIAN CONSTITUTION*, art. II (n.d.), https://constitutioncenter.org/media/files/The_Libertarian_Constitution_1.pdf [<https://perma.cc/TE7Y-ERP3>]. See generally *Constitution Drafting Project*, NAT'L CONST. CTR., <https://constitutioncenter.org/news-debate/special-projects/constitution-drafting-project> [<https://perma.cc/9AAN-N47H>].

that a new constitutional convention would altogether abandon the principle of federalism and its protection of separate prerogatives and sovereignty of the states. While the relative balance of power between the states and the federal government may never again be what it was before the Civil War, the United States—as its very name implies—will not be a single unified entity in which the states are mere subsidiaries. Consequently, even if there were a new constitutional convention, it is most reasonable to assume that it would retain the basic structural elements of the Madisonian system.

Moreover, even if Americans were open to jettisoning the essential features of Madisonian democracy, there are good reasons to think that doing so would be a mistake. It is not as if the Westminster-style systems are doing so much better than the United States in handling the challenges that currently confront all democracies. Consider, for example, the turmoil that Britain has recently experienced as it adopted Brexit and had four different prime ministers in the two-year period between 2022 and 2024.¹⁰⁶ New Zealand is also undergoing convulsive change as its new right-wing government endeavors to reinterpret the nation's founding constitutional relationship between its indigenous Māori and other citizens, thereby sparking large-scale Māori demonstrations in protest.¹⁰⁷

The basic Madisonian structural elements of federalism and the separation of powers, including the checks and balances of a bicameral legislature and an executive not entirely subservient to the legislature, are worth preserving. While the balance of power between Congress and the President needs recalibration, Madison's basic belief that it would be unduly dangerous to have all government authority located in a single institution remains essentially sound.¹⁰⁸ Although in the modern

Democracy: A Journal of Ideas also sponsored a group of scholars to propose a new constitution; it also retained the presidency in essentially its existing form. See The Delegates of the Democracy Const., *A New Constitution for the United States*, DEMOCRACY (2021), <https://democracyjournal.org/magazine/61/a-new-constitution-for-the-united-states/> [https://perma.cc/KZG2-RM84].

106. See Patrick Diamond & Jack Newman, *Instability and Inequality in the British State*, 77 PARLIAMENTARY AFFS. 645, 648–49 (2024) (describing Brexit); Richard Hayton, *Instability, Crisis, and Statecraft in Conservative Britain, 2010–24*, 77 PARLIAMENTARY AFFS. 816, 826–30 (2024) (describing Prime Minister turnover); see also James Gregory, *Three PMs in Two Months, Is Political Chaos the UK's New Normal?*, BBC (Oct. 25, 2022), <https://www.bbc.com/news/uk-63383616> [https://perma.cc/P3R9-KS7W].

107. Yan Zhuang, *New Zealand Veers Sharply Right, Leaving Jacinda Ardern's Era Behind*, N.Y. TIMES (Nov. 18, 2024), <https://www.nytimes.com/2024/11/18/world/asia/new-zealand-conservative-maori-protest.html>; Charlotte Graham-McLay, *Proposed Law Threatening Māori Rights Sparks Massive Protests in New Zealand*, PBS (Nov. 18, 2024, 1:56 PM), <https://www.pbs.org/newshour/world/proposed-law-threatening-maori-rights-sparks-massive-protests-in-new-zealand> [https://perma.cc/54QT-CH7E].

108. See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 525 (2015).

Madisonian system, the President, the Senate, and the House of Representatives should all be popularly elected by America’s citizenry, the separate elections for each of these institutions is an important reminder that no single institution of representative democracy can perfectly represent the people themselves, and instead it is better to have multiple representative bodies each representing the people in a distinct way.

Thus, the goal should be to repair—not replace—America’s existing Madisonian system. The challenge is how best to do that. There is, and should be, no going back on crucial changes to this system as a result of its previous transformations. Madisonian democracy must remain one in which all adult citizens have the equal right to vote for all elected officeholders, including the President, Senators, and Representatives in Congress. But Madisonian democracy can be significantly strengthened by making these elections conform to Madison’s own recognition that elections should produce winners who are “the real preference of the Voters.”¹⁰⁹

D. A Revitalized Madisonian Democracy Requires Condorcet Voting

Revitalizing Madisonian democracy in the United States will require more than just electoral reform. As already indicated, the balance of power between the President and Congress must be adjusted so that the presidency, even if elected pursuant to a reformed process that produces winners who are “the real preferences of the Voters,” is not so dangerous an institution as it has become.¹¹⁰ Among other necessary adjustments, for example, is achieving more equal representation of the nation’s voters in the Senate. California and Wyoming both have two Senators despite their vastly different populations. The Constitution forbids giving California more Senators than Wyoming without Wyoming’s consent. But the Constitution permits subdividing larger states with their consent, and this option should be pursued in order to avoid the allocation of seats in the Senate, which has become disproportionate and unfair from the perspective of contemporary principles of democracy and federalism.¹¹¹ Madison himself understood the need to subdivide states from time to time, as he witnessed both Kentucky carved out of Virginia and Maine

109. Letter from James Madison to George Hay, *supra* note 1.

110. Cf. BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* (2020).

111. See U.S. CONST. art. IV, § 3, cl. 1 (No “State [may] be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”); *id.* art. V (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

from Massachusetts.¹¹² It ought to be possible to subdivide blue states like California and New York along with red states like Texas and Florida in such a way that does not alter the partisan balance between Democrats and Republicans in Congress and thus is politically feasible (as the Constitution requires Congress as well as the affected states to approve any such subdivision).

Additionally, electoral reform along the lines that Madison himself envisioned in his 1823 letter to Hay is an essential component of any effort to repair America's malfunctioning Madisonian system. For one thing, the goal of any representative democracy must be to elect representatives whom a majority of voters truly prefer to alternative candidates.¹¹³ Thus, as Madison acknowledged, an electoral method that is actually capable of electing the candidate who is "the real preference of the Voters" is a reform that should be adopted.

Moreover, an electoral procedure based on Condorcet's principles—which elects the candidate whom a majority of voters prefer to each alternative and whom is called a "Condorcet Winner"—would avoid the election of a charismatic authoritarian who, although extremely popular with a portion of the citizenry, lacks support of a majority of voters when compared one-on-one to each other candidate. A Condorcet-based electoral system elects the candidate who is most preferred by the electorate's median voter, meaning the voter at the center of the electorate's partisan distribution, with half the electorate to the median voter's left and half to the median voter's right.¹¹⁴ Thus, a Condorcet-based system tends to elect candidates who are more moderate and less extreme—who are more of a compromise between competing positions and are thus more consensus-builders.¹¹⁵ This type of centrist candidate, who builds a winning coalition from both the left and the right against alternatives from either end of the spectrum, is much less likely to present a danger of authoritarianism or tyranny than a candidate who comes from one extreme or the other. (Mussolini and Stalin, among other autocrats, were not consensus-building centrists.) Accordingly, insofar as Madison's suggestion of a Top Three electoral system was premised on

112. Martin Kelly, *States and Their Admission to the Union*, THOUGHTCO. (Sept. 3, 2024), <https://www.thoughtco.com/states-admission-to-the-union-104903> [<https://perma.cc/HF34-6W4Y>].

113. Few dispute the elementary philosophical proposition that Condorcet Winners, when they exist, should win the election if democracy is to be faithful to the fundamental principle of majority rule. Rather, the debate among contemporary election scholars tends to be how best to structure an electoral system so that in practice it achieves the election of Condorcet Winners. On this point, see NICHOLAS O. STEPHANOPOULOS, *ALIGNING ELECTION LAW* (2024); Nicholas O. Stephanopoulos, *Finding Condorcet*, 81 WASH. & LEE L. REV. 981 (2024).

114. See BLACK, *supra* note 32, at 159–80.

115. See Foley, *Ballot Structures*, *supra* note 33, at 53.

Condorcet’s principles, it is a reform proposal that would serve the paramount Madisonian goal of protecting republican government from authoritarian usurpation.

We have seen that a Top Three system based on Condorcet principles, if used for the 2024 presidential election, would have elected Nikki Haley, not Donald Trump, as the “real preference of the Voters.”¹¹⁶ This fact alone is enough to demonstrate the potential of a Top Three system to protect against tyranny. But there is more: If a Top Three system were used to elect Senators and Representatives, members of Congress would also be much less likely to be authoritarians themselves or susceptible to pressure from an authoritarian President.¹¹⁷ In many states and congressional districts where an extreme MAGA-type Republican, after winning the Republican primary, will beat the Democrat in the general election, if there were a Top Three election with a more moderate non-MAGA Republican as the third candidate, this non-MAGA Republican would win as the real preference of the voters. In Ohio’s 2024 U.S. Senate election, for example, a Trump-endorsed MAGA candidate (Bernie Moreno) beat a non-MAGA opponent (Matt Dolan) in the Republican primary and then went on to win the general election against the Democrat (then-incumbent Sherrod Brown).¹¹⁸ But in a Top Three election involving all three of these candidates, the non-MAGA Republican (Dolan) would have been the Condorcet Winner, being preferred by a majority of voters in comparison to either the MAGA candidate (Moreno) or the Democrat (Brown). This example could be replicated with many others in both Senate and House elections.¹¹⁹ Consequently, if members of Congress were elected in a Top

116. Letter from James Madison to George Hay, *supra* note 1.

117. See Edward B. Foley & Eric S. Maskin, *How To Depolarize Politics*, PROJECT SYNDICATE (Feb. 8, 2024), <https://www.project-syndicate.org/commentary/top-three-election-system-solves-polarization-and-democratic-disillusionment-by-edward-b-foley-and-eric-s-maskin-2024-02> [<https://perma.cc/2JNF-PF5Z>].

118. See *United States Senate Election in Ohio, 2024*, BALLOTPEdia, https://ballotpedia.org/United_States_Senate_election_in_Ohio,_2024 [<https://perma.cc/N4JJ-SGAC>]; see also Henry J. Gomez & Emma Barnett, *Trump and Ohio’s GOP Establishment Clash Ahead of a Rowdy Senate Primary*, NBC NEWS (Mar. 18, 2024, 7:09 PM), <https://www.nbcnews.com/politics/2024-election/trump-ohio-gop-establishment-clash-senate-primary-rcna143955> [<https://perma.cc/XRV2-TUA2>].

119. North Carolina’s 2022 U.S. Senate election is another example, where Trump-endorsed election denialist Ted Budd beat former Governor Pat McCrory (a traditional Republican) in the GOP primary and then defeated the Democrat in the general election, but McCrory would have been the Condorcet Winner in a three-way race. See *United States Senate Election in North Carolina, 2022*, BALLOTPEdia, https://ballotpedia.org/United_States_Senate_election_in_North_Carolina,_2022 [<https://perma.cc/QT7N-RVLM>]; see also Allan Smith, *Trump-Backed Ted Budd Wins GOP Senate Primary in North Carolina*, NBC News Projects, NBC NEWS (May 17, 2022, 7:51 PM), <https://www.nbcnews.com/politics/2022-election/trump-backed-ted-budd->

Three system, Congress would be much less dominated by extreme MAGA members even if Republicans remained the majority party in both chambers. Thus, Congress would be much less likely to support potentially authoritarian policies or feel beholden to an authoritarian President from the same party. In this way, a Top Three electoral system for congressional elections would facilitate the elemental Madisonian goal of effective checks and balances between the legislative and executive branches.

IV. IMPLEMENTING A MADISONIAN TOP THREE ELECTION

What would a Top Three electoral procedure look like in practice? At the outset, we observed that Madison's concern that a Top Three election would be impractical caused him to abandon the idea. Is it really possible that a Top Three procedure could be feasible to conduct?

A. The Basics of a Feasible Top Three Election

It is easier to answer this question in the context of congressional rather than presidential elections, and so let's start there. A Top Three congressional election would require two stages. The first would involve all candidates, regardless of political party, seeking the specific congressional seat.¹²⁰ There could be a signature-gathering requirement that all these candidates would need to meet in order to qualify for the first-stage ballot. Prior to this first-stage vote, political parties could conduct their own nominating process to select the party's nominee, and a party's nominating process could be what we call a "party primary," in which the party's voters identify which of the party's candidates they most prefer for the particular office. But this "party primary" would be different from the first stage of the Top Three procedure, and candidates who ran in the "party primary" but did not win would still be eligible to qualify for the first-stage ballot in the Top Three procedure. This first-stage ballot, however, could identify which candidate was a party's nominee, requiring candidates not nominated by a party to appear on the first-stage ballot without any party designation.

There are different ways to conduct the first-stage vote. The simplest is to have each voter select one candidate to advance to the second stage and to tally the number of voters that select each candidate, with the three

wins-gop-senate-primary-north-carolina-nbc-news-rcna29137 [https://perma.cc/RN3D-5LA9].

120. This first stage would be similar to what currently occurs in California's Top Two system and Alaska's Top Four system. See Edward B. Foley, *The Nomination and Election of Statewide Candidates*, 2024 U. ILL. L. REV. 1607, 1617–18, 1629 [hereinafter Foley, *Nomination and Election*].

candidates who are selected by the most voters being the ones to advance. A slightly more complicated way to determine the three candidates who advance would be to have each voter identify their first, second, and third choice candidates, and to award three points for each first-choice vote, two points for each second-choice vote, and one point for each third-choice vote.¹²¹ The three candidates with the most total points would advance to the second stage according to this alternative method, which at the cost of its extra complexity has the advantage of advancing candidates with a broader range of support. A third possible method would also have the first-stage voters select three candidates rather than one but would award a single equal point to each of the three candidates a voter selected.¹²² This method too would tend to advance three candidates with broad support, but in comparison to the second method it loses the advantage of letting voters indicate the relative strength of their preference for each of the three candidates they select. In any event, whatever voting method is used at this first stage, the key feature of the Top Three procedure is that the top three candidates according to that voting method are the ones—and only ones—to appear on the second-stage ballot.

The second-stage ballot has voters select their preferred candidate for each pair of these top three candidates: *A* versus *B*, *A* versus *C*, *B* versus *C*. The candidate with more votes than each opponent in these pairwise comparisons is the Condorcet Winner and thus wins the election. To return to Ohio’s 2024 U.S. Senate election as an example, the ballot would have voters express their preference for each pair of candidates: Moreno versus Brown, Moreno versus Dolan, Brown versus Dolan. Moreno would beat Brown, as he did in the actual November 2024 vote. But Dolan would beat Moreno (as Democrats who like Brown best would support Dolan as the less objectionable Republican), and Dolan would also beat Brown (because Republicans, even though they prefer Moreno to Dolan, would rather have Dolan than Brown). Dolan, as the Condorcet Winner in the Top Three election, would become Ohio’s new Senator instead of Moreno, making the Senate less MAGA-extreme in accordance with the real preference of Ohio’s voters.

But what if there were no Condorcet Winner at the second stage of a Top Three election? Madison’s main concern about the practicality of a Top Three election was the possibility, as Condorcet himself identified, that a cycle might occur where each of the three candidates gets more votes against one opponent but fewer votes against the other. (Again,

121. In technical terms, this point system would be a truncated Borda count. See Zoi Terzopoulou & Ulle Endriss, *An Axiomatic Study of the Borda Rule on Top-Truncated Preferences*, 92 J. MATHEMATICAL ECON. 31 (2021).

122. This third method would be a form of Approval Voting. See STEPHEN J. BRAMS & PETER C. FISHBURN, *APPROVAL VOTING* 3–10 (2d ed. 2007).

Rock beats Scissors but loses to Paper, Scissors beats Paper but loses to Rock, and Paper beats Rock but loses to Scissors.) How is this potential problem to be solved in a way that would enable a Top Three election to be practical?

There are several feasible solutions that have been developed by subsequent scholars. One is simply to count the total number of votes that each candidate receives against both opponents and to elect the candidate with the most total votes.¹²³ Another is simply to elect the candidate whose single defeat has the smallest margin—in other words, is the narrowest loss.¹²⁴ There are arguments in favor of either approach, but as a practical matter (again, Madison’s concern) it’s unlikely to make much difference because recent scholarly analysis has shown that this kind of “Condorcet cycle” is very rare in real-world elections.¹²⁵ The reason is that whenever voters are arrayed by ideology or partisanship along a left-right spectrum and prefer candidates based on perceived proximity along this spectrum, then there will always be a Condorcet Winner who is closest to the median voter (and thus never a “Condorcet cycle”).

Nevertheless, even if it turned out that “Condorcet cycles” occurred more frequently than expected in Top Three elections, that should not be a concern from a Madisonian perspective. Electing the candidate with the narrowest margin of defeat puts into office the candidate with the broadest degree of support (because the fewest voters preferred a different candidate). With this method, the Top Three election achieves the most representative result feasible for the electorate, which is an outcome consistent with the fundamental republican values of a Madisonian democracy.¹²⁶

Thus, if Madison could have known about the advancements that have occurred in the analysis of electoral procedures since Condorcet, Madison would perceived no insurmountable obstacles to the implementation of a Top Three method that elects the “real preference of the Voters”—a Condorcet Winner whenever there is one—and in any case elects the most representative candidate in light of the electorate’s collective preferences.

123. This method is equivalent to using a Borda Count to elect the winner as a backup for when there is no Condorcet Winner—a method proposed by Duncan Black, *supra* note 32, at 174–75.

124. See Foley, *Maximum Convergence Voting*, *supra* note 33, at 53.

125. See Eric Maskin, *Is Majority Rule the Best Election Method?* 7 (Inst. for Advanced Study, Occasional Papers of the School of Social Science, Paper No. 11, 2001), <https://www.ias.edu/sites/default/files/sss/papers/papereleven.pdf> [<https://perma.cc/Y83G-TRFG>].

126. See Foley, *Maximum Convergence Voting*, *supra* note 33, at 20.

B. The Optimality of Madison’s Top Three Electoral Method

One might wonder whether, to achieve the objective of repairing and revitalizing Madisonian democracy, it would be enough to eliminate the pernicious blocking effect of partisan primaries by having a two-stage Top Two electoral procedure that is the same as the Top Three procedure except that it advances two, rather than three, candidates to the second stage.¹²⁷ In this kind of Top Two system, a candidate who did not win a party’s nomination could still compete in the first stage and thus would not be blocked by losing a party primary. While this Top Two procedure is superior to how most states currently conduct their elections, it still suffers from the problem that Madison—and Condorcet before him—identified: It fails to elect the candidate whom a majority of voters prefer to either of the “top two” candidates who advance to the second round.

If a Top Two procedure had been used for the 2024 presidential election, the top two finalists would have been Donald Trump and Joe Biden, subsequently replaced by Kamala Harris, and Nikki Haley would have been left behind even though in the Top Three procedure Haley would have been the Condorcet Winner as the “real preference of the Voters.” Likewise, if the Top Two procedure had been used for Ohio’s 2024 U.S. Senate election, Bernie Moreno (the MAGA candidate) and Sherrod Brown (the Democrat) would have been the top two finalists, leaving behind Matt Dolan (the non-MAGA Republican), even though Dolan would have been the Condorcet Winner in the Top Three procedure, preferred by a majority of Ohio’s voters compared one-on-one against either Moreno or Brown and thus “the real preference of [Ohio’s] Voters.” To achieve the Madisonian goals of electing the candidate *both* most preferred by the voters *and* least likely to endanger democracy with authoritarian predilections, it is necessary to employ a voting method capable of electing a Condorcet Winner from among more than two candidates.

One wonders then whether the reform of Madisonian democracy should involve, rather than a Top Three electoral procedure, a Condorcet-based electoral method with four or five, or perhaps even more, candidates.¹²⁸ To be sure, it is possible to design an electoral procedure with more than three candidates, and there may be instances in which the Condorcet Winner in a Top Four or Top Five election would

127. This Top Two system is what California currently has. Foley, *Nomination and Election*, *supra* note 120, at 1617–18. For arguments that eliminating partisan primaries is the highest election reform priority, see NICK TROIANO, *THE PRIMARY SOLUTION* 143–44 (2024); Richard H. Pildes & Fla. L. Rev., *2024 Dunwoody Distinguished Lecture in Law*, at 15:13–22:51, ZOOM (April 19, 2024), https://ufl.zoom.us/rec/share/4sT_CevipCdolydOrLpmyGH63_7tolQNRnewQRVtcmBglOGvE1eAaHdhEPGY4DO6.4LiDRDXW18maVW0u.

128. See Foley, *Ballot Structures*, *supra* note 33, at 58–67.

not have made it as a finalist in a Top Three election. But those circumstances would be rare, and especially so if the first stage of the Top Three election used the method of assigning points to each voter's top three choices.

Moreover, the significant added complexities of a Top Four or Top Five election pose a problem of practicality that must be a major concern from a Madisonian perspective. For one thing, with more than three candidates, it becomes necessary to use ranked ballots as a practical matter, whereas with three candidates the procedure of identifying a Condorcet Winner can be conducted directly, with three head-to-head comparisons as described above. The computational process of identifying a Condorcet Winner from ranked ballots is much less transparent than from the three direct head-to-head comparisons involving three ballots, and this relative lack of transparency risks considerable voter distrust of the process. It is much better to let voters understand immediately that the candidate who receives more votes than either opponent when matched against each other head-to-head is obviously entitled to win the election.¹²⁹

Also, when there are more than three candidates, the solution in the event of a "Condorcet cycle" (when there is no Condorcet Winner who is preferred by a majority of voters compared to each opponent) is much more complicated. Multiple alternative solutions have been proposed by post-Condorcet scholars.¹³⁰ If the goal of the solution is to elect the candidate most representative of the electorate given its collective preferences, as the goal presumably would be from a Madisonian perspective, it is not as simple as electing the candidate with the slimmest head-to-head defeat—which is the case when there are only three candidates.¹³¹

Thus, all in all, the sweet spot turns out to be the one Madison himself suggested: a final vote among three candidates, not two and not more than three, in order to determine which of the three most accords with the collective preferences of the voters.

C. A Top Three Presidential Election

To adopt a Top Three electoral procedure for congressional elections, as described above, requires nothing more than Congress enacting it into law—as Congress is entitled to do—or, in the absence of this congressional enactment, each state adopting the procedure for its own congressional elections. Any state could do this with a statute enacted by the state's legislature, and those states that have procedures

129. See Foley, *Maximum Convergence Voting*, *supra* note 33, at 11.

130. See Tideman, *How Should Votes Be Cast*, *supra* note 32, at 13–22.

131. See Foley, *Maximum Convergence Voting*, *supra* note 33, at 10.

for citizen-initiated ballot measures could also adopt Top Three congressional elections by this alternative means. The obstacle to implementing Top Three congressional elections is not legal, but political: The American public must become educated on the need for this Madisonian reform in order to resuscitate their floundering Madisonian democracy and must demand that it be adopted one way or another. Alternatively, a coalition of Democrats and non-MAGA Republicans must come to understand that this reform is the way to protect America’s democracy from the danger of MAGA-induced despotism.

Adopting a Top Three election procedure for presidential elections is more challenging—but not impossible. Without a constitutional amendment (which would work, but is exceedingly difficult to achieve), the way to achieve this reform would be to modify the National Popular Vote Interstate Compact (NPVIC).¹³² That plan aims to pool the electoral votes of enough states to reach the number necessary to control the outcome of the presidential election: 270. Once enough states have signed on to that plan, all these states will award their electoral votes to the winner of the national popular vote. Right now, states with 209 electoral votes have joined the plan.¹³³

This pooling concept can be modified so that states with a combined 270 or more electoral votes award all their electoral votes to the winner of a Top Three election procedure that these states implement as part of their pooling plan. The first stage of the Top Three election would occur in September, after the political parties hold their primaries and nominating conventions. The party nominees would be on the September ballot, as would any other candidates who qualify by collecting enough signatures—including candidates who ran in a party’s primaries but did not receive the party’s nomination. The top three candidates from the September vote would advance to the November ballot. Whichever of these three candidates wins more votes against each opponent head-to-head, counting together all the votes from all the states in the pool, would receive all these states’ electoral votes and thus win the presidency. Once enough states have joined this Top Three pooled presidential election, every state would need to join; otherwise, its voters would be shut out of the process of determining the winner of the presidential election. In this way, the pooling process could achieve a nationwide Top Three presidential election.

Moreover, the prospects of reaching 270 electoral votes for this pooling plan is greater with the Top Three method than with a simple

132. *Agreement Among the States To Elect the President by National Popular Vote*, NAT’L POPULAR VOTE (Apr. 4, 2024), <https://www.nationalpopularvote.com/sites/default/files/202404/1-pager-npv-v235-2024-4-15.pdf> [<https://perma.cc/9M47-HY44>].

133. *Id.*

national popular vote. Currently, only blue states have joined the NPVIC, because only Democrats have perceived an advantage from doing so.¹³⁴ By contrast, in purple and even moderately red states (like Ohio), a coalition of non-MAGA Republicans and Democrats should perceive the benefit of a Top Three presidential election that will give both their kinds of candidates a fair chance of winning by demonstrating that they are the “real preference of the Voters” and at the same time prevent the election of an extreme authoritarian who is not. While convincing this coalition to form in enough states will be challenging, it is worth the effort in order for America to conduct presidential elections in accordance with Madisonian principles—an objective that the nation has never achieved, as Madison himself acknowledged late in life.

CONCLUSION

When Madison was seventy-two years old and twice his age at the time of attending the Constitutional Convention and writing *The Federalist Papers*, he penned a letter in which he suggested a two-stage electoral procedure in which the three candidates with the most votes in the first stage advance to the second stage and, of these three, the candidate favored by more voters compared to each of the other two wins the election. He recognized the advantage of sending three rather than two candidates to the second stage because often the third-place candidate in the number of first-stage votes would be the one that more voters in the second stage would favor over each of the other two. Sending only two candidates to the second stage, he realized, would prevent the election of the candidate who was “the real preference of the Voters,” as he put it in his letter.¹³⁵

In the same letter, however, Madison immediately rejected his own suggestion because he considered it impractical. He recognized that sometimes in an election with three candidates, no single candidate is favored by more voters over each of the other two. Instead, each of the three candidates is favored by more voters compared to only one of the other two. Madison did not see a way to resolve this impasse, and thus he settled for sending only two candidates to the second stage even knowing that often doing so would defeat the true will of the majority.

In the two centuries since Madison wrote that letter, scholars have developed what Madison did not envision: practical means for identifying the winner of an election with three candidates when each is favored by more voters against one opponent but not the other. These practical tiebreakers, moreover, are unlikely to be put to much use, as scholars have also shown that one of the three candidates will always be favored

134. *See id.*

135. Letter from James Madison to George Hay, *supra* note 1.

by more voters over each of the other two whenever voters perceive the three candidates to line up left to right along a partisan or ideological spectrum and the voters themselves base their preferences among the candidates accordingly. Thus, Madison’s fear that his own proposed procedure for identifying “the real preference of the Voters” would be infeasible has proven unfounded.

America’s ongoing Madisonian democracy should be updated to include Madison’s proposed Top Three electoral method. Not only would using his Top Three procedure for congressional and presidential elections produce Congresses and presidencies more aligned with the “real preference of the Voters,” but doing so would protect Madisonian democracy from the authoritarian tendencies of candidates capable of prevailing in polarized conditions when voters are limited to choosing between only two major-party candidates. If Madison’s Top Three system had been in place for the 2024 presidential election, Nikki Haley would have been the kind of third candidate that Madison understood to be the “real preference of the Voters” compared to each of the two major-party nominees. But the existing two-party electoral system prevented voters from expressing this true preference on their ballots in the November general election, and instead the winning candidate—Donald Trump—was one whose previous term as President demonstrated the danger his return to office poses for the continued operation of Madisonian democracy itself.

To protect Madisonian democracy from this kind of danger, and to enable it to achieve outcomes that conform to what the voters actually want, America today should adopt what Madison himself recognized would be a better way to represent the electorate if a subsequent generation could overcome the obstacles his generation could not.

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