



THE DEMOCRACY AMENDMENTS

Constitutional Reforms to Save the United States



John J. Davenport



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John J. Davenport
Fordham University



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This work is dedicated to my incredible wife, Robin, and to all of our children, nieces, nephews, and grandchildren to come, who will grow and lead their lives under the institutions that our older generations leave to them.

In this sacred trust, we must not fail.

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Chapter Two

SOLUTIONS I: THE TOP TEN AMENDMENTS TO REDUCE POLARIZATION AND MAKE OUR GOVERNMENT WORK

The American political landscape has changed dramatically in recent years. Many social conditions have improved during the last four decades. Child poverty rates have come down, and over 91% of Americans had some medical insurance during all of 2021 (up from 84% in 2010). Americans have collectively worked on reducing bullying in schools, domestic violence, harassment in workplaces, and denigration or exclusion on the basis of race and (more recently) sexual orientation. These are all examples of progress. But partly in response to these social changes, and goaded by media algorithms that profit from cultivating fear and loathing, political preferences have become ever more sharply polarized. Our major political parties have grown more uncompromising—two changes that feed into each other in a vicious cycle. People increasingly avoid political debate with anyone who is not likeminded because it has become too uncomfortable or stressful; this is driving political segregation as Americans increasingly seek to live and work where their political views are predominant.

In this situation, no president or political party can do much to help the US move forward simply by winning an election, even by a large margin. A decade ago, Thomas Mann (a moderately left-wing scholar) and Nicholas Ornstein (moderately right) partnered to diagnose the problems. They noted that highly polarized parties make it much harder to get results in a system with many checks and balances like ours. Thus in Obama’s first term, hyper-partisanship resulted in unbending obstructionism, “the virtual disappearance of regular order from Congress” (which arguably began in 2007) and dramatic declines in “legislative productivity”¹—trends that have continued ever since. Mann and Ornstein point to several factors driving the intense polarization: separate media bubbles, perverse incentives to reduce turnout, gerrymandering that reduces the number of competitive districts, closed primaries with generally low turnout, the lack of runoff mechanisms in winner-take-all elections, election funding that is held hostage by large donors and lobbies, and unlimited spending on political advertising.²

In this chapter, I offer proposals to fix these and other related institutional problems that are paralyzing our government. A single party usually holds the presidency and both

chambers of Congress only for two years of any president's time in office. This was true for Clinton, Obama, Trump, and (so far) for Biden. Over the 54 years from 1969 through 2023, there were only 18 years in which the same party held the Oval Office, the House, and the Senate. It is sometimes said that this shows Americans *want* divided government. On contrary, we get divided government because our electoral systems naturally favor it, no matter what the people want.³ We will review several examples of this (see #4, #8, and #24).

There is an extra obstacle to consider too. In the same 54 years, there was only one *three-month period* (during 2009) in which the same political party controlled the presidency, the House of Representatives, and 60 out of 100 senators—the threshold required for most legislation to overcome filibusters, bring debate to an end, and force a final vote in the Senate.⁴ Even then, after his landslide mandate in the 2008 elections, Obama had great difficulty getting enough Democrats in Congress to agree on a single health care bill. Because his long efforts to negotiate led to no Republican votes, every Democratic senator was crucial. As a result, all could—and a few did—hold ‘Obama-Care’ hostage to extract unrelated benefits for their states.

Thus an eight-year presidency following a landslide initial victory almost came legislatively to nothing beyond an economic stimulus bill to reverse the steep recession of early 2009. To avoid the situation that Obama faced, a president would probably need at least 63 or 64 loyal senators, which is an unimaginably high hurdle today. We remain stuck in what one recent study called “the zone of legislative death” where neither party can ever win a functional filibuster-proof majority.⁵

Our government is often divided in part because we have close presidential races. That is not surprising by itself: game theory predicts that in a system with two dominant political parties, they will usually adjust what they stand for to bring them just above 51% of the vote; to gain more than this, they would have to sacrifice priorities that a majority of their voters favor.⁶ This means that we have frequent changes in party control of government, which in itself is good for democracy. But without large margins, the filibuster becomes deadly, as Democrats discovered again in 2021–2022.

Divided government might still be workable if compromise was frequent, but the factors driving polarization now work against this. For example, despite offering many concessions, Biden was unable to win a single Republican vote for his “human infrastructure” bill in 2021. The polarization also reduces legislators’ incentives to check overreach or even blatant corruption by a president of their own party: instead, party loyalty becomes everything.⁷ This in turn feeds further extremism among the electorate, as I argued in the previous chapter.

To get out of the vicious cycle and overcome partisan gridlock, our highest priority must be to break the two-party stranglehold, which is the worst among all developed democracies,⁸ and alter the present incentives not to compromise.⁹ And our second highest priority must be to rid ourselves of excessive anti-majoritarian obstacles that have been *added over and above* the basic checks, balances, and divisions of powers in the original design of our government—to the point of making our legislature nearly

useless. Unless we want to collapse into anarchy or become a parliamentary democracy without significant states' rights, we must make our federal system work.

∞

This chapter will review 10 changes to our Constitution that are essential to restoring effective government and preserving our democratic processes. They are all *procedural* changes affecting how law and policy are made, adjudicated, and understood by citizens, although #10 includes some substantive conditions. The first six proposals focus on making our political parties more representative and constraining them to govern in the interests of the nation as a whole rather than mainly serving special interest groups. After fixing our parties and elections, the most urgent reforms include two basic changes to Congress, staggered term limits for Supreme Court justices, and a straightforward way to insulate Americans from the tsunami of lies, misinformation, and knowledge deficits that are turning otherwise good people toward violence.

I say little immediately about how these amendments could actually be passed: that vital topic is mostly left for Chapter Four. But the need for fundamental reform in most of these 10 areas is already widely recognized, and several of these proposals could be relatively easy to pass if they are explained well to the public. Throughout, I will refer to such amendments as “low-hanging fruit.” The three reforms concerning voting rights, the Senate filibuster, and the structure of the House might be somewhat more difficult to pass. But the hardest constitutional reforms, given entrenched partisan dogmas, are addressed in Chapter Three.

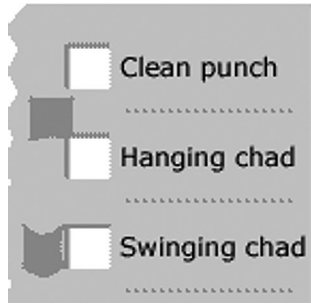
The present chapter is divided into sections on each proposed amendment, which are numbered sequentially throughout the book. Each section is also structured slightly differently, given the nature of its topic, but the basic format is similar: I offer background on the problem, including some historical context; an explanation of why the problem cannot be fully solved without a constitutional change; a proposed amendment; and a cross-section of other proposed fixes, with their strengths and weaknesses.

Usually the precise language of an amendment is not crucial; the basic idea or gist is enough. But when specific formulations are essential for clarity, I will indicate generally how they should go. Readers should remember that in virtually every case, my particular proposal has close cousins that would be almost as good or good enough. *What matters most is the spirit rather than the letter of each proposed amendment*—and that we recognize the problems to be solved. The main procedural goal is to make elections and political parties work for the common good.

1. Ranked Choice Voting: The End of Two-Party Domination

The presidential election of 2020 was certainly a wild ride. The massive increase in mail ballots during the pandemic delayed complete results and opened the door to many spurious charges of ballot theft and voter fraud. But the election of 2000 remains even more astonishing. On the evening of November 7, as George W. Bush's lead

in Florida shrank to under a couple thousand votes, it became apparent that a recount would be necessary in the state. Although Al Gore had won over half a million more votes nationally, the outcome in Florida would determine who won the Electoral College (EC) and thus the White House.



A long series of legal battles over that recount featured fierce debates about how to interpret poorly designed punchcard ballots that voters had only poked most of the way through—the so-called “hanging chads”—and ballots excluded for other errors caused by terrible ballot format. It ended when the Supreme Court stopped the recount in mid-process, with Bush a mere 537 ahead out of over 5.3 million votes cast by Florida residents. This shocking decision gave Bush all of Florida’s electoral votes, which made him the next president.

RCV Illustrated. This divisive outcome in Florida is often held up as an example of the EC’s basic injustice: it gives more weight to voters in small-population states, because they can have no fewer than three electors. Bush won more of the smallest states, which gave him the number needed to make Florida decisive (see #12).¹⁰

Yet the bigger problem on display in the Florida race is the way our system awards all the state’s presidential electors to a candidate winning a *mere plurality* of votes, i.e. the largest share, even if that is less than 50%. The same thing has happened in many close House and Senate races in recent years. It can be easily fixed with a method commonly known as “ranked choice voting” (RCV) or “instant runoff” that is used for elections in Australia, and for some elections in Maine, Alaska, and a handful of US cities.

We can illustrate how this solution works by considering voters for smaller alternative parties in Florida’s 2000 race.¹¹ When the recount was stopped on December 12, Ralph Nader had received 97,421 votes as the Green Party candidate in Florida. Pat Buchanan, the hard-right isolationist Reform Party candidate, received 17,484, while Harry Browne (Libertarian) received 16,415. Within this mix, roughly 24,000 people registered as Democrats in Florida voted for Nader. It is a very conservative bet that at least half of them would have ranked Al Gore as their second choice, if given that chance. We can safely stipulate the same for at least a quarter of Nader voters who were not registered Democrats. So let’s assume that 31% of all Nader voters would have ranked Gore second. Let’s also imagine that a full third of Buchanan and Brown voters would have ranked Bush as their second choice.

In this simplified scenario,¹² when neither Gore nor Bush won a majority of the (actually counted) Florida presidential ballots, which only recorded voters’ first choices, the most common type of RCV—namely the instant runoff system—would eliminate the candidate with the *lowest number of first-choice votes* (in this case, Browne). It would transfer these ballots to second-choice candidates (if any) selected on them by Browne voters, thereby boosting Bush’s numbers. Then Buchanan, with the next lowest vote tally, would be eliminated. Ballots cast by Buchanan voters would be transferred to

Table 2.1 Imaginary Ranked Choice Vote in Florida’s 2000 Presidential Election

Florida 2000 Ballots	First-Choice Picks	Second-Choice Picks on Same Ballot	Votes Added in Later Rounds	Total
Gore	2,912,253		30,355	2,942,608
Bush	2,912,790		11,187	2,923,977
Nader	97,488	30,355 for Gore		
Buchanan	17,484	5,770 for Bush		
Browne	16,415	5,417 for Bush		
Total	5,956,430			

their stated second choices—most likely Bush. But these two transfers would still leave Bush with only 49% of the Florida vote.

So, finally, the system would reallocate Nader ballots to their casters’ second choices. With 31% of them transferred to Gore, he would secure an absolute majority by a margin of 18,631 votes—over *thirty times* the margin by which Bush won the actual election. Of course, because I made up the numbers in the middle column to illustrate the ranked choice method, it is possible that in real life, more second-choice votes could have been cast for Bush (including by some Nader voters), thus increasing his lead. Either way though, the true wishes of third-party voters would have controlled the outcome in Florida, and thus the White House.

This system with a “single transferrable vote” is similar to holding an actual runoff election in which voters pick between the two candidates who finished highest on round 1. RCV ballots simply let voters say who they *would* choose in such a second or even a third round if their top-choice candidate came in last in the first round (or in the second round, if more than two candidates remained). This method thus combines multiple rounds into one ballot. It usually produces a majority winner, just as an actual runoff would, without the delay and costs. Even if an RCV election yields a plurality winner, it will usually increase the final margin of victory. This dramatically lowers the chance that a handful of late-arriving absentee votes or disputed ballots with problems could change the outcome in a high-stakes race.¹³ So RCV *reduces controversy* and avoids court fights that make people question whether a reported outcome is reliable.

Most importantly of all, RCV allows third parties to grow without requiring a complete parliamentary system with proportional representation. Several states are now considering RCV for this reason. Democrats and Republicans have dominated almost every federal election for over a century because, without RCV or actual runoffs, to vote for third-party candidate probably means “wasting” your chance to impact the decision between the two frontrunners.

Consider the special election held in August 2022 for Alaska’s one House seat, in which RCV was successfully used. Of 53,810 votes for Nick Begich (who came in third in round one), 27,053 were transferred to Sarah Palin, and 15,467 were transferred to Mary Peltola, leaving Peltola with a 51.5% margin. Thus a massive 79% of Begich voters took their new opportunity to name a second choice, and this determined the race. If Palin had convinced at least 2,621 of them who ranked Peltola second to favor her

instead, then Palin would have won. These Begich voters really mattered, even though their first pick was eliminated in the first round.

Now consider Alaska's election for federal senator in November 2022. Three Republicans split much of the first-pick votes, leaving moderate Lisa Murkowski with 43.4%, just 2,015 votes ahead of hard-right Kelly Tshibaka. But many Alaskans who ranked the Democratic candidate first also put Murkowski second: she received 22,835 more votes to Tshibaka's 5,044 in the second round. Thus Murkowski finished with an absolute majority of 53.7% and a clear 18,806 vote margin of victory. There was no need for a recount, and Alaskans felt free to express their top choice, knowing they could still support Murkowski or Tshibaka as their fallback.¹⁴ And less than 1,000 ballots suggested confusion about the RCV procedure.

By contrast, without RCV, Nader was the greatest third-party "spoiler" in recent American history. As we saw, if just 600 Nader voters had switched to Gore instead, he would have won. One chagrined Nader voter later wondered how things might have been different after the terrorist attacks on September 11, 2001, if Gore had been president. Perhaps, he thought, the US would still have gone to war in Afghanistan to stop Taliban support for al Qaeda. But we would not have invaded Iraq in 2003. Maybe, as so many Green Party voters wanted, we would even have seen an enforceable global compact on carbon and methane emissions to limit climate change by the end of Gore's presidency. And incidentally, without the massive tax cuts promoted and signed by Bush in spring 2001, the US federal debt might be half of its present size today.

This spoiler problem can hurt Republican candidates just as easily as Democratic ones. Democrats might not have won control of the Senate in 2006 if third parties in Virginia and Montana had not taken many votes from Republican candidates.¹⁵ Similarly, the last time a third-party candidate gained a large share of the national vote in a presidential election was in 1992, when Ross Perot won almost 19%. Although this was not enough for him to win any single state (and its electors) outright, it may have helped Bill Clinton win pluralities in several states that gave him the EC—much as Nader did for Bush.¹⁶

This spoiler problem could impact other big elections in the near future. That is why, according to a Senate investigation, a few Republican operatives in 2016 worked to get Green Party candidates on the ballot in Wisconsin and in Pennsylvania "swing districts:" they believed the diversion of votes from Democrats to Greens could hand a plurality win to Republican candidates.¹⁷ After all, during the 2016 presidential election, if even a third of the votes cast in Michigan for Green Party candidate Jill Stein had gone to Hillary Clinton instead, Clinton would have carried this swing state. The Russian regime clearly had the same idea; that is why it hired propagandists to post false narratives on social media sites in 2016 to support Jill Stein.¹⁸ Similarly, a few Democratic groups tried to swing 2022 general elections in a handful of races by promoting minor party candidates who could siphon votes from official Republican nominees.¹⁹

Obviously, winning by tricking voters into wasting their votes is not what our framers intended. It is awful that our friends and neighbors can be manipulated in this way when they *should* be able to vote for third-party candidates without fear of helping a candidate they strongly detest (Nader was surely right about that much). A recent

Gallup poll shows that a striking 62% of Americans now say that viable third parties are needed, up sharply from 40% in 2003.²⁰ Over a third of Americans do not wish to register as either Republican or Democrat, even though most of them “lean” more to the left or right—and thus would probably put one of the major party candidates down as their second choice in RCV elections.

These voters are aware of the spoiler problem in current one-round plurality elections. This explains the huge gap between the number of Americans who say they would like to vote for third-party candidates and the number who actually do. Independent candidates have occasionally been elected to Congress, most recently in Maine, Vermont, and Alaska. But third parties cannot rise as national movements until the spoiler problem is fixed by instituting RCV voting processes.

If an amendment were adopted requiring RCV ballots in all federal and state elections, *at least three* dramatic improvements would rapidly be felt. First, turnout would jump because more independent-inclined voters would see participation as worthwhile. Their true preferences could now be recorded and publicized without risk, because they could also name one of the frontrunners as their second choice. Of course, some people would *only* vote for their alternative party candidate (call that candidate Smith), but many others would vote for Smith as their first choice and Jones as their second (plus possibly a third choice too). This would boost the reported first-round totals for Smith to a point that she might start getting wider attention.

Second, alternative parties would grow their strength in many districts to the point where they could actually start winning seats in Congress, thus breaking the two-party lock. Some studies have indicated that Americans actually coalesce around eight or nine distinct bundles of political views.²¹ If so, this would be reflected in the range of competitive parties under RCV. More likely, 3–5 major parties would coalesce within a couple of decades according to varying positions on a small number of variables.²² Either way, with their spoiler effect eliminated, smaller parties would quickly make many House and Senate races much more competitive and produce more “swing” states in the presidential races—even without the other reforms I recommend below.

Third, that shake-up would further increase voter registration and turnout, as election outcomes became less predictable and thus more interesting to all potential voters. A virtuous cycle would follow: rising registration and turnout among moderate voters who had given up on the old system would force Democrat and Republican candidates to court more moderate or centrist voters to win. Television channels that are currently catering to the activist wings of both major parties might even have to temper their extremism, as market incentives to address moderate party members increased. Once third-party candidates began to carry House and even Senate races, they might also become dealmakers who can broker compromise. Eventually, we might even see a grand coalition of center-left or center-right parties controlling Congress and the presidency—a complete reversal of our current trajectory.

All this would be achieved without cumbersome actual runoff elections that are held weeks after Election Day, which draw out the process, increase uncertainty, and—as Georgia voters know too well—drive a tsunami of advertising money into your phones and homes.²³

Alternatives. I do not claim that the standard form of RCV described above is the only good alternative to our current one-round plurality elections. It has one technical problem that might rarely affect outcomes.²⁴ Eliminating the last-place finisher works well when it helps choose among two candidates who enter the general election as already frontrunners by large margins (as with Gore and Bush in 2000, or Murkowski and Tshibaka in 2022). But when three or four major candidates split the vote more evenly, the outcome turns on which of them happens to be the first choice of fewest number of voters, perhaps by a small margin.

The same issue has existed for centuries with actual runoffs. Consider the recent mayoral race in Boston, in which supporters of three black candidates among five total candidates split their vote widely: as a result, none of these black candidates placed among the top two in the actual runoff election that followed.²⁵ Similarly, standard RCV is not ideal in rare cases in which one candidate is the second favorite of a strong majority of voters but few voters' first choice. This candidate A may lose even though a majority prefers A over B in a two-way race, while a different majority prefers A over C if they went head to head. A would then beat B and C in a "round-robin" tournament by winning two contests between *pairs*. Such a round-robin winner is also called a "Condorcet winner," after the Marquis de Condorcet, who pioneered voting theory.²⁶

This problem can be avoided by programming the computer that collects the voters' rank-ordered preferences to identify the candidate who would win a round-robin series. The machine does this in the first round by comparing the *two* candidates who get the least first-place votes and eliminating the one of these who was ranked lower by more voters over all. It then reassigns ballots for the eliminated candidate—and so on in the next automated rounds. For instance, in our initial example from 2000, this system would look at how Buchanan and Browne were ranked *relative to each other* before eliminating one of them, rather than just eliminating Brown for having the least first-place votes.²⁷

However, this alternative itself needs a couple tweaks. First, in small electorates, occasionally a Condorcet winner does not exist because ties are possible: ballots could indicate that A, B, and C would *each win one* of the matchups between pairs. In that case, the system could revert to the standard-method RCV system that Alaska uses.²⁸ Second, an instant round-robin vote tabulation works well only if most voters rank-order all or most of the candidates. But many voters might not want to rank-order more than 2 (or have clear preferences beyond this). For example, a lot of voters in Florida 2000 would have only ranked Browne first and Bush second, or Buchanan first and Bush second; far less would have ranked Browne *and* Buchanan along with Bush. To deal with this, the system could eliminate candidates who are not ranked at all by over two-thirds (or three quarters) of voters, before figuring the round-robin winner.

Finally, such Condorcet methods are harder for voters to understand. Imagine, for example, a process in which every candidate but the Condorcet winner and runner-up are eliminated, and ballots ranking any of the eliminated candidates first are transferred to whichever Condorcet frontrunner (if either) their casters ranked higher on those ballots after their first choice. This may be a superior method, but it is tough to grasp.

"Cumulative" voting systems, in which each voter has more than one vote to allocate, offer another way to reduce the spoiler problem in single-member districts.²⁹ They can

increase the number of legislators from minority backgrounds when voters from minority groups care very much about electing someone from the same demographic groups as themselves.³⁰ But they can also give voters strategic incentives to allocate votes in ways that hide their true preferences.

Overall, experts on voting systems find that there is no absolutely perfect method; each fulfill some, but not all, intuitive criteria for fairness in voting, including being easy to grasp.³¹ But standard RCV is the simplest alternative to our current one-round plurality elections, as Alaska has shown. It should be the default, before states try out its superior but more complex variations down the road.

A Proposal and Objections. The main lesson is that our current plurality winner system is utterly out-of-date. This much is the consensus finding of virtually every expert on voting theory. If our founders had known everything that the social science of elections has taught us in the last century, they would not have allowed our current system in federal elections. We embrace ultra-hightech medicines and procedures for our physical health. Why then would we stick with an 18th-century balloting method that was adopted before its problems were understood? To do better, we have only to educate Americans about the alternatives that have been designed by election theorists.

The constitutional amendment should require states to move away from single-round plurality winner voting in both federal and state elections. States could choose between standard RCV and methods that improve on it with a round-robin (Condorcet) component. Voters must be allowed to rank at least three candidates. Otherwise the two dominant parties will collude to block the rise of third parties, as they have for decades by banning “fusion” candidates cross-nominated by two or more parties—and federal courts will let them do it.

Against this, critics argue that, once two parties cannot monopolize the political landscape, radical minor parties with destructive ideologies may gain visibility. And it is true that small radical parties can gain a foothold in parliamentary systems using proportional representation if there are no bottom thresholds (e.g. 8%–10%) to win *any* seats in parliament. However, my proposal is not to abandon single-member congressional or statehouse districts for multimember districts (see #4). But even if a state created districts with (say) three representatives elected by finishing first, second, and third out of a large pool, the law could eliminate candidates polling less than 10% by the end of the second automated round. Neither Communist nor Execute-all-Immigrants parties are going to grow to the point of winning outright in many races decided by any version of RCV.

As an added benefit, RCV elections would require many states to improve their voting machines and any paper ballots read by machines, so that the reassignment of ballots to second choices when needed can be done seamlessly. This alone would have prevented the design flaws that led to over 175,000 ballots not being counted in Florida’s 2000 election—over 325 times the margin of victory! If we supplement the automatic runoff with uniform federal standards for voting (see #6), the results will become even more reliable and representative.

One might object that the federal government can mandate RCV by ordinary statute, just as it could create national standards for registration and ballot design by law. But unfortunately this will not work for two reasons. First, the two-party system is the basis of legislators’ job security: while it makes them less responsive to a majority

of constituents, it also makes their life easier. Second, even if by some miracle Congress passed a national RCV law, the Supreme Court could well overturn it. The Court has held that states control most aspects of their election processes and have a lot of discretion in how they format ballots and aggregate votes—as long as they do not violate the one-person-one-vote standard.³²

The Court has also allowed states to keep small parties off the ballot or to prevent viable candidates—who received well beyond 10% or 15% of all primary votes cast for all candidates—from appearing in televised debates. It's as if the Court reads the Constitution as mandating or preferring a two-party system, even though it actually says nothing about political parties at all.

An amendment, then, is the only secure way to fix the spoiler problem and end two-party dominance. The amendment could specify that state governments will manage election processes: it would only mandate that all states adopt some version of RCV (the standard runoff by lowest elimination or its superior variants) and give candidates with some proven level of popular support equal treatment. An amendment is also far better than waiting for different states to adopt RCV one by one: that might weaken one of our two main parties in some states while leaving the other in total command in other states. The only fair solution is to ensure that all voters have *the same* opportunity everywhere to support third parties without helping a candidate they oppose by backing a spoiler like Nader, Perot, or Stein.

2. Rotate the Early Primary Elections between All States

We have primary elections so that voters, rather than political bosses and their cronies, can select their party's standard bearers for each office in the general election. Political parties are essential for democracy in a massive society like ours: when rightly structured, they provide many benefits. As Tarunabh Khaitan says, well-functioning parties act as bidirectional intermediaries between government and the general public, and thereby lower four key types of “information and transaction costs,” including “political participation costs, voter’ information costs, policy packaging costs, and ally prediction costs.”³³

In lay terms, parties vet potential candidates, think through policy options, and help citizens determine how they might best coordinate with other citizens for shared goals by organizing flexible coalitions. Parties thereby aggregate tons of information for voters who could not research even 1% of all this information on their own. This is why, as even Madison admitted in his later years, political parties arise naturally within democracies and are essential to its operation on a mass scale.

The problem is that our Constitution does not direct and constrain political parties: the founders did not anticipate their rise, and framers of later amendments were themselves party leaders. In this respect, a central feature of the Constitution was out-of-date within a decade after it was ratified. The result is that political parties operate according to 50 different states' laws, which in turn are limited by Supreme Court decisions on freedom of association and campaign spending (see #5). The great freedom parties enjoy makes it hard to prevent collective action problems that distort party functioning.

This constitutional lacuna underlies two big problems with our primary elections: the “front-loading” effect and the way that low turnout in primaries empowers the most zealous or militant Republican and Democratic “base” voters. The first problem especially impacts the presidential race, while the second pushes incumbents in Congress toward the extremes in order to avoid primary challengers who might get support from single-issue interest groups and fanatics. The first problem is relatively easy to fix, but the second is somewhat harder to correct (so I’ll save that for the next section).

Front-loading is not a problem unique to elections. In his bestselling book *Who Gets What—and Why*, Nobel prize-winning economist Alvin Roth describes several cases in which market efficiency unravels and leads to suboptimal results because some participants “jump the gun” by trying to buy, trade, or seal a deal before competitors can enter the market. You may have seen this on “Shark Tank,” but Roth’s examples range from absurd to damaging and infuriating. Federal judges trying to hire clerks from top law schools ignore rules that establish a common calendar and make “exploding” offers that candidates have to accept or reject on the spot. The NCAA tries to prevent groups organizing popular bowl games from signing up college teams before late November; but teams kept signing contracts earlier anyway before their rankings are clear. Electronic traders spend millions on cables that are nanoseconds faster than their competition’s wires.

Without a rule to restrict people from transacting before rivals can compete, everyone can end up worse off. Roth describes one polygamous tribe of aboriginal people in Australia who had to betroth their unborn grandchildren—future children of their infant children—to ensure them an adequate opportunity for a good match.³⁴

Consider in this light our crazy calendar for primary elections during presidential years: states keep trying to move their primary date earlier to one-up other states, thereby elongating the campaigning season, which now starts more than year in advance for the presidency. As Caroline Tolbert describes, the national parties tried to control this “race to the front” by denying or reducing delegates for any state that held its primary election before February 5. But Iowa, New Hampshire, Florida, and South Carolina pushed their primaries earlier anyway.³⁵ Eventually, a temporary compromise took hold for the first seven races in 2020:

Table 2.2 Primary Election Dates in 2020

Feb. 3	Iowa (caucuses)
Feb. 11	New Hampshire
Feb. 22	Nevada caucus (Democrat only)
Feb. 29	South Carolina
March 1	Wyoming presidential primary caucus (Republican only)
March 3	Alabama, Arkansas, California, Colorado, Maine, Massachusetts, Minnesota, North Carolina, Oklahoma, Tennessee, Texas, Utah, Vermont, Virginia
March 10	Idaho, Michigan, Mississippi, Missouri, North Dakota, Washington

The pattern is clear: to be viable past early March, presidential candidates must win some of the first five states, and then seal the deal when 14 states (count them!) all vote on Super Tuesday. After that, even the next 6 states whose elections are held a week later are largely a formality: candidates without a lot of delegates after Super Tuesday cannot secure enough big donor funding and small contributions from ordinary citizens to advertise and tour in the next states.

Thus in recent presidential elections, the Democratic and Republican frontrunners have largely secured by the nomination once Super Tuesday voting is complete. Voters see this, and so turnout in primary elections after Super Tuesday drops precipitously, which affects down-ballot races for the House and Senate, and state elections as well.³⁶

The result is that Iowa, New Hampshire, Nevada, South Carolina, and Wyoming have enormous advantages over all other states in presidential elections. In addition to bringing in millions of dollars in extra business, the primary calendar gives them far more influence over presidential elections. Although mass media coverage is also key, one study of the 2004 Democratic primaries found that early primary voters had five times (500%) more influence in deciding between John Kerry and Howard Dean.³⁷

That all of us in the other 45 states have tolerated this outrage for so long is a good indicator of the institutional inertia that makes people assume that we just have to put up with big procedural injustices. We don't. As Larry Sabato says of IA and NH, "[t]hese two states seem to assume that the Constitution guarantees that they should go first," but actually it says nothing about primary elections. Why, he asks, "should two small, heavily white, disproportionately rural states have a hammerlock" on presidential nominations? As one irate commentator noted in 2020, the combined population of IA and NH is smaller than Kansas City, Missouri.³⁸ Even by March 10, a week after Super Tuesday, only *three* larger and more diverse coastal states had voted in 2020.

But the solution is not more competition among states. Already IA and NH look likely to move their primaries into January for 2024. MI, GA, and NY are trying to move their primaries into February, and more states aim to get into Super Tuesday as well.³⁹ By the 2028 election season, we might see IA and NH holding their primaries in December 2027. To end this absurdity and shorten the election period, we need a constitutional amendment guided by basic fairness (see Desideratum 6): "Every state and region ought to have essentially an equal chance, over time, to influence the outcome of parties' presidential nominations."⁴⁰

Although it is tempting to write an amendment saying that IA and NH cannot hold their primaries before June 30 for the next century, the best solution is a rotation in which states are divided into four or five regions that take turns holding the earliest primaries. A single primary per region, with a couple weeks between regions, would give candidates, their teams, and journalists more opportunity to spend longer within each region, meeting more residents in smaller venues. How many regions? Three would make the regions too large for campaigns to interact with people at local levels. Still, the first two or three regional results are likely to have a nearly decisive influence on large party nominations, which is a reason not to make six or more.

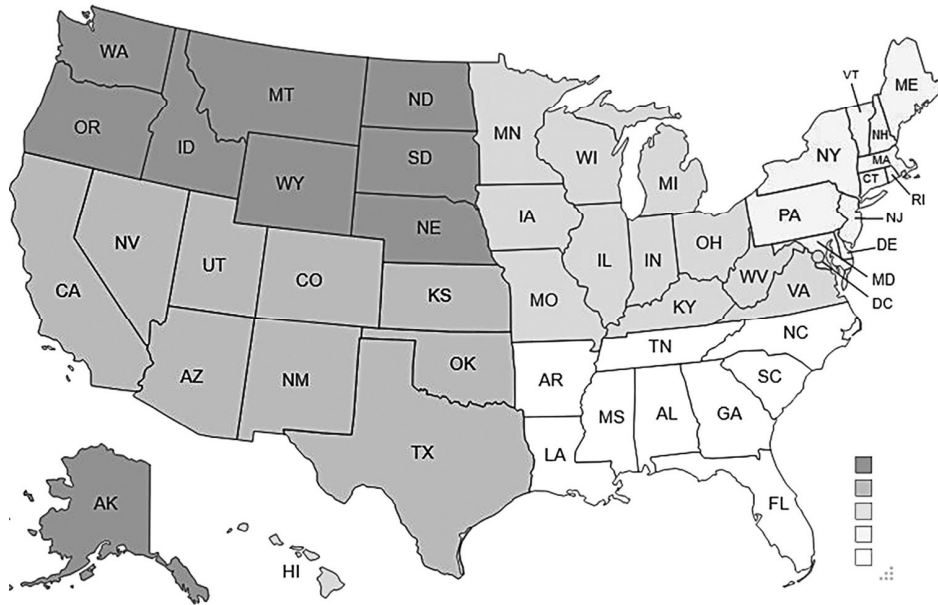


Figure 2.1 Primary Elections Rotating by Five Regions

I favor five regions of 9–11 states each: the Northwest (including Alaska), Southwest (including Hawaii), the Midwest, Southeast, and Northeast (see Figure 2.1). The amendment should list states in each region, with a provision for new states, to prevent any party that later controls Congress from altering the schedule for some imagined strategic advantage.

The first primary date could be set for the Saturday closest to April 2, reducing the time and expense of big campaigns. The subsequent dates could follow on three-week intervals ending around June 25. The party conventions could then occur in late July or August. Others have suggested even more compressed schedules beginning in May.

The amendment should also set a rotation so that each region goes first (and another last) once in every five presidential election years. The relative order of states would stay fixed during the three years after each presidential election. For example, in 2028 the Northwest could vote first, followed by the Midwest, Northeast, and so on in clockwise order. After four years, each region would move up in the rotation, with the region that voted second in 2028 going first in 2032. So in my illustration, in 2032, the Midwest would vote first on April 2, followed by the Northeast on April 23, and then the Southeast three weeks later, followed by the Southwest. Finally the Northwest, having voted first in 2028, would vote last in June of 2032. In 2036, the Northeast would vote first, followed by the Southeast, and so on.

Alternatives. Sabato, after collaboration with other experts, suggests a similar division into four regions. Although 12–13 states is a lot of ground for candidates to cover before each regional primary election, this system is a workable possibility. However, he also argues that on each presidential election year, a *lottery* (held around January 1)

should decide the order in which regions vote for that year.⁴¹ The main advantage of this idea would be to make it harder even for wealthy campaigns to mount a lot of visits and events during the summer and fall prior to our presidential election years—as they now routinely do in IA and NH. Because campaigns would not know which regions will hold the first and second primary elections, they could not jump the gun and start campaigning in them earlier, and thereby elongate the full election to an absurd 15 months or more.

That is a good point, but the risk that one region might go eight presidential elections or more without its lotto ball popping up first, or that the same region might by chance get to vote first in two out of four presidential elections in a row, would diminish the perceived fairness of the amendment and reduce its chances of ratification. A fixed rotation guarantees each state its chance, once every 20 years, to do what IA, NH, NV and SC do now in winnowing the field. The prospect of big campaigns starting early in the first-voting region could be controlled by capping overall campaign spending (see amendment #5), or even by putting high taxes on early campaigning. Moving the first primary into April would also reduce the campaign length.

Some commentators argue instead for a single national primary across the entire country. But that is not necessary to solve the front-loading problem, given the options just described. It would doubtless increase turnout a lot, but at the price of eliminating valuable opportunities for less well-known candidates running smaller campaigns to rise through early primaries, as others are winnowed out. A single national primary would afford potential voters no chance to learn from the earlier primary races and their results.⁴²

In one national primary, candidates would also have to mount all-out nationwide campaigns from the start, relying entirely on advertising blitzes and big rallies rather than smaller events, including direct contact with residents in early-primary states. This would favor the richest and already famous candidates, shutting out younger contenders and aggravating the outsized influence that wealthy donors have on the primary process.⁴³ In fact, holding a single national primary in the spring would merely turn it into the first round of a general election, with the November election then functioning as a runoff. There is no need for that once we have RCV in the November vote (see #1).

3. Open or Semi-Open Primary Elections: End Control by the Extreme Wings

The previous proposal for regional primaries with a fair rotation schedule would, if enacted, increase turnout substantially, especially in the regions voting first and second in a given presidential year. That's crucial: only about 33% of registered Americans voted in the 2020 primary elections, and that was the highest in decades.⁴⁴

Even in presidential years, the most radical 20%–25% of registered Democrats and Republicans increasingly control the Congressional and presidential primary election outcomes, driving candidates toward the extremes and making legislative compromise less feasible when Congress meets. Given the effects on the nation, it is shocking to realize that only around 9% of Americans voted for either Trump or Clinton in the 2016

primaries.⁴⁵ This is explained by low turnout driven by the dominance of early primaries, the lack of RCV balloting, and the plurality winner taking all delegates in some states. Republican voters who disliked Trump largely split their votes between Governor John Kasich, Ben Carson, and Senators Cruz and Rubio. If even half of them had favored (say) Rubio as their second choice in primaries with RCV ballots, Rubio would have won 4.13 million votes to Trump’s 3.38 million by the end of Super Tuesday.⁴⁶

Because so many House and Senate seats are now “a lock” for one of the two dominant parties (see Figure 2.2), partly as a result of gerrymandering (see #4), the primary election becomes crucial in those districts and states. That’s how we get Republican legislators who are unwilling to control drug costs to the point of blocking a cap on insulin prices for anyone not on Medicare (they did this during the passage of the Inflation Reduction Act in September 2022). It’s also how we get Democratic legislators who support a mandatory single-payer health care system, rather than a “public option,” that would allow people to keep their employer-paid health insurance. A desire to compromise with the strongly held convictions of other groups in order to get legislation done is not a serious concern for such candidates.

For such reasons, some political scientists suggest giving more influence to party leaders in selecting general election candidates, because they tend to “prefer moderate candidates over ideological ones.”⁴⁷ Maybe “smoke-filled rooms” were not so bad, my family friend comments. But that also has its own risks, including keeping strong concerns among portions of the public bottled up and festering, out of view in national politics. I have no objection to leaders having a bloc of votes at their party’s convention, but resisting the drive toward extremes also requires boosting primary turnout by broadening eligibility to vote in primary races. There are several possible ways to do this. In evaluating four main options,⁴⁸ we should look for one that maintains the idea of party as a political association but reduces the “barriers to entry” for new voters.

Four Options. (I) As the primary election currently works in most states, you can only vote in the primary for the party in which you registered a significant time prior

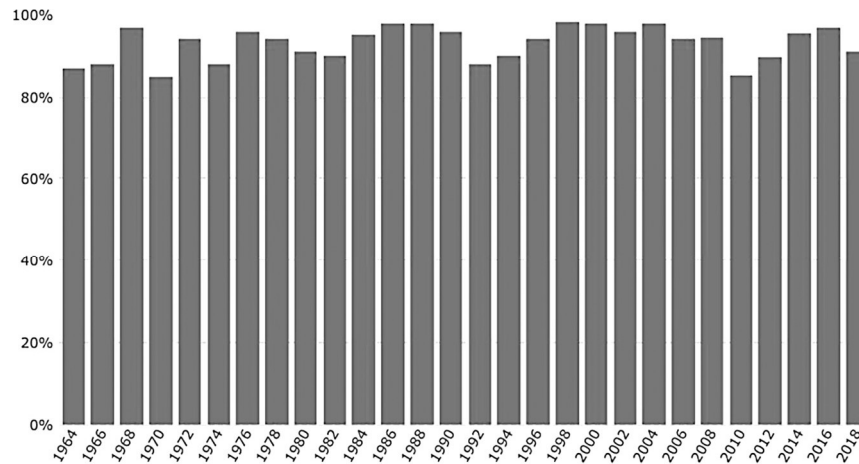


Figure 2.2 US House Reelection Rates

to the primary election date. But many Americans register to vote without affiliating with either of the big parties: a late 2021 Gallup poll found that fully 42% of voters identify as independent, although many may lean more Republican or more Democrat. That is a lot of independents who were at least uncertain about party affiliation when they registered and/or whose natural party “home” may be foreclosed by the two-party duopoly. They should have a voice in primary elections, especially when their House district and/or state is dominated by one of the big parties.

For example, if you are a Democrat resident in Idaho, which is heavily Republican overall, you can predict that the Republican nominee for an open Senate seat is very likely to win. Although your party affiliation matters to you, the Republican primary becomes the main event for such a “safe” seat—much as the Democratic primary for mayor of New York City was the decisive race for that office in 2021. The more heavily red or blue districts we have for Congress, state legislatures, and city government, the more primary elections become crucial.

In recent years, some states and localities have tried alternative primary systems to find a better way. The many permutations can get confusing, especially because the terminology is not totally standardized. It’s helpful to distinguish the types, whatever we call them, by their main components.

- (I) The traditional system in which you select among candidates who got on the ballot for your registered party (subject to state rules) is a “closed” primary.
- (II) By contrast, an “open primary” usually refers to an election system in which
 - (i) a voter V who is *not* registered as a member of party P, because they are registered as independent or as a member of another party Q, can still opt to vote in P’s primary.
 - (ii) without V having to register as a new member of the P party when voting;
 - (iii) but each voter can only vote in *one* party’s primary race each election year.

This would obviously help Democrats in deep red districts and Republicans in deep blue districts to have a real influence, thereby promoting more moderate general election candidates. That is also true if, reversing (ii), such “crossover” voters must register with party P on primary election day in order to vote in P’s primary. According to Ballotpedia, in 21 states, at least one party uses one of these “open” methods.

- (III) A “semi-open” (or “semi-closed”) primary is like an open primary except that condition (i) is more restrictive: (i*) only voters who are registered as independent can cross over to vote in party P’s primary.

For example, if Mr. V (a voter) previously registered with party Q, he could not decide at the polls, or when receiving a mail ballot, to vote in P’s primary instead of Q’s. To do that, he would first need to re-register as independent some time before the primary election day or before a mail ballot is sent to him. States allow particular variations, but usually semi-open primaries also require that (ii*) once an unaffiliated voter V votes in party P’s primary, they are registered as a P-voter. So, given (i*),

V cannot vote in Q’s primary next time without first re-registering. Some states, e.g. California, have at times allowed each party to choose between open, semi-open, or closed primaries (see Figure 2.3).

- (IV) There are also “blanket primaries” in which condition (iii) is altered so that any voter V can vote for one primary candidate C for each office on the ballot, regardless of V or C’s party affiliations. For example, suppose V is a Democrat. In the primary, V can (if she wants) choose among several Democratic candidates for senator, and among several Republican candidates running for V’s House district, and among Green Party candidates for governor. It sounds complicated; yet it is not hard for a well-programmed voting machine to keep track of such votes.



Figure 2.3 How to Vote in a Primary Election

The Supreme Court in 2001 rejected that blanket system, which had been used in California and Washington, as a violation of people’s rights to free association in a party that can exclude nonmembers. But, oddly, the Court allowed Louisiana’s *nonpartisan* top-two primary, in which the two candidates receiving the highest number of primary votes for a given office—regardless of their party—advance a runoff election if no one wins an outright majority for that office in round 1.⁴⁹ This is one version of so-called “jungle primaries,” in which voters winnow out some *or all* candidates from each party. So in a top-two jungle primary, for example, the general election may only feature one Libertarian and one Republican, or two Democrats, for a given office.

Jungle primaries can be bad for at least three reasons. First, the ballots sometimes do not even tell voters what the party affiliations of candidates are. Second, they still have the spoiler problem. Imagine that 2 Democrats and 4 Republicans are running. By dividing the Republican vote, they may leave only the 2 Democrats in the top two places to compete in the general election.⁵⁰

Third, a top-two jungle primary turns the general election into a runoff, and thereby gives up on the distinctive function of primary elections, which is to winnow down *each party’s* candidates to one for each elected office. Especially in areas dominated by one party, the top-two nonpartisan primary will usually have the perverse result that third-party candidates are closed out of the final stage.⁵¹ Some reformers suggest allowing the top *three* to proceed to the general election,⁵² but this is also not enough to ensure a spectrum of alternative party candidates in the general election: voters may see only two Republicans and one Democrat (or the inverse) for key offices on the general election ballot.

The Proposal and Objections. Comparing these four methods, the jungle primary method is trying and failing to solve the problem that RCV is designed to fix. The open or semi-open primaries are less confusing but still encourage larger participation and allow a broad spectrum of small parties into the general election stage (where, with RCV, they pose no spoiler danger). Unlike jungle primaries, semi-open primaries also allow parties some level of control over their membership and candidates, which they need to perform their functions of gathering information and enabling collective action.

The main criticism of open primaries is that they can enable voters strongly aligned with party P to “raid” party Q’s primary race in order to help elect a weak nominee for Q—a “poison pill” candidate. For example, if the primary race is close between a moderate law-and-order Republican (A) and a fire-breathing Republican (B) who promotes election conspiracies and wants to eliminate all social welfare programs, Democrats might cross over to vote in the Republican primary in order to nominate B, who will probably lose the general election to a Democrat. Or when a moderate Democrat has a primary challenger who advocates for totally open borders and abolition of all prisons, Republicans might raid that primary to help this non-viable far-left candidate win the nomination.

While that is technically possible, there seems to be little evidence so far that such raiding has happened to a large extent in open primaries. Still, in an age of mobs coordinated by social media propoganda, we should not entirely discount that possibility. Crossover is more likely if a major party P runs a candidate C who is utterly detested by

eligible voters affiliated with other parties: some of them might then try to influence P's choice of nominee *to veto* that particular candidate C. That could happen spontaneously, whereas it would take a lot of coordination to raid P's primary in order to prevent P's most electable candidate from winning P's nomination.

The semi-open system is able to reduce these sorts of crossover threats. Few people would be organized enough to keep changing a party affiliation that resulted from voting in the last semi-open primary. The semi-open primary still reduces control by the fanatical party bases by allowing independents a vote in states with one dominant party. However, in states where one party is especially strong, a top-*four* system like Alaska's should ensure candidates from at least three parties in the general election, but it can also allow the top two from the dominant party to reappear in general (rather than winnowing them to one).

So I suggest that our amendment should mandate that primaries (a) be held on the same day for all parties in a given state; (b) use the open, semi-open, or top-four primary system, according to each state's choice; and (c) allow federal law to make adjustments needed to curb any large level of primary raiding, when these adjustments are narrowly tailored to that end. Over time, this will boost voter participation *on top* of what RCV brings by itself and result in generally more moderate nominees being selected to represent the larger parties in the general election.

Given the difficulties of this issue, critics will surely ask, shouldn't we simply leave it to each state, as we do now? The problems with this status quo are threefold:

- increasingly radical state governments may try to tailor the primary method to help their party's perceived interests;
- and/or these state legislators may want to keep primaries closed to protect more radical candidates in their party, including themselves; and
- such state legislatures might also adopt nonpartisan blanket or top-two "jungle" primaries to appear innovative while actually keeping third parties from becoming viable.

In short, if we make no change, soon Maxine Waters and Marjorie Taylor Green will look tame by comparison with new House members. Some national standard is necessary to resist rising ideological fervor and voter alienation, and to ensure fairness across all states.

It might seem that this can be achieved by ordinary federal laws, which are also easier to change if adjustments are needed later on. Unfortunately though, that route is not sufficiently secure. The two-party duopoly in Congress might decide to mandate a top-two primary to protect their dominance and blunt the effects of RCV. Or today's ultra-politicized Supreme Court might well decide to ban open or semi-open primaries, as with blanket primaries in the past, on the specious ground that political parties are just private clubs. That's why we need an amendment that explicitly recognizes the crucial public functions and responsibilities of political parties, so courts will help ensure that they serve public interests over the private advantage of party leaders and their big funders.

This is not to disparage the importance of private civic associations in promoting collective self-governance.⁵³ Rather it is simply to recognize that political parties are especially crucial organizations for informing, aggregating, and channeling the political concerns of citizens and smaller associations to which they may belong. When parties massively mislead their members and destroy national goods for their own short-term benefit, they need deep reform. That time has come.

4. Fair Districting: End Gerrymandering and Make Congress More Responsive

“Gerrymandered” electoral districts may be the most hated of all American constitutional problems, but solving it still involves some difficult policy questions. Many outrageous districts have their own famous names: the Earmuffs, the Octopus and Serpent, Goofy Kicking Donald Duck, and so on. This section goes beyond the weird shapes to the policy questions in a summary fashion that cuts through a lot of details—and most of the mind-boggling maps—that are usually offered to demonstrate the problem. I take this approach because the details often obscure the essential choices needed for a fair, stable, long-term solution (but more detailed explanations, including more district maps, are available on *TheDemocracyAmendments.org*).

Big Costs to the Nation. Consider three kinds of damage that gerrymandering does. (1) While I focus below on congressional elections, the effects of gerrymandering for statehouse districts are also dramatic. They allow a party controlling a slim majority in both chambers of a state legislature (a) to magnify its statehouse majority by redrawing its electoral districts, and (b) then use this enhanced control after a national census to gerrymander the state’s congressional districts. A good example of this, as David Litt argues, is found in Wisconsin, where Republicans held 65% state assembly seats after the 2018 elections, even though Democrats won 53% of the votes.⁵⁴ Democrats did the same thing in Georgia during 2001.

(2) The gerrymandering of House districts then becomes a major cause of political polarization and gridlock because it produces so many “safe seats” in the general election. With district lines drawn to favor them, most House members can focus on their party base and ignore the general electorate in their districts.⁵⁵ In 2020, a *New York Times* analysis found that only 61 of the current 435 House seats were “battleground competitions”—a mere 14%. After all the gerrymandering in 2021, competitive districts are down to about 12.5% in 2022 (with only 7% being highly competitive).⁵⁶ The number would be even lower if New York had not been de-gerrymandered by state court order in 2022.

As many analysts point out, the decline in competitive districts partly reflects the “self-sorting” of Americans into bluer urban areas and redder rural areas. Even if all districts were *randomly* drawn, there would be a lot of uncompetitive ones in which people with similar political views are packed together.⁵⁷ But gerrymandering inflates the number of noncompetitive districts as they are redrawn once a decade after the national census.

Minimizing your opposition’s chances by gerrymandering has become an advanced science aided by smart computer modeling.⁵⁸ For example, when they controlled the Texas statehouse, Democrats had drawn the districts to give their party 17 out of

32 congressional districts (53% of seats) in 2002, even though they received only 44% of votes.⁵⁹ By 2020, after two major rounds of gerrymanders by a Republican statehouse, Republicans won 23 out of 36 House seats (64%), even though they only received 53.4% of votes. In other words, their share of the vote dropped by almost 3 points; yet their share of seats won rose by 17 points—all due to the magic of computer-aided gerrymandering.

This technology has turned what was already a big problem into a true orgy of cheating. After the 2020 census, state governments redrew enough districts in precisely the shapes needed to flip at least five House seats *even if* turnout and voter choices had remained unchanged.⁶⁰ Everyone recognizes that this is dirty, much like tactics to rig voter registration (see #6), and it turns off moderate voters. As former Supreme Court Justice John Paul Stevens puts it, “whether liberal or conservative, candidates can be expected to adopt more extreme policies when competing within a single party” rather than against candidates from other parties.⁶¹

Republicans currently control more state governments and so do more gerrymandering, but Democrats also do it. For example, see Maryland’s 3rd district, the “Praying Mantis,” as it was in 2018 (see Figure 2.4). MD’s new 2021 map was also rejected by a state court as excessively gerrymandered: it had 7 Democratic districts and 1 tossup, with no safe Republican district, although a third of MD voters are Republicans.



Figure 2.4 Maryland District 3 in 2018

(3) Gerrymandering also helps to make minority rule possible in the House of Representatives, which was intended to be controlled by the popular vote. For example, in 2012, Republicans won 53.8% of House seats while receiving 1.4 million less votes than Democrats.⁶² Three times since 1950, one party has won an outright majority of all votes for House seats but still lost control of the House. This almost happened again in 2020.⁶³

The American public is aware of the first two harms and is angry about them. In August 2021, the anticorruption group RepresentUS found that almost 90% of Americans disapprove of gerrymandering.⁶⁴ People can see that congressional and statehouse politicians are handpicking their voters rather than voters picking the politicians—a total inversion of democracy. Yet parties feel that, if the other side is going to gerrymander, they have to as well. In short, it is an arms race (with the structure of a “prisoner’s dilemma”).

The Limits of Districting Commissions and Federal Law. So then, why do we not just write an amendment mandating that independent commissions of experts handle all districting and be done with this nonsense? Such an amendment might well get ratified, and studies show that commissions generally do improve the situation. For example, California’s commission has made more districts competitive in that state.⁶⁵ Currently, in 2022, only seven states give truly independent commissions the main responsibility to redraw statehouse *and* congressional district lines. In other states, the commissions are joint bodies of politicians, and/or they only draw state legislature districts, and/or they are only advisory or act as backups if the legislature fails to produce legal new maps.

Commissions can be made largely impartial if their members are selected by lottery from an expert pool or perhaps, as Sabato suggests, made up of retired judges.⁶⁶ But for this fix to be fair, we need commissions to be introduced everywhere, not in one state at a time. In 2022, California, Washington, Colorado, Arizona, and Michigan gave districting power to independent commissions, while no large red state did so.⁶⁷ And in 2014, New Yorkers passed a state constitutional amendment for fair districting, which courts enforced in 2022, reducing safe Democratic seats from 20 out of 26 to 15—enough to give Republicans control of the House in 2023–2024.⁶⁸ Thus Republican candidates now have a better chance in some large Democrat-controlled states, while Democrats’ chances are minimized by unrepentant gerrymandering in all large Republican-controlled states.⁶⁹ As David Imamura argues, “[i]t cannot be that only blue states have independent redistricting processes while red states draw whatever lines they want. All states together must adopt uniform redistricting reforms.”⁷⁰ Without a national standard, state-led reform amounts to unilateral disarmament by one side.

Congress *may* have the power to solve this problem by mandating independent commissions, at least for all congressional districts (if not statehouse districts). The “For the People Act” (FTP) passed by the House in 2021 would require each state’s congressional districts to be approved by an independent commission made up of experts and ordinary citizens. So did Senator Joe Manchin’s 2021 compromise proposal: “The commissions would each include five Democrats, five Republicans and five independents, requiring bipartisan approval for districts [...]”⁷¹

It would be great to solve this giant problem without needing constitutional change, but there are at least three big obstacles to that hope. First, the FTP formula for commissions would disadvantage smaller third parties. Second, a federal mandate for independent commissions would have to surmount a filibuster, which defeated the FTP and Manchin’s draft bill. The same would apply to any updates needed to rein in unforeseen tactics by state governments to manipulate their state’s commission (e.g. by spurious impeachments of members, etc.).

The third reason is the most shocking: the Supreme Court may soon hold that independent commissions, state courts, an even state constitutions cannot prevent a state legislature from drawing whatever congressional districts it likes. In 2015, Arizona’s Republican party argued that the state’s constitutional amendment (passed by a ballot initiative) creating an independent commission violates Article I, §4 of the federal Constitution, which says that “the Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof [..],” although Congress can “alter such Regulations.” Their argument turned on a fringe theory, long rejected by most constitutional scholars, that “Legislatures” here refers only to one part of state government, giving them power “independent” of all other parts to draw district lines. The same argument would appear to allow state legislatures by themselves, without the governor’s signature, to override any executive decisions made by state or county officials concerning how to count ballots under state law.

On the contrary, a lot of precedent interprets the word “Legislatures” in Article I to encompass a state’s whole legislative processes,⁷² because, of course, a state legislature only exists by virtue of its state constitution—and our framers typically used the term as a metonym for the state government⁷³ (this is an example of the vices of short constitutional text, see *Desideratum* 7). But AZ Republicans backing this outlandish “independent” or “absolutist” state legislature theory only lost by a 4–5 margin in a 2015 Supreme Court decision,⁷⁴ and the Court has moved farther right since then.

This theory, which may also have a major impact on presidential elections (see #12), will be tested in a pending case, *Moore v. Harper*, which began in 2021 when the North Carolina legislature drew new district maps and the NC supreme court rejected them for violating the state constitution. As in AZ, NC’s Republican-majority legislature argued that their state courts have no right to limit their gerrymandering of congressional district lines. The Republican plaintiffs lost in lower federal courts; but in June 2022, the Supreme Court agreed to hear their appeal.⁷⁵

Of course, this extreme tactic only increases the arms race: if the Court makes state legislatures “independent” of the rest of state government, despite 230 years of contrary interpretation, then Democratic-controlled statehouses can also destroy any and all checks and balances against gerrymandering in state law. Like NC’s legislative majority, they can also use underhanded tactics to control any resistant state courts as well.⁷⁶ Even then, existing constitutional language should allow federal law to empower independent districting commissions or otherwise limit gerrymandering—unless the Court also rules that any attempt to limit gerrymandering by federal law violates the 10th Amendment.

No Constitutional Right to Fair Districts, Yet. This much is certain: the Supreme Court will not find any limit to gerrymandering in the current federal

Constitution. Over three decades, the Court has increasingly accepted gerrymandering for naked partisan advantage. While previous decisions held that federal courts could review this kind of gerrymandering, in *Rucho et al. v. Common Cause*, a case decided in July 2019, a 5–4 Republican majority on the Court opened the floodgates. Chief Justice John Roberts wrote that, although gerrymandering districts for one party’s advantage might be unjust, federal courts will not even review district lines on that basis—*no matter how extreme the gerrymander is*.⁷⁷

It has been a long road to this worst-case endpoint. Back in 1986, a majority of the Court ruled that each political group should have an *equal opportunity* to “elect representatives of its choice,” which put political and racial gerrymandering on a par: both are unconstitutional when done primarily to reduce the “voting strength” of a racial group *or* a political party.⁷⁸ The Roberts Court now says the opposite.

As a result, a constitutional change is the only truly secure way to end gerrymandering at both the state and federal levels.⁷⁹ However, whether the commission fix is attempted by statute or amendment, commissions must use *specific parameters* that define fair districting in a democratic society. And there is no consensus on what those are: different state governments, commissions, and older Supreme Court cases point to different parameters. There are no value-neutral ways of defining fair districts: it is a substantive ethical matter.

Four Criteria. Here I will mercifully spare readers most of the geometrical intricacies and legal history that direct attention away from the key ethical questions involved in defining fair districts. But, beyond a few illustrations, you will have to trust me; those who want fuller explanations can find them on this book’s online extension.⁸⁰ The main districting criteria that have emerged from experience, analysis, and legal argument generally reduce to these four:

- Proportionality: the percentage of the electorate supporting a political party is similar to its share of seats won for the next legislative term.
- Competitiveness: there are small margins of difference between political groups in a district, which typically produce close races (the opposite of safe seats).
- Compactness, contiguity, and traditional boundaries: regular district shapes, which may also respect county lines and natural boundaries such as rivers.
- Communities of interest: ethnic, religious, cultural, or economic groups with shared interests and some level of political cohesiveness, which may include minority racial groups who have historically often been victims of disenfranchisement.

Each of these criteria has intuitive appeal, as well as many supporters, and every critique of gerrymandering implicitly appeals to one of more of them. For example, when Litt calculates that gerrymandering currently gives Republicans at minimum a 20-seat head start in the race for the House,⁸¹ he means 20 seats above their proportion of the national total of all votes for House seats. Let’s clarify each of these proposed standards.

1. *Proportionality between the votes for each party and the seats won.* In 2020, North Carolina’s district lines enabled Republicans to win 8 out of 13 House seats with 49.6% of the vote, while Democrats won only 5 seats (or 38.4%) despite getting 50% of the vote. This big disproportion arises from “packing” Democrats into a couple districts in which they

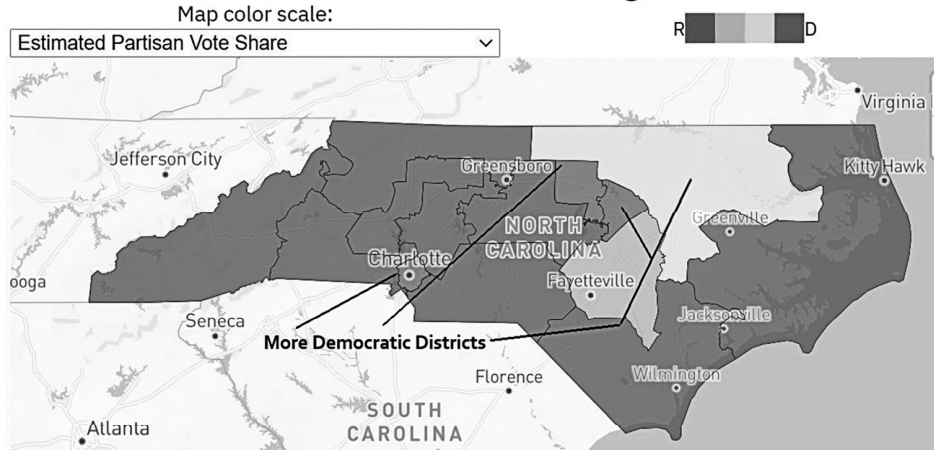


Figure 2.5 North Carolina Legislature’s First Map 2021

have huge majorities and dividing (“cracking”) other Democratic areas between two districts in other parts of the state. After North Carolina gained a House seat in 2021 due to the 2020 census, Republicans redrew the lines again to ensure Republicans at least 9–10 out of the 14 districts (roughly 70%). That map (see Figure 2.5)⁸² was thrown out by the NC state supreme court for being so disproportionate in its effect, leading to the *Moore v. Harper* case. The NC court’s much fairer map resulted in each party winning 7 of the 14 seats in November 2022.

This manipulation is possible because people vote by single-member geographic districts for the House of Representatives, as well as for most statehouse and county legislature seats. There are two main proportional remedies and variants of each:

(A) First, gerrymandering would disappear entirely if North Carolina took a *statewide* vote for its House delegation by “party list.” Then a 50%–50% election result would translate into Republicans and Democrats each receiving half of the state’s House seats. Each of these legislators could still be *allocated* to one of 14 congressional districts after the fact. But voters would be voting for their preferred party’s statewide ranked list of candidates (a “slate”; see Table 2.3). In this method, which specific candidates are elected depends on how many total seats their party wins.

Table 2.3 Party Slate Proportional Representation

North Carolina	Candidates in Order of Rank from a Primary Race								
Republican slate	A	B	C	D	E	F	G	H	I
Democratic slate	J	K	L	M	N	O	P	Q	R
Forward Party slate	S	T	U	V	W				
Libertarian Party slate	X	Y	Z						
	Shaded candidates are elected proportional to the total vote for each party’s list								

This system gives smaller third parties a chance. For example, in NC, if the new “Forward” Party received 1/14th of the vote (7.15%), it would win one seat. Adding RCV to this system would allow voters to rank whole slates if they wish to. For example, in this illustration, if the Libertarian party was ranked first by only 5% of voters, which is too low to win one seat, these ballots would be transferred to their casters’ second choice, if any (probably the Republican slate).

Still, in smaller states, any party would need a substantial percentage of votes to get a single seat. In states with less than five congressional districts, rounding means the outcome could still be disproportionate because we cannot divide House members into fractions. For example, if Democratic candidates in New Mexico won 56% of the statewide House vote, they would still get two out of three House seats available there (66.7%) in a party list proportional election. (Increasing the total number of House districts reduces this problem; see #8).

In big-population states, the party list system yields more proportional outcomes than would large “multimember” districts combining three or four contiguous single-member districts. For in such multimember districts, rounding will again make the outcome significantly disproportional to each party’s percentage of votes, just as in a whole state with only three or four single-member districts.

But a party list system also requires a way of rank-ordering candidates in each party’s slate. A well-designed statewide primary election for each party can do this by allowing each voter to vote for one of the primary candidates or to rank several. In my illustration (see Table 2.3), A would be the candidate with the most Republican primary votes, B would be the runner-up in the primary, etc. Another more complex variation is feasible: in the general election, voters can vote both for a party and for multiple candidates. Then the party vote determines the percentage of seats for each party, while the votes for individual candidates determine their places in their party’s slate. But either way, statewide at-large elections can be fairly confusing for voters new to such a system.

(B) So it is simpler for voters if (a) single candidates are still elected by voters in their district alone, but (b) a commission draws the district lines to produce a proportional outcome. In North Carolina, for example, it would be easy enough to design seven districts with more Republicans (say 58%–75% of each district population) and seven districts similarly full of Democrats.

This second way of bringing about a fairly proportional outcome by carefully tailored district lines would be more familiar than the statewide method, which might seem too radical to many Americans (see Desideratum 4).⁸³ More voters would also *like* their individual House member, given that they elected her or him by very wide margins. But while that might seem like a good outcome, it requires gerrymandering voters into likeminded or homogenous districts. This is not a recipe for vigorous contests and exposure to a diversity of viewpoints.

2. *Competitiveness.* Here we have come to the fundamental problem: vote-to-delegation proportionality can be in tension with the other vital criterion of competitiveness.⁸⁴ The reason is easy to grasp: when a lot of districts are competitive, a fairly modest swing in voter opinion, say by 3%–5%, can “flip” or alter the outcome in a lot of single-member districts. This large *threshold effect* in quite competitive winner-take-all districts

could be good for the country in some respects, because it would keep House members responsive and yield sizeable majorities in Congress that can move more decisively to enact their promised program.

Thus we cannot assume that proportional outcomes by themselves are the gold standard. Calling proportionality “representational fairness” or speaking of every deviation from it as an “efficiency gap”⁸⁵ only hides this dilemma. Votes cast for losing candidates are not fairly described as “wasted” in *close elections*: after all, they make the winning candidate aware of their vulnerability and encourage voters on the losing side to try harder next time (because with just a bit more, they could get over the threshold). For example, that a Republican almost won the race for governor of NY in 2022 is having an impact on NY policies. So beware of terminological pitfalls when reading about gerrymandering!

To illustrate, imagine that in NC, (a) each House member is still elected one district at a time (like now), but the state’s 14 districts are drawn to be as internally competitive as possible, given the population’s political leanings (as suitably measured at the time of redistricting). On this approach, with a population split nearly 50–50 by favored party, NC could draw a lot of districts in which there are nearly equal numbers of Republican-leaning and Democratic-leaning adults eligible to vote.

In that very unfamiliar but feasible situation, even an average 3% swing in opinion across the state could easily cause 10–12 districts to change hands. For example, Republicans could win 11 seats out of 14 (or 79%) with only 55% of the statewide vote, because they would net (say) a 1%–6% margin in 11 districts. This outcome would be quite disproportionate, but *not* because Republicans had gerrymandered 11 safe seats for themselves. Precisely the opposite: because they won 11 very “unsafe” seats, these Republican House members would know that their districts could easily return to the Democrats with a 3%–5% average swing in the next election. So they would be more likely to compromise with Democrats on a police chokehold ban, Medicaid expansion, or larger child tax credit for households earning under \$70,000 a year. Obviously the same would hold in the reverse case where Democrats narrowly won (say) 10 out of 15 districts: they would be more moderate on cultural issues, such as sex education in elementary schools.

That would be a very good thing: the resulting NC House delegation would be hyper-responsive to the whole electorate in their districts. The lesson is that, while competitive districts definitely magnify the effects of small changes in voter sentiment, they transmit this effect into the federal system through *much more moderate* congressmen and congresswomen who are very keen to get good things done for their state. They have a mandate (as a party) and strong motives (as individuals) to govern effectively and compromise when necessary.

By contrast, on the statewide proportional method (A), it is easy to see that the five top Democrats and five top Republicans in their party’s list, however it is made, will feel quite safe. That’s because their party is almost certain to win at least 40% of the statewide House vote—equal to 5 out of 14 seats—no matter how the popularity of each party fluctuates over several election cycles. So, while the candidates ranked 6th, 7th, and 8th on their party’s list after the primary would be worried and eager to appear bipartisan, at least 10 of the NC’s House seats will be predictable in this system. The senior politicians holding them will take more extreme positions, because especially with closed primaries, the only

voters they need to fear are radical primary voters who could push them farther down their party's slate.

This problem is worse in variant (B) with single-member districts drawn to yield a House delegation that is roughly proportional to the statewide vote margins. Just like now, many potential voters in the broad middle would be disillusioned, knowing that the general election outcome in their district is predestined by the packing of likeminded voters into these districts. If we are determined to make proportional outcomes the main criterion, the statewide vote by party list will be somewhat more competitive, especially in small states.

The proportional methods look a lot worse in this light: they can produce high numbers of noncompetitive seats even in states as evenly divided on political lines as North Carolina. Competitiveness and proportionality are inherently in tension, even if district lines are drawn by a commission. These ethically important criteria have to be balanced.

Still, our current gerrymandering system literally combines *the worst of both worlds*: it minimizes the number of competitive districts in a state *and* often yields outcomes that are wildly disproportionate in favor of party controlling the state government (and the districting). In sum, the fundamental evil of gerrymandering lies in using it to secure outcomes that are *neither* competitive *nor* proportional to the overall vote.

3. *Compactness and Contiguity*. What does all this have to do with district shapes, which are another common focus of public ire? The surprising answer is: *not as much as you think*. Like most Americans, I first became concerned about gerrymandering upon seeing bizarrely drawn districts. A classic example was North Carolina's 12th and 1st districts from a decade ago (see Figure 2.6). Obviously, both were gerrymandered to pick out precise groups of voters. In fact, both were drawn in 2011 to create majority-Black districts.

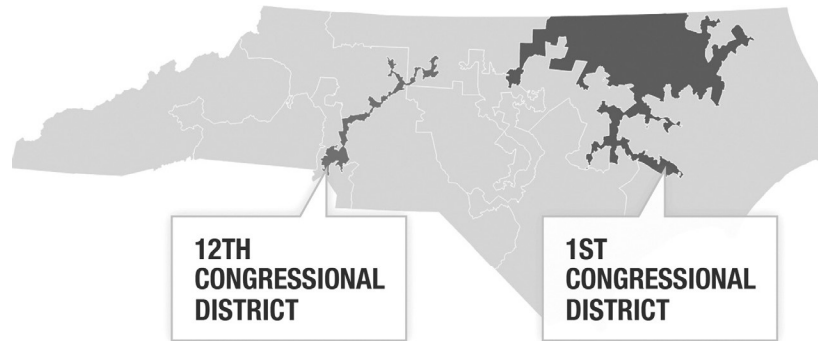


Figure 2.6 North Carolina's 1st and 12th Districts in 2011

They both *look* absurd, like Maryland's 3rd district (see Figure 2.4). In more technical terms, they are "contiguous" (with connected parts) but not "compact." To understand this, we need just a bit of math. Compactness had no precise definition in the 20th century, but today, experts usually measure the compactness of a district's shape (S) by comparing S to *the smallest circle C* that could contain all of S, as follows:

$$\text{Compactness of } S = \frac{\text{the area enclosed in } S}{\text{the perimeter of } S} \text{ divided by } \frac{\text{the area enclosed in } C}{\text{the perimeter of } C}$$

So if S is a circle, the ratio equals 1, indicating maximum compactness. By contrast, the old NC 12th was very noncompact, as we can see by nesting it within a circle (see Figure 2.7): this district's area is small compared to the circle's area, and the district's perimeter (total length of its edges) is huge, which usually indicates a lot of fine tailoring. But, while several states and districting commissions use compactness as a criterion, it is a very misleading one. Looking back at Figure 2.5, we see that NC's districts on the legislature's first proposed 2021 map are much

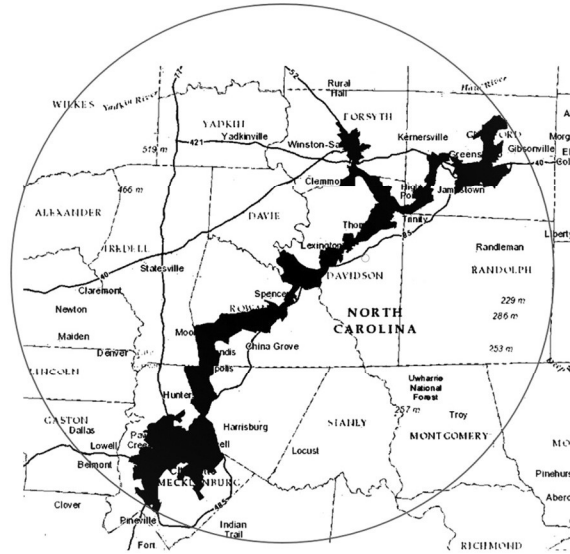


Figure 2.7 NC 12th District Noncompactness

more regular in shape than the old NC 12th: the Princeton Gerrymandering project rated the 2021 districts as slightly above the national average in compactness. And yet, as we saw, the outcome under them would be severely disproportionate *and* noncompetitive in most districts—the worst-case result, despite their compactness!

So regularity in shape will guarantee neither competitiveness nor House delegations that are even moderately proportional to voter support for the parties. As Kristin Eberhard notes, depending on how a party's voters happen to be clustered or spread more evenly across a state, often the only way to get “fair representation” (i.e. proportional outcomes) while staying with single-member districts is to draw noncompact or “oddly shaped” districts.”⁸⁶ In North Carolina, one might have to divide some heavily Democratic urban centers to make six or seven districts in which (say) 55% of eligible voters lean Democratic. The same would be true if we wanted to make most of the 14 districts highly competitive: noncompact districts would be needed.

Two key points emerge here. First, highly irregular shapes only indicate that districts are being drawn with *some* goal in mind. But the goal behind the drawing is not necessarily unjust. Second, conversely, we cannot infer from district regularity or compactness that unjust gerrymandering is absent. In fact, manipulation of district lines is merely a tool that can be used for at least three different purposes:

- (i) to make more competitive districts (unsafe seats); or
- (ii) to make proportional outcomes more likely (through some safe seats)—whether for voters grouped by party or grouped by race/ethnicity; or
- (iii) to make districts noncompetitive *and* outcomes disproportionate in favor of one party (and/or in favor of some other group).

Goal (iii) is the real evil; the tailoring of district lines is not always wrong in itself.⁸⁷ This evil explains some bizarrely shaped districts, like many of Florida's districts today. Noncompact districts set off our alarm bells because in our history, they have mostly been used to "dilute voting strength" of some group, in the language of the Voting Rights Act of 1965 (VRA). Let's briefly consider that legacy, which has associated irregular shape with racial discrimination in particular.

4. "*Communities of Interest*" and *Racial Groupings*. The fourth criterion would have us keep within single electoral districts certain "communities" or salient groups of residents who deserve protection and may have enough shared interests for them to elect someone with similar interests and concerns. This is what demographers call a politically "cohesive" group.

The trouble is that there are many different kinds of social groups—cultural, ethnic, religious, linguistic, age cohorts, and maybe economic classes—that might each want to control electoral districts in order to feel properly "represented." Each might have some objective social importance, too. Yet because these groups partly overlap, different and conflicting maps would be needed to give each of them control of some House seats.

Moreover, districts in which any such group is a significant majority would often be noncompact and cross country lines. At one time, it might have been plausible that the most important communities were largely defined by geographic boundaries such as rivers, mountains, coastal areas, or distinct ecosystems (e.g. arboreal forests or tropical bayous), which county lines may reflect. Such groupings were crucial for life in the past when it was hard and expensive to travel around large estuaries or communicate with people on the other side of a mountain range. But those barriers are less relevant today.

Likewise for contiguity: it reflects an old-fashioned belief that voters in a single district should live near to each other because they will share interests. That is much less obvious today. Unless "natural" boundaries pick out people with quite distinctive economic and/or social interests, it is unclear why rivers, mountains, etc. should still matter for fair districting.

Confusion follows from this proposed "communal" criterion and its "natural boundaries" cousin. Even if district-makers try to respect a given community's perceived desires, giving priority to any ascriptive group when districting is an ethical choice that affects society more broadly, for it embodies a judgment about which groups are most politically *relevant*. That can diminish people's autonomy by deciding in advance which group identities should matter most to them. It can also encourage insularity and single-issue tunnel vision. Do we really want experts to signal, through district lines, that voters should be more concerned to elect someone who "looks like them," or speaks like them, or prays like them, or trades and banks like them, or lives in a huge retirement community like them, rather than focusing on broader statewide or national issues?

At its worst, this could be a recipe for bigotry and/or a narrowminded focus on particular cultural interests. Rather than making diverse districts where people from different backgrounds must work together to be politically effective, the "communities of interest" criterion may encourage voters to follow whatever certain group leaders say, rather than making their own judgments after critical reflection (see *Shaw v. Reno* [1993] for related concerns). This may further encourage

more people to “self-sort” into politically homogenous neighborhoods, which they are already doing, and thereby compound intolerance of political “others.” More extreme identity politics and unreflective political tribalism are the exact opposite of what our nation needs.

That said, the US has a long history of disenfranchising Black, Hispanic, and Native American groups who have been frequent targets of violence, segregation, or other forms of social exclusion into the late 20th century. Thus federal courts have repeatedly cited the 14th and 15th Amendments as a basis for *reducing underrepresentation* of minority racial groups that results from districting lines. Before it was gutted (see #6), the VRA also protected racial, ethnic, and linguistic groups who are numerous, geographically proximate, and politically cohesive enough to constitute a majority or near-majority of a congressional district: their voting strength should not be “diluted” by cracking them into many districts or packing them into one district.⁸⁸ For example, in 2022, Governor Ron Desantis replaced maps drawn by Florida’s legislature with his own district lines in order to “wipe away half of the state’s Black-dominated congressional districts, dramatically curtailing Black voting power in America’s largest swing state.”⁸⁹ This is a truly egregious case of gerrymandering type (iii).

The VRA, then, aimed for more proportional representation of historically vulnerable groups in Congress, whatever their current party affiliations may be. This was one goal in North Carolina’s 1st and 12th districts, as we saw, although the Supreme Court said in this case that more African-Americans were packed together than they needed to be in order to elect a black representative (they would have more voting power if spread between 3 or 4 districts).⁹⁰

Another famous “majority-minority” (M-M) district was Illinois’s “Earmuffs” around Chicago, which created a majority-Hispanic district. Likewise, Louisiana’s district 4 (the “Mark of Zorro”) during 1994–1995 was a thin irregular district on the northeast side of the state (Figure 2.8)⁹¹ with a

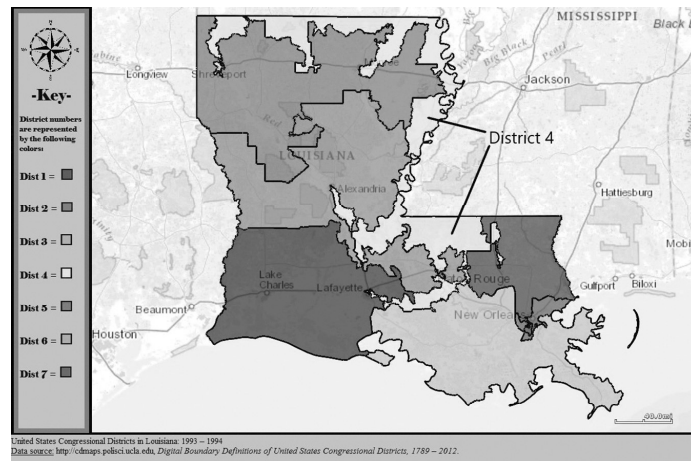


Figure 2.8 Louisiana’s 4th District in 1994

63% African-American population at the time.⁹² These special cases of gerrymandering show again that compactness is not a criterion of intrinsic importance in itself. District shapes are only *symptoms* of the underlying districting goals combined with the geographic location of various groups within a given state. And remedial assistance to increase minority representation in Congress and statehouses is arguably a good goal.

But the truth today is that politicians involved in districting are mostly focused on the potential benefits to their own party, even if they claim that representation for ethnic or cultural groups is their goal. And since 2019, they no longer need to pretend to have more “noble” motives to draw safe districts for themselves and their friends. That’s because of the Court’s shocking ruling in *Rucho*, as described above. Now even a district insanely shaped to pack Black residents into a 90% majority might pass muster with this Court, if it were drawn that way for *political* reasons, e.g. to turn 2 majority-Democratic districts out of 4 into 1 out of 4.

The Proposal. So what is the best solution? Even independent commissions and district-drawing computer programs need to know which criteria to emphasize. This brief analysis implies that the Constitution should ban gerrymandering that makes a state’s House districts both less competitive and less representative (proportional to vote margins for different parties), unless this is absolutely essential to preserve a minimum level of minority representation. Beyond that, I strongly believe that the increasing competitiveness should have priority.

Without serious competition, the two top parties turn into a duopoly—like rival street gangs who agree to hold residents hostage by enforcing monopoly control of “their” neighborhoods. By contrast, compactness and respecting county lines and/or natural borders are of no inherent importance; they are distractions from the truly vital goals of fair districting. Violations of compactness grab attention because they are symptoms of the deeper problem. Emphasizing these criteria can, at best, leave the impact of district lines to chance.

What about M-M districts with a majority of citizens from minority backgrounds? Probably the constitutional amendment should still allow Congress, through an updated VRA, to require that the number of M-M districts in a state not be less than half of what is possible, given its Black, Hispanic, Asian, or Native American populations. For example, if a state could in principle have four Black and/or Hispanic districts with enough irregular line drawing, then it must have at least two. Still, a lot has changed in the seven decades since the VRA. Might Americans in general be better off if more Republicans felt more need to win Black and Hispanic voters, and youth votes, while more Democrats were attentive to rural voters and military families? Ethnically homogenous districts do not promote that goal.

As long ago as the 1990s, Lani Guinier, a brilliant and vocal lawyer-advocate for increasing minority voice in our federal and state governments, argued that a “token” handful of Black and Hispanic representatives from M-M districts cannot by themselves easily overcome prejudices in “decision-making bodies.”⁹³ Efforts to increase the number of representatives whose election depends on support from Black or Hispanic communities, while better than nothing, may simply give compact and cohesive minority communities an inattentive representative who relies on low-turnout primaries and political patronage to control their district like a personal fief.

In short, tokenism is no substitute for being able to form fluid coalitions with more potential allies and to cooperate with other segments of the population in order to advance interests that voters themselves, rather than districting algorithms, choose to prioritize. Such fluid coalition power requires *more competitive* elections, which are not guaranteed by putting a couple heavily minority-populated districts on the state map.⁹⁴ Still, this point cannot

justify extreme moves like DeSantis's that dramatically reduce minority representation in Congress. His maps do not improve competitiveness either: FL votes for congresspersons in 2020 were 47% for Democrats and 52% for Republicans, but Democrats won only 8 out of the state's 28 heavily gerrymandered districts (or 28.5%) in 2022.

These examples suggest that competitiveness and outcomes proportional to party support among the electorate are the truly fundamental criteria for district lines, which should replace our current corrupt system. Proportionality is most easily achieved with a statewide vote for a House delegation, but it can be indirectly promoted by tailoring the boundaries of single-member districts too. Its main virtues are to increase stability, giving people some reliable basis on which to predict likely political outcomes in their region, and ensure that most voters will like their representative.⁹⁵

Competitiveness is a more forward-looking standard. It gives people incentives to (a) change their minds in response to new arguments and events, (b) participate in public political discussions, and (c) vote based on their conclusions, because all of these things could make a real difference—especially if they can build fluid coalitions to bring other voters along with them. In an era when so many eligible voters are not yet affiliated with a party (see #3), competitive districts respect people whose minds are open and whose policy priorities are responsive to ideas and evaluations of options presented during the campaign. Delegations proportional to statewide support for parties will be harder to maintain via districting—especially in smallest 23 states, which have fewer than 6 districts each—as new parties grow through RCV.

Thus my proposal favors competitiveness, but not to the extreme point that in a large state, a 3%–5% swing in votes could flip almost all districts from Republican to Democrat, or the reverse. Some limit to disproportional outcomes is needed to prevent unrepresentative supermajorities in Congress. This can be accomplished with a five-step recipe of this kind:

- I. Congress will establish by law a suitable way of measuring popular support (Y) for each political party (P) with at least 7% of the electorate behind it in the decade up to and including each census year.
- II. Let M be the margin between the two parties with the highest measured levels of voter support Y, averaged over 10 years. District lines should be drawn so that in states with 4 or more districts, at least half the districts (rounding down) have a margin no more than 5% or one-half of M, whichever is more.
- III. When there are 8 or more districts in a state, for any party P polling Y% in statewide support averaged over the last 10 years, when Y is 25% or more, there should be, at minimum, a percentage of districts equal to half of Y (rounding down at or below half-percents) in which P is likely to have a 5% margin of advantage or more going into the next election.
- IV. Among remaining district options that satisfy both of these requirements when they apply, the choice must be made by a nonpolitical state commission that draws maps according to the above criteria, whenever possible, and works to protect the interests of historically underrepresented minority groups.
- V. Disputes about districting according to these criteria are heard by federal district courts but may be appealed to a national Fair Elections Court as the final arbiter.

To explain, §II imposes minimum levels of competitiveness even in fairly small states. In larger states, §III prevents states from cracking or packing significant political voting blocs to the point that these blocs can win no seats, or far fewer seats than their numbers would imply. The last two sections lay out how authorities will apply these criteria and resolve disputes.

Let's illustrate this recipe for fair districts with three different kinds of cases. First, consider Oregon, a state with 6 House members. Suppose the measured spread in the decade up to 2020 is 55% Democrat to 45% Republican: so $M = 10\%$. According to §II, at least 3 districts in Oregon (half of its 6) must be competitive: they can have a margin of no more than 5% between these leading parties—even if this requires noncompact lines—in the year of redistricting (the 5% margin cap applies because it is equal to half of M). The other 3 districts can be less competitive. Although §III does not apply, because Oregon has less than 8 districts, the commission required by §IV would probably draw 1 Republic-leaning and 2 Democratic-leaning districts among these 3.

In North Carolina, assume that the spread is measured at 48% Democrat to 50% Republican in 2021: so $M = 2\%$. According to §II, at least 7 of the 14 districts must have a margin of no more than 5% (which is more than half of M) between these two parties. §III then requires that 24% of the districts (half of 48%)—or 3 districts (rounding down)—lean Democratic by 5% or more. Likewise 25% of the 14 districts—or 3.5 rounded down to 3 districts—should lean Republican by 5% or more. These conditions give us 7 competitive districts, and 6 that are safer (3 for each party), leaving 1 district to the commission's discretion—probably to be an M-M district.

Now, instead consider a heavily red-trending state like Tennessee with 9 districts. Suppose the spread was measured at 60% for Republicans and 40% for Democrats; so $M = 20\%$. Because the state leans so heavily one way, §II does not require draconian measures to make very close districts. It allows half of the districts, rounded down to 4, to have a 10% margin (half of M) or less. But §III requires that 20% of the districts (half of 40%)—which is 1.8 districts, rounded up to 2—be safer for Democrats, to the extent possible. There are enough Democrats to form at least a 5% majority in 2 districts. With 6 districts controlled by these conditions, the independent commission will have more discretion concerning the remaining 3. It could try to ensure that one district is majority-black, given that 17.5% of Tennessee residents are African-American.

§I and §III also allow smaller parties to grow by limiting cracking. Once a party gains 25% support in general elections in a state with 8 districts, it would get one relatively safe seat (0.125% of districts). In a state with 12 districts, it would win or be competitive in 2 seats unless its supporters are too scattered. Having seats in Congress would gain these smaller parties lots of attention. And these rules could also be extended to statehouse elections too.

In sum, this is a balanced formula. Unfortunately, this solution will take some time for voters to understand, but the issue is complex. It provides the sort of guidance that commissions and computer algorithms need if they are to produce fair districts in many different states of widely varying populations. A nationwide standard is essential to ensure that we do not end up with mostly safe seats in small states

and mostly competitive districts in larger states, which would give an unjust edge to a party dominating more small states.

Variations are easy to imagine. One could emphasize competitiveness a bit more by lowering the maximum margin in §II from 5% to 4%. Or one could increase proportionality in outcomes by raising the minimum margin in §III to 6% or 7%. The main point is that we can devise a constitutional amendment that greatly reduces gerrymandering, based on a politically impartial set of objective standards that do not overemphasize superficial geometric parameters. If the House of Representatives is expanded (see #8), there would also be fewer states with less than 8 districts, which would make this kind of antigerrymandering formula even more effective.

The Define–Combine Alternative. I conclude this compressed analysis with a brief look at a proposal to draw new district lines every decade by a two-step process that is a bit like letting one hungry child cut slices in a small pizza, after which the other child picks the first slice. On this approach, the majority party draws the maps, but it has to draw *twice* the number of districts that the state’s congressional delegation actually has, and it cannot draw any “donut” districts that completely encircle other districts in its proposal. The next largest party goes second: it combines neighboring districts in the majority’s proposed map however it likes, until the number of districts is cut in half. These are then the final congressional districts for the coming decade.

This “Define-Combine” procedure ensures that the majority party can get much less advantage from districting. For example, when the minority party’s potential majorities have been cracked, the minority can recombine them (although they cannot divide packed districts).⁹⁶ This fix works by enforcing bargaining under restricted parameters to produce the maps. This looks promising; although future analysis may reveal a first-mover or last-mover advantage in this process, such a flaw might be fixed by tweaking its conditions.⁹⁷

However, Define-Combine would probably produce two-party compromises in which each receives a lot of safe seats. This would not yield the increased competitiveness we desperately need, and it would also shut smaller third parties out of the process. However, Define-Combine illustrates a way to reduce reliance on the sort of specific conditions that I laid out. It could even be used by commissions for districts left primarily to them under §IV of my proposed formula. Or an amendment could include a specific competitiveness condition like §II in my proposal and use Define-Combine for a state’s remaining districts.

In conclusion, gerrymandering is one of the hardest issues to explain to the public and resolve in a way that should be widely acceptable. But expert analysis is finally yielding workable solutions. Luckily, the fundamental reforms needed to fix political campaigns and balloting are easier to explain. They are set out in the next two sections.

5. Campaign Finance and Election Spending Reform

The New Oligarchy. Leonard Leo is not a person whose name is known to most Americans. He was for many years co-chair of the right-wing Federalist Society, an increasingly powerful group that lobbies for particular conservative judges to be appointed to federal and state courts. His group groomed and promoted five of the six

justices who overturned *Roe v. Wade* in 2022, allowing states to outlaw abortions, even with few medical exceptions. From the Federalist Society, to the White House short list, and finally to the Court is now the pathway.⁹⁸

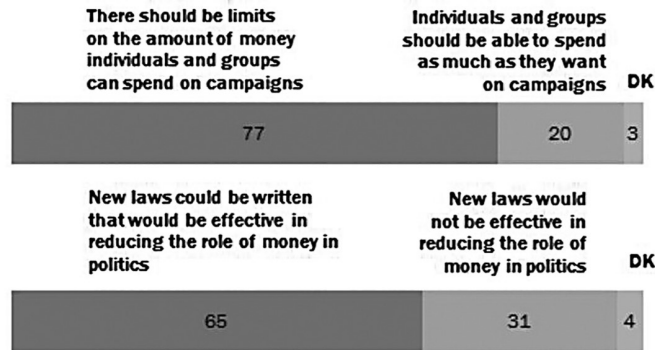
Barre Seid, a Chicago billionaire, is even less known, although he has reportedly made millions in secret donations to conservative groups over the years. In 2021, he gave \$1,600 million in shares to Marble Freedom Trust (MFT)—a “dark-money” organization that does not have to report donations. Seid avoided up to \$400 million in capital gains taxes in the process. Marble Freedom is run by Leonard Leo, who was at the time apparently its only paid employee.⁹⁹ Seid’s gift is widely thought to be the largest single donation to an independent political group in history. Leo may use this fortune to fight laws and regulations designed to reduce climate change and to push the absolutist state legislature theory described above (see #4).

This is the kind of subterfuge that has made Americans across the political spectrum loathe the rising political clout of the richest few. Before the Covid years, a 2019 bipartisan poll found that a majority of likely voters rated “corruption in the legal system” as the nation’s worst problem, above even health care costs, crime, or climate change. And 61% wanted major changes to our campaign finance laws along with more enforcement.¹⁰⁰ More than 67% of Americans also disapprove of the way that presidential and congressional elections—and increasingly statehouse elections too—spend ever-inflating amounts of money to flood airwaves with negative and misleading ads bankrolled by wealthy donors, lobbyists, and big corporations (see Figure 2.9), which are often not even disclosed in public records.¹⁰¹

People are right to be worried. As Sarah Chayes argues, kleptocracy is a creeping danger in America. After deregulation fever hit in the 1980s, “the lobbying profession

Nearly two-thirds of Americans say new laws would be effective in reducing role of money in politics

% who say ...



Source: Survey of U.S. adults conducted March 7-14, 2018.

PEW RESEARCH CENTER

Figure 2.9 Strong Majorities Favor Limiting Election Spending

exploded, and industries began writing legislation for their own sectors; public services such as incarceration and war fighting” were partly turned over to contractors. In general, “the brakes on money in politics were released; and presidents began filling top regulatory jobs with bankers.”¹⁰² Contrary to Trump’s promise to “drain this swamp,” these problems worsened during his administration.

To understand what is happening, it helps to start with some distinctions. There are four ways to look at money in elections, and each is important:

- by *sources* of funds used for campaigns and “political activities” more generally (from individual donations, parties, political committees, public matching funds, etc.);
- by *types* of spenders—campaigns, corporations, unions, and other groups;
- by *targets*—types of election (presidential, congressional, statehouse, ballot question, etc.), or for direct influence on congressional committees and bureaus in the executive branch; or
- by *ways* of spending or what is purchased—advertising, registration drives, campaign tours, making a movie, or publishing a book, etc.

The charts in this section offer snapshots of these different aspects (and there is more on *TheDemocracyAmendments.org*). For example, consider how sources relate to spenders. Individuals (including candidates themselves) may give to every type of spender—specific candidates’ campaigns, political parties, and independent “social welfare” groups (501-c-4s), whose primary purpose is not supposed to be political activities or lobbying (but often still is). They can also give to “political nonprofits” (527 orgs) that are primarily devoted to political advocacy.

Some sources can also spend directly on political activities, while others cannot; most can also give to other sources—but within a few limits. For example, an individual can pay to print a flyer and to hand it out. Parties can spend on organizing and also donate to specific campaigns, while corporations and independent groups cannot.¹⁰³ But corporations can contribute to political action committees (PACs) and to the independent groups, which do their political work for the big businesses—almost like contractors. PACs were formed in the 20th century as legal ways for businesses and unions to contribute to political campaigns: they are usually connected with particular businesses, nonprofits, or trade groups, and can give only \$5,000 to each candidate during each election cycle.

By contrast, “SuperPACs” are not as linked to particular companies. Like political nonprofits and other independent groups such as Leo’s, they do not give money directly to campaigns, and they supposedly promote views on “issues” rather than particular candidates. Currently, they can raise and spend money *without limit* from individual donors, corporations, independent NGOs, and other interest groups. SuperPACs are not supposed to “coordinate” with political parties. But it is usually pretty clear which side they support—and some SuperPACs promote a single candidate. All of the advertising, lobbying, and events they pay for are *in addition* to what official campaigns spend from their own well-heeled sources.

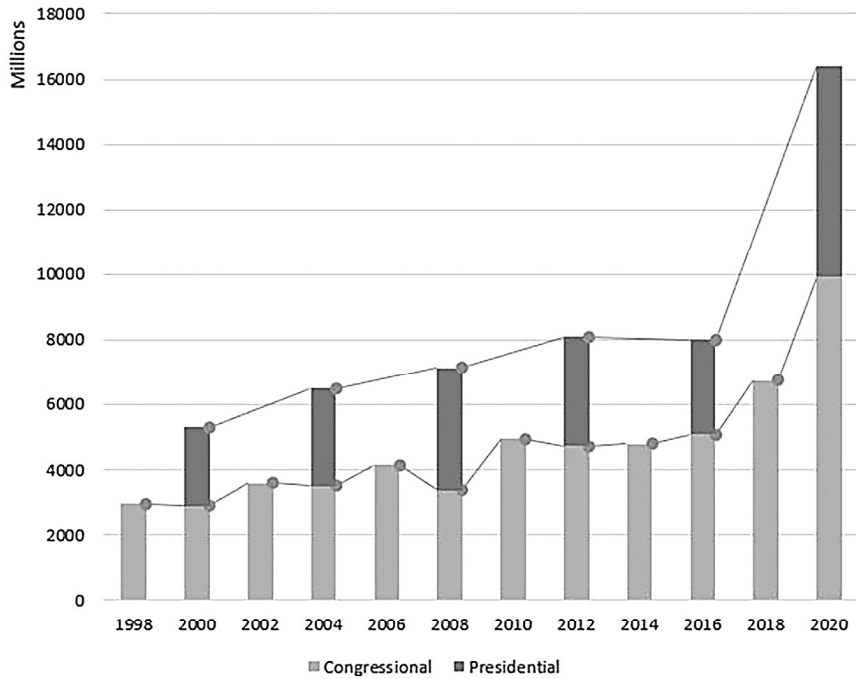


Figure 2.10 Spending by Campaigns, Parties, and Independent Groups on Federal Elections

Confused? If so, you are not alone. The myriad problems of campaign finance and money in politics today are hard for most Americans to understand, because they are hidden behind such a complex web of different kinds of entities. It's like a shell game.

The results, however, are quite evident. Figure 2.10 shows all inflation-adjusted election spending by presidential and congressional candidates, combined with separate or “outside” spending by political parties, PACs, SuperPACs, and other independent groups to influence federal elections. Total spending has more than tripled from 2000 to 2020! This is on top of steep rises in the last three decades of the 20th century. Billionaires account for \$2.6 billion of the \$14.4 billion spent in 2020. That's a handful of the absolute wealthiest Americans controlling almost *one-fifth* of the nation's entire election budget.

If we break out official *campaign* spending in congressional races, the costs rose from \$343 million in 1982 to \$2,286 million in 2020—almost a six-fold rise in 38 years.¹⁰⁴ This is an out-of-control arms race in which the richest 0.1% are battling to influence the federal government, while the rest of us are increasingly sidelined. OpenSecret's statistics on federal campaign dollars in 2016 and 2020 reveal that big donors and multimillionaire candidates' self-funding made up *over half* of the sources. Small individual donations by less wealthy Americans were not even one-quarter (see Figure 2.11).

The influence of the richest grows even larger when we add the money flowing into Leadership PACs, SuperPACs, and groups like Leo's MFT, which spend fortunes on television and radio ads, mailers, online messaging about hot-button issues, and attacks on candidates (including even elected judges) who don't do their bidding. Total

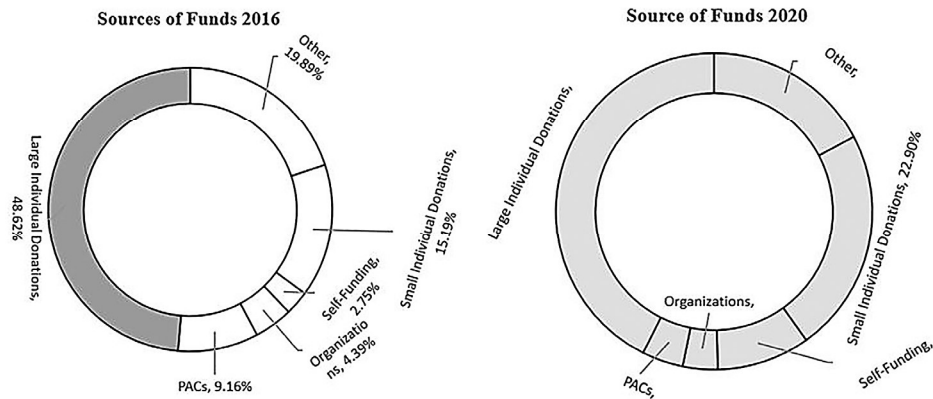


Figure 2.11 Official Campaign Spending, 2016 and 2020

outside spending by such entities was an enormous \$3.3 billion in the 2020 presidential election, almost double the 2016 figure. And often these PACs and social “issue” groups can twist an incumbent’s arms in Congress without spending one dollar: just the prospect that they might fund a primary or general election opponent is enough to induce terror and obedience.

Monetary Leverage. The result is what I will call “monetary leverage,” namely the ability of people to use large amounts of wealth to shape law and government policy to their liking. Consider four among thousands of sickening examples.

(1) In his stunning book, Adam Cohen describes how leading Republicans in Congress came to Las Vegas to pay homage to Sheldon Adelson, the billionaire casino magnate.¹⁰⁵ Adelson had donated over \$92 million to their party, conservative candidates and PACs, and to other groups in 2012—more than the next 9 largest individual conservative donors combined.¹⁰⁶ This should worry anyone, including many Republicans, who may not benefit from policies that specifically help casinos.

(2) Members of Congress seek out assignment to committees with leverage over laws that affect big donors, because these jobs reap rewards. As David Litt puts it, “if you’re on the financial services committee, you can expect huge contributions from banks,” and if your committee covers agriculture, “you can expect Monsanto to come knocking.”¹⁰⁷ In 2017, three former members of Congress—two Republicans and one Democrat—explained how much fundraising a congressperson must do for their party (“party dues”) in order to chair important committees. And even without that perk, congresspersons often report having to spend over 20–25 hours a week calling or visiting with donors:

These demands to raise money take legislators away from doing the people’s work, incentivize members of Congress to seek campaign cash from the interests they regulate, and elevate fundraising skills over policy knowledge when it comes to who controls legislation. Furthermore, [this practice] strengthens a small elite of Washington-based powerbrokers.¹⁰⁸

(3) Some of the most influential donors and lobbyists represent drug-makers,¹⁰⁹ military suppliers, banks, high tech, and big box stores. In 2022, Home Depot donated more than any other company to the so-called “sedition caucus” of 2020 election deniers. But big financial firms, their lobbyists, and PACs and SuperPACs that they support may have the biggest influence. This is why private equity and hedge funds run as partnerships have for years paid a tax rate much lower than everyone else’s: Congress carved out a loophole specifically for them, famously leading investor Warren Buffet to remark on how unjust it is that his effective tax rate is lower than his secretary’s.

After more than a decade of reform efforts, it looked like this \$14 billion giveaway to the richest 0.01% would be ended in the Inflation Reduction Act of 2022—until Senator Kyrsten Sinema (D-AZ) insisted on keeping the loophole for “wealthy hedge fund managers and private equity executives.”¹¹⁰ Earlier she had also opposed any increase in marginal tax rates for top earners. *The Wall Street Journal* notes that “Ms. Sinema has received roughly \$2.2 million in donations since 2017 from individuals and committees in the securities and investment industries, more than from any other sector.”¹¹¹

(4) On a much broader scale, large donors and their lobbyists work overtime to secure tax dodges and massive subsidies for certain businesses at our collective expense. Consider what we might call the Mother of all Plutocratic Wins, namely the December 2017 tax cut law pushed by Trump, Treasury Secretary Mnuchin, and House Speaker Paul Ryan. It was billed as a way to lower everyone’s taxes and bring profits from multinational corporations back to the US. Instead, most of the savings went to the wealthiest companies and individuals, while taxes on middle-class families with high mortgages and state taxes went up (see Figure 2.12). As Cohen reports, after this law was signed, 60 “profitable Fortune 500 companies paid no taxes at all, including General Motors, IBM, and Netflix” in 2018. Adelson’s casinos saved \$670 million.¹¹²

New Tax Law Delivers Large Tax Cuts to Most Well-Off

Income group	Percent change in after-tax income	Average tax change
Lowest fifth	0.4%	-\$70
Second fifth	0.9%	-\$390
Middle fifth	1.3%	-\$910
Fourth fifth	1.4%	-\$1,680
Top fifth	2.3%	-\$7,460
Top 1 percent	2.9%	-\$61,090
Top 0.1 percent	2.7%	-\$252,300

Note: Excludes effect of repeal of health reform’s individual mandate, which required most people to buy health insurance or pay a penalty.
Source: Tax Policy Center

CENTER ON BUDGET AND POLICY PRIORITIES | CBPP.ORG

Figure 2.12 Tax Cuts in the December 2017 Tax Law

The result of such influence campaigns has been rising income inequality, corporate “rent-seeking” (special protections), dangerous financial speculation, and opportunities galore to externalize costs onto the public—all through favored treatment by the government.¹¹³ The system produces government not “for the people” but instead for elites who capture larger shares of the economic pie, even when the total pie shrinks in recessions. The saddest aspect of such cases is that they no longer shock us.

Evaluation: Corruption, Leverage, and Access. In sum, monetary leverage is a huge problem in America today. Leverage or strong influence on legislation is what hedge fund managers have through Senator Sinema, and conservative American bishops have through Leonard Leo and his protégé, Justice Samuel Alito. Leverage arises from the interaction of several factors, including at least

- who can contribute to political campaigns, and how much;
- what spending is allowed on political advertising by campaigns and by other groups or legal entities;
- how much public funding is available for political campaigns;
- whether free time on mass media is given to qualifying political campaigns; and
- what the relation is between individual candidates and their parties.

For example, in nations with parliamentary proportional representation, there is much less focus on candidates as individual personalities than there is with US single-member districts and two senators per state; so individual campaigns are small in most parliamentary democracies. This is why a third of the Organisation for Economic Co-operation and Development (OECD) nations have no limits on campaign contributions: most of them have parliamentary systems *and* strict limits on political advertising. The US is nearly alone in having an open sluice gate for election spending by independent groups, weak limits on contributions to political campaigns, little public funding for campaigns nor much free “air time” (mass media presence), and as much advertising as available funds will allow.¹¹⁴ This has huge impacts because, on average, Americans watch about three hours of TV (and/or online shows) with ads every day.

We have to evaluate campaign donations, advertising by third-party groups, and other spending by corporations to influence legislators within this larger context, which helps explain why most politicians are virtually *forced* to seek large amounts of campaign funding and SuperPAC support. It is not because they go into government to become ultra-wealthy or to lick the boots of billionaires; in fact, most of them could make much more money in the private sector. Rather, their predicament is like that of someone running a small business who has to pay one local mafia family for protection against another.

This is a crucial point that many Americans do not understand: the private gain, and thus corruption, is mostly on the side of the donors. Neither Justice Alito nor Senator Sinema took *bribes* to enrich themselves; it is not like they are stashing millions of campaign dollars in their private bank accounts or receiving free title to a private