DEMOCRATIZING GUBERNATORIAL SELECTION

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ABSTRACT

At the time of American Independence in 1776, most state constitutions created governors in a form unrecognizable today. In virtually every state, governors were indirectly elected in some capacity. Over the nineteenth century, as American political institutions underwent significant democratic reforms, most of these methods of indirect election were eliminated outright. But some still exist today—either because the original methods were kept intact or because new methods were adopted during the Jim Crow era in the pursuit of Black suppression. In recent years, states (and cities) around the country have started experimenting with different, sometimes radically democratic, methods of conducting elections. These efforts suggest that gubernatorial elections could be significantly reformed and made more democratically legitimate. This Article chronicles the untold history of gubernatorial elections—their initial character and their modification over time—and surveys how reform efforts currently underway could reshape their character today.

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INTRODUCTION

A Jim Crow-era spectre haunted the 2019 Mississippi gubernatorial election—and not *just* the continued resistance to the Voting Rights Act of 1965,[1] felon disenfranchisement,[2] the potential diminished voter participation because of the off-year election,[3] racial and partisan gerrymandering, and other miscellaneous voter suppression. This particular spectre set a high threshold for actually *winning* the election. Under the 1890 Mississippi Constitution, the person who received both a majority of the popular vote and the electoral vote would be elected; if no person received both majorities, the house of representatives would choose a governor from the two candidates with the highest number of of popular votes.[4]

This provision has rarely come into effect, though it did several times during the 1990s,[5] yet it stood to disproportionately harm Jim Hood, the Democratic nominee in the race. Because the state's legislative districts were gerrymandered to favor Republican candidates, Hood would've been required to win about 55 percent of the statewide vote to translate his support into a majority in Mississippi's quasi-electoral college.[6]

In the end, the concerns about the constitutional provision proved

1 *See* Gloria J. Billingsley & Sylvester Murray, *Redistributing Power in Mississippi: The Reversal of Section 4 of the Voting Rights Act*, 4 RALPH BUNCHE J. PUB. AFFS. 211, 226 (2015) (explaining that Mississippi's failure to correct past mistakes pertaining to voters' rights negatively impacts future elections and progress); *see also* Max Feldman, *Voting Rights in America, Six Years After* Shelby v. Holder, BRENNAN CTR. FOR JUST. (June 25, 2019), https://www.brennancenter.org/our-work/analysis-opinion/voting-rights-america-six-years-after-shelby-v-holder.

2 *See Felony Disenfranchisement in Mississippi*, SENT'G PROJECT (Feb. 13, 2018), https://www.sentencingproject.org/publications/felony-disenfranchisement-mississippi/.

3 *See* Paul Braun et al., *Why These 5 States Hold Odd-Year Elections, Bucking the Trend*, NPR (Nov. 4, 2019), https://www.npr.org/2019/11/04/767959274/why-these-5-states-hold-odd-year-elections-bucking-the-trend.

4 *See generally* MISS. CONST. art. V, § 140 (amended 2020); *id.* § 141 (repealed 2020).

5 Bobby Harrison, *Lawsuit Targets Jim Crow-Era Provision in State Constitution that Governs How Statewide Officeholders Are Chosen*, MISS. TODAY (May 31, 2019), https://mississippitoday.org/2019/05/31/lawsuit-targets-jim-crow-era-provision-in-state-constitution-that-governs-how-statewide-officeholders-are-chosen/. The first time that the provision came into effect was in the 1903 election for Clerk of the Mississippi Supreme Court. *See* H.R. JOURNAL at 95–98 (Miss. 1904); *see also* Quinn Yeargain (@yeargain), TWITTER (July 15, 2021), https://twitter.com/yeargain/status/1415707970827079688?s=20.

6 *See* Declaration of Jonathan Rodden at 41, McLemore v. Hosemann, 414 F. Supp. 3d 876 (S.D. Miss. 2019) (No. 3:19-cv-00383-DPJ-FKB), 2019 WL 8301448; *see also* Jeff Singer, *A Jim Crow Law Stacks the Deck Against Mississippi Democrats. Our New Data Set Shows Just How Badly*, DAILY KOS (Feb. 4, 2019), https://www.dailykos.com/stories/2019/2/4/1832206/-A-Jim-Crow-law-stacks-the-deck-against-Mississippi-Democrats-Our-new-data-set-shows-just-how-badly.

largely academic. The Republican nominee, Tate Reeves, won a majority of the vote over Hood;[7] the legal challenge to the provision was effectively rendered moot;[8] and the state legislature approved a constitutional amendment abolishing the double-majority requirement and implementing runoff elections rather than legislative selection, which the voters approved in 2020.[9]

But even under this revised regime, Mississippi still deviates from how modern-day governors are usually selected. Generally, popular elections are scheduled and the candidate with the most votes wins the election. But the usual case is not *every* case. Beyond Mississippi, three other states—Georgia, Louisiana, and Vermont—along with four territories—Guam, the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands—similarly impose majority-vote requirements. If no candidate wins a majority, a runoff election is held in Georgia, Guam, Louisiana, Mississippi, the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands. And in Vermont, in the absence of a majority winner, the legislature selects the winning candidate.

Even with this significant amount of variation from the norm, the current state of gubernatorial selection is simpler and more uniform than at any other point. For much of early American history, governors were selected by legislatures or were elected in procedures that were deliberately removed from the people. Indeed, a full history of gubernatorial selection reveals a complicated, messy, frequently undemocratic process that lasted well past its expiration date—and these effects linger today in many state constitutions.

This Article tells the story of how states have selected governors

7 Luke Ramseth & Giacomo Bologna, *Republican Tate Reeves Wins Mississippi Governor Race*, Clarion Ledger (Nov. 5, 2019) (updated Nov. 6, 2019), https://www.clarionledger.com/story/news/politics/2019/11/05/tate-reeves-wins-mississippi-governor-race-defeats-jim-hood/4159647002/.

8 *See McLemore*, 414 F. Supp. 3d at 887–88 (denying plaintiffs' motion for a preliminary injunction against the double-majority requirement prior to the election, noting that "[a]bsent some impact on the election results, the constitutional injury caused by discarded votes is outweighed by the harm a preliminary injunction would cause when the Court attempts to craft a new method for electing statewide officers on the eve of the election").

9 Miss. Const. art. V, § 140 ("The person receiving a majority of the number of votes cast in the election for these offices shall be declared elected. If no person received a majority of the votes, then a runoff election shall be held under procedures prescribed by the Legislature in general law."); Ashton Pittman, *Mississippi Votes to End Jim Crow Electoral College-Like System; Popular Vote to Choose Governor*, Miss. Free Press (Nov. 3, 2020), https://www.mississippifreepress.org/6733/mississippi-votes-to-end-jim-crow-electoral-college-like-system-popular-vote-to-choose-governor/.

and extracts from that story lessons about how contemporary gubernatorial elections ought to be reformed. It begins in Part I by laying out the original history of gubernatorial elections—specifically detailing the history of legislative election and majority-vote requirements in early state constitutions. Part II then explores how majority-vote requirements have re-emerged in more modern constitutions, both as a cudgel to wield against voters of color and, less maliciously, to reflect specific political realities. Finally, Part III concludes the Article by reviewing the contemporary reforms to gubernatorial elections that have developed, like the top-two primary and ranked-choice voting, as well as some that haven't (yet), like the adoption of parliamentary democracies. It also suggests fertile ground for some of the most forward-thinking and innovative reforms in places such as the Northern Mariana Islands and Puerto Rico.

I. THE EARLY HISTORY OF GUBERNATORIAL ELECTIONS

Governors today bear little resemblance to the governors that were created in Revolutionary-era state constitutions. Modern governors have substantially more executive power—including the power to veto, make appointments, and convene the legislature, which are probably the most prototypically executive powers—than governors more than two centuries ago. These differences extended beyond powers, however. Revolutionary-era governors were also selected by entirely different procedures. At the time the Revolutionary War began, most state governors were elected by state legislatures; many others were elected by state legislatures under certain conditions. But as a wave of democratization swept the country during the nineteenth century, many of these provisions were eliminated and this opened gubernatorial selection to public input.

Part I discusses the initial landscape of gubernatorial selection at the time the Revolutionary War commenced, as well as how gubernatorial selection was affected by nineteenth-century trends toward democratization in state constitutional law. Section A begins with the initial adoption of gubernatorial selection procedures in the late eighteenth century. Section B then discusses how these procedures were revised in the century that followed.

A. *Revolutionary War Period*

In 1776, the Declaration of Independence was signed. It was accompanied by the quick adoption of state constitutions that were intended to function as provisional governing documents—though many lasted well

beyond that provisional period. Other states didn't adopt official constitutions until much later, instead operating under their colonial charters, in some cases, with some significant modifications. The governments created in the wake of declared independence look unrecognizable today. Looking back on these governments now shows that organization of state governments could well have taken a different path were it not for the sudden dominance of one particular form of government.

When the original thirteen colonies declared their independence and established temporary state governments, they did so in radically inconsistent ways. For starters, post-independence Massachusetts and New Hampshire did not have governors; instead they delegated executive authority to the legislature. In Massachusetts, this was because the state continued to operate under its charter, but had no "constitutional means" of selecting a governor. Accordingly, through the impossibility of the governor's existence, the state forced executive power to reside in the legislature.[10] In other instances, like in New Hampshire, this was because its provisional 1776 constitution opted out of having a governor.[11] However, this state of affairs did not last for long—Massachusetts adopted a constitution in 1780 providing for an elected governor, and New Hampshire's second constitution, which took effect in 1784, did as well.[12]

When Massachusetts and New Hampshire created their first post-colonial governors, they were in the minority of states that provided for directly elected governors. At the time of the thirteen original colonies, only three other states—Connecticut, New York, and Rhode Island—had directly elected governors.[13] Delaware, Georgia, Maryland, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia all had governors who were elected by their state legislatures.[14]

10 Lawrence Friedman & Lynnea Thody, The Massachusetts State Constitution 8–9 (2011).

11 Susan E. Marshall, The New Hampshire State Constitution: A Reference Guide 6–7 (2004); *see also* N.H. Const. of 1776, para. 3 (providing for a bicameral legislature, but no governor).

12 Friedman & Thody, *supra* note 10, at 10–11; Marshall, *supra* note 11, at 11–12.

13 *Charter of Connecticut*, *in* 2 The Public Records of the Colony of Connecticut, From 1665 to 1678: With the Journal of the Council of War, 1675 to 1678, at 3, 4–5 (J. Hammond Trumbull ed., Hartford, F.A. Brown 1852); N.Y. Const. of 1777, art. XVII; *Charter of Rhode Island and Providence Plantations - July 15, 1663*, Yale L. Sch.: Avalon Project, https://avalon.law.yale.edu/17th_century/ri04.asp (last visited Oct. 15, 2021) [hereinafter *R.I. Royal Charter of 1663*].

14 Del. Const. of 1776, art. 7; Ga. Const. of 1777, art. II; Md. Const. of 1776, art. XXV; N.J. Const. of 1776, art. VII; N.C. Const. of 1776, § 15; Pa. Const. of 1776, ch. II, § 19; S.C. Const. of 1776, art. III; S.C. Const. of 1778, art. III; Va. Const. of 1776; Va. Const. of 1830, art. IV, § 1.

The method of elections used in Connecticut and Rhode Island, which was later adopted by Maine, Massachusetts, New Hampshire, and Vermont, required that a successful gubernatorial candidate win a majority of the vote.[15] Connecticut and Rhode Island continued to operate under their colonial charters until well into the nineteenth century, only adopting constitutions in 1818 and 1842, respectively.[16] New York was the only of the original thirteen colonies that provided for a directly elected governor, but did not require that the governor receive a majority of the vote to be elected.[17]

But the majority requirement didn't originate in either the Connecticut or Rhode Island charters; it functioned in both states as a common, loosely codified practice. In Connecticut, for example, the applicable state statutes simply provided that "if there be any want of any of the [Governor and Lieutenant Governor], by reason of death or otherwise, after the election, such want shall or may be supplied and made up by the general court's election, or appointing some suitable person or persons to supply such vacancy."[18] This provision was construed as empowering the legislature to elect a governor when no candidate won a majority, despite not saying so explicitly.[19]

The process in Rhode Island was similarly opaque. Neither the 1663 Royal Charter nor the state's election law explicitly required a majority, defined a failure to win a majority as a failure to elect, or set out a procedure for resolving such a contingency.[20] The majority requirement instead operated as a sort of implicit requirement of the royal charter. Accordingly, in the three gubernatorial elections that failed to produce a majority winner, each was resolved differently. The 1806 gubernatorial election was the first one in the state's history to not produce a majority winner. To deal with this unprecedented situation, the state essentially opted to do nothing at all;

15 CONN. CHARTER of 1662; ME. CONST. art. V, pt. 1, § 3; MASS. CONST. pt. 2, ch. II, § 1, art. III (amended 1831); N.H. CONST.; N.H. CONST. pt. II (amended 1792); *R.I. Royal Charter of 1663*, *supra* note 13; *see* VT. CONST. ch. II, § X (amended 1836); *see also* VT. CONST. ch. II, § X (amended 1870).

16 PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION 24–26 (2011). WESLEY W. HORTON, THE CONNECTICUT STATE CONSTITUTION 8–10, 16–19 (2011).

17 *See* N.Y. CONST. of 1777, art. XVII.

18 1808 Conn. Pub. Acts 202.

19 *See, e.g.*, Simeon E. Baldwin, *The Three Constitutions of Connecticut*, 5 NEW HAVEN COLONY HIST. SOC'Y PAPERS 179, 216 (1894) ("[I]f no person had a majority of the ballots for Governor, the Assembly proceeded to elect whom they would for that office") (citing *id.*).

20 *See generally R.I. Royal Charter of 1663*, *supra* note 13.

the elected Lieutenant Governor served as acting governor for the term.[21] Several decades later, in 1832, the legislature amended the election code, likely in anticipation of the competitive gubernatorial election taking place that year, to provide for additional elections if no candidate won a majority.[22] That year, it took *four* additional elections to finally produce a majority winner.[23] The legislature quickly repealed this provision,[24] but didn't replace it with anything else,[25] effectively reverting to the do-nothing method. As a result, because the 1839 election produced majority winners in neither the gubernatorial nor lieutenant-gubernatorial elections and the re-do election requirement had been repealed, the senior-most state senator, Samuel W. King, served as Governor.[26]

Accordingly, the constitutionalization of the majority requirement in Massachusetts and New Hampshire in the early 1780s, along with the procedure for resolving a gubernatorial election in which no candidate won a majority, set the stage for Connecticut and Rhode Island to do so in their first state constitutions. When Vermont was admitted as a state in 1791, it too had an identical requirement, which originated in its 1777 constitution.[27] And when Maine broke off from Massachusetts and was admitted as a state in 1819, it heavily borrowed from the Massachusetts constitution, including the gubernatorial election provision.[28]

The operation of these provisions is worth discussing, given the frequency with which they were used.[29] In Connecticut, New Hampshire

21 This considerably simplifies the matter. Following the gubernatorial election, the legislature seemed mystified as to what to do. One member of the legislature moved that Richard Jackson, Jr., the Federalist nominee for Governor, "be declared Governor, since he had received a large plurality of the votes cast, since the charter required a choice to be made, and since in 1780 the assembly had elected a delegate to Congress by plurality vote." But the motion failed and Isaac Wilbour, who was elected Lieutenant Governor that same year, ended up serving as acting governor for the term. *See* Clarence Saunders Brigham, *The Administration of the Fenners, 1790-1811*, *in* 1 State of Rhode Island and Providence Plantations at the End of the Century: A History 272, 292 (Edward Field ed., 1902).

22 *See* Clarence Saunders Brigham, *From 1830 to the Dorr War*, *in* 1 State of Rhode Island and Providence Plantations at the End of the Century: A History, *supra* note 21, at 318, 321–22.

23 *See id.* at 323.

24 *See* 1833 R.I. Pub. Laws 11.

25 *See* Brigham, *supra* note 22, at 331.

26 *Id.*

27 *See* Vt. Const. of 1777, ch. II, § XVII; Vt. Const. of 1786, ch. II, § X; *see also* Vt. Const. ch. II, § X (amended 1836).

28 *See* Marshall J. Tinkle, The Maine State Constitution 4–5 (1992). *Compare* Me. Const. art. V, pt. 1, § 3, *with* Mass. Const. pt. 2, ch. II, § 1, art. III (amended 1831).

29 In Connecticut, 16 gubernatorial elections failed to produce a majority winner and

(following the ratification of its 1792 constitution), and Rhode Island, the legislatures were restricted to selecting from among the top two finishers, and it elected the governor in a joint convention.[30] In Maine and Massachusetts, and in New Hampshire from 1784 to 1792, the house of representatives would vote for two of the top four finishers, and the senate would select from among the two names sent to it by the house.[31] Vermont established no such numerical requirements in its first three constitutions, instead just providing for a joint convention,[32] but an 1836 amendment restricted the legislature to picking from among the top three finishers.[33]

But in 1776, the direct election of governors was by far a minority position; everywhere else in the country, governors were indirectly elected.[34] In all of these states except Pennsylvania, the legislature was tasked with electing the governor.[35] In Pennsylvania, the voters of the state elected a twelve-member supreme executive council, which then elected one of its members as "president" of the state.[36] Few limitations were placed on state legislatures in picking governors. For example, South Carolina's 1776 and 1778 constitutions suggested, but did not require, that the legislature would

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were resolved by the legislature prior to the abolition of the requirement; in Maine, 10 elections; in Massachusetts, 11 elections; in New Hampshire, 18 elections; in Rhode Island, 7 elections; and in Vermont, the only state where the practice is ongoing, 23 elections. *See* GUIDE TO U.S. ELECTIONS 1639–40 (Deborah Kalb ed., 7th ed. 2016).

30 CONN. CONST. of 1818, art. IV, § 2; N.H. CONST. pt. II (amended 1792); R.I. CONST. of 1842, art. VIII, § 7. In an interesting distinction from other states in New England, Rhode Island's constitution barred its legislature from disqualifying votes to effectively engineer a no-majority-winner election, instead requiring that a do-over election take place when a lack of majority "is produced by rejecting the entire vote of any town, city or ward for informality or illegality." *See* R.I. CONST. of 1842, art. VIII, § 7.

31 ME. CONST. art. V, pt. 1, § 3; MASS. CONST. pt. 2, ch. II, § 1, art. III. *Compare* N.H. CONST. pt. II ("[I]f no person shall have a majority of votes, the house of representatives shall by ballot elect two out of the four persons who had the highest number of votes . . . ."), *with* N.H. CONST. pt. II (amended 1792) ("[I]f no person shall have a majority of votes, the senate and house of representatives shall by joint ballot elect one of the two persons having the highest number of votes . . . .").

32 VT. CONST. of 1777, ch. II, § XVII; VT. CONST. of 1786, ch. II, § X; VT. CONST. ch. II, § X (amended 1836).

33 VT. CONST. ch. II, § X (amended 1836).

34 DEL. CONST. of 1776, art. 7; GA. CONST. of 1777, art. II; MD. CONST. of 1776, art. XXV; N.J. CONST. of 1776, art. VII; N.C. CONST. of 1776, § 15; PA. CONST. of 1776, ch. II, § 19; S.C. CONST. of 1776, art. III; S.C. CONST. of 1778, art. III; VA. CONST. of 1776, para. 7; VA. CONST. of 1830, art. IV, § 1.

35 DEL. CONST. of 1776, art. 7; GA. CONST. of 1777, art. II; MD. CONST. of 1776, art. XXV; N.J. CONST. of 1776, art. VII; N.C. CONST. of 1776, § 15; S.C. CONST. of 1776, art. III; S.C. CONST. of 1778, art. III; VA. CONST. of 1776, para. 7. *See generally* VA. CONST. of 1830, art. IV, § 1.

36 PA. CONST. of 1776, ch. II, § 19.

select a governor from among their members.[37] While at first glance this may have created a pseudo-parliamentary state government, these arrangements didn't resemble Westminster-style parliaments in the ways that mattered most.[38] Despite the indirect elections of governors in the states, elections were still scheduled on fixed, immovable dates; governors were elected to fixed terms; and not only did the legislature lack the ability to prematurely remove the governor but, in case of a vacancy, the successor was predetermined.[39]

B. *Changes Following Nineteenth Century Democratization*

Over time, both majority requirements and indirect election provisions were slowly repealed. This process unfolded considerably faster for indirectly elected governors. By 1850, all states but South Carolina had provided for directly elected governors, but by this point, no majority requirement had been repealed. At the same time, the vast majority of the states admitted to the Union ratified constitutions with governors who were directly elected, and who could be elected by simply winning the most votes. This section addresses how both kinds of provisions were repealed in the nineteenth century during a time of democratization.

1. Majority Requirements

In the nineteenth century, every state in New England had codified a majority-vote requirement for governors, along with all other state officers.[40] Only one state outside of New England had a majority-vote requirement: Georgia. But despite adopting the provision in its 1824 constitutional

37 S.C. Const. of 1776, art. III ("That the general assembly and the said legislative council shall jointly choose by ballot from among themselves, or from the people at large, a president and commander-in-chief and a vice-president of the colony."); S.C. Const. of 1778, art. III (quoting S.C. Const. of 1776, art. III).

38 The Westminster system of government is that used in the United Kingdom and in most countries colonized by the British Empire. Scholars disagree on what the "essence" of the Westminster system is. Some see it "as a set of relationships between the executive government and parliament"; "[t]he key feature here is that the parliament determines *who* is the government and for *how long* they are in [power], and parliament limits a great deal of what the executive can do." R.A.W. Rhodes et al., Comparing Westminster 3 (2009).

39 *See generally* T. Quinn Yeargain, *Democratizing Gubernatorial Succession*, 73 Rutgers U. L. 1145 (2021) (discussing gubernatorial succession).

40 Conn. Const. of 1818, art. IV, § 2; Me. Const. art. V, pt. 1, § 3; Mass. Const. pt. 2, ch. II, § 1, art. III; N.H. Const. pt. II, art. XLII; R.I. Const. of 1842, art. VIII, § 7; Vt. Const. ch. II, § X (amended 1836).

amendment that made its governor directly elected,[41] Georgia didn't actually encounter a gubernatorial election lacking in a majority winner until *1966*.[42] By the mid-nineteenth century, only Massachusetts had abolished the majority-vote requirement, which it did in 1860[43]—but the tide had started to turn against these requirements. By 1912, Connecticut, Maine, New Hampshire, and Rhode Island had each abolished the requirements. Today, only in Vermont has the provision remained intact,[44] and indeed it still comes into play today; the 2014 Vermont gubernatorial election was ultimately resolved by the legislature when no candidate won a majority.[45]

The factors that have led to the abolition of the majority requirement, and the substitution of the plurality requirement, have not been discussed at great length in the historical or legal literature. This omission is somewhat surprising, given the rich history in each state that led to these constitutional changes throughout New England. While this Article does not voluminously recount the details of how these changes took place, two themes are worth noting: (1) the extent to which informal coalition-building and log-rolling occurred while majority-vote requirements were applicable, and (2) that states frequently experienced contentious and controversial gubernatorial elections—which frequently involved incumbent governors attempting to stay in power—immediately preceding the repeal of the majority-vote requirement.

First, majority-vote requirements incentivized informal, *ad hoc* coalition building. In the mid-nineteenth century, the United States was undergoing significant political changes. As the Whig Party began to die out, several third parties—like the Liberty Party, the Free Soil Party, and the Know-Nothing (or American) Party—achieved some measure of success in several Northern states.[46] These parties' gubernatorial nominees won enough votes to deprive the major-party nominees of a majority, therefore tossing elections to the legislature in Maine, Massachusetts, and New Hampshire.[47] Moreover, these states *also* imposed a majority-vote requirement for *state senate* elections.[48] In these states, if no candidate for the state senate won

41 GA. CONST. of 1798, art. II, § 2 (amended 1824).

42 GUIDE TO U.S. ELECTIONS, *supra* note 29, at 1639–40.

43 Tyler Quinn Yeargain, *New England State Senates: Case Studies for Revisiting the Indirect Election of Legislators*, 19 U.N.H. L. REV. 335, 362–63 (2021).

44 *See* D. Gregory Sanford & Paul Gillies, *And If There Be No Choice Made: A Meditation on Section 47 of the Vermont Constitution*, 27 VT. L. REV. 783, 787, 789, 799 (2003).

45 Neal P. Goswami, *Lawmakers Re-Elect Shumlin*, RUTLAND DAILY HERALD, Jan. 9, 2015, at A1.

46 *See* Yeargain, *supra* note 43, at 362–63, 380.

47 *Id.* at 380–81.

48 *See id.*

a majority, that election was also tossed to the legislature.[49] With so many offices up for grabs—governor, state senate, members of the state executive council, and other offices normally elected by the legislature—there was plenty of opportunity for coalition building.[50]

However, even outside those three states, similar deal-making developed as a result of majority-vote requirements in gubernatorial elections. For example, in Connecticut in 1849, when no candidate won a majority in the gubernatorial, lieutenant-gubernatorial, secretary of state, comptroller, or treasurer elections, a loose and imperfect coalition formed among the Democrats and the Free Soil Party. A Democrat was elected Speaker of the House with Free Soil support;[51] Whigs were elected as governor, lieutenant governor, secretary of state, and comptroller;[52] a Democrat was elected as treasurer;[53] a Free Soiler was elected as State Printer;[54] and the remaining offices in the State House were "divided" among Democrats and Free Soilers.[55] A similar split took place in 1851, primarily because of intra-party differences on temperance.[56]

In Rhode Island similar coalitions occurred. In the 1875 gubernatorial election, the Republican Party was split, with two candidates running over the issue of alcohol prohibition. No candidate won a majority, with both Republican candidates—Henry Lippitt, opposed to prohibition, and Rowland Hazard, in support of it—emerging as the top two finishers.[57] A similar split happened in the lieutenant-gubernatorial election, with temperance Republican Daniel Day and anti-Prohibition Republican Henry Sisson finishing as the top two candidates.[58] Accordingly, Democrats

49 *Id.*

50 *Id.* at 380–86.

51 *See generally Connecticut*, Vt. Patriot & State Gazette, May 10, 1849, at 2.

52 *Election of State Officers*, Hartford Courant, May 4, 1849, at 2.

53 *Connecticut*, *supra* note 51.

54 *Coalition in the Connecticut Legislature*, Bangor Daily Whig & Courier, May 12, 1849, at 2. The same paper noted, "Such coalitions may answer for a while but they breed a brooding of monsters that will devour their parents." *Id.*

55 Lewisburg Chron., May 9, 1849, at 2 ("All the other State officers except Treasurer are Whigs. In the House, the Free Soilers and Democrats divided the offices.").

56 *See Connecticut*, Brooklyn Daily Eagle, May 9, 1851, at 2 ("It will be remembered that no choice was made for Governor and State officers, and that the duty of choosing was devolved upon the Legislature, in joint ballot . . . . [This] resulted in the re-election of Thomas H. Seymour, (Dem) by three majority . . . . After this, Green Kendrick, (Whig) was chosen Lieutenant Governor, and Thomas Clark, (Whig) was chosen Treasurer, by one majority, each.—The scale was turned in their favor, by Temperance votes. The Democratic candidates for Secretary, John P. C. Mather, and for Comptroller, Rufus G. Pinney, were elected by two majority.").

57 *Personal and Political*, Brooklyn Union, May 26, 1875, at 2.

58 *Id.*; *Summary of News in Brief*, Daily Rec. Times (Wilkes-Barre, Pa.), May 26, 1875, at 2.

joined with anti-Prohibition Republicans in the legislature to elect Lippitt as governor and Sisson as lieutenant governor.[59]

But while this coalition-building was frequently unseemly—it seemingly incentivized state legislators to effectively "trade" elected positions with each other—a far more egregious consequence of majority-vote requirements was its effect during close and contentious elections. The states that ultimately abolished their majority requirements experienced controversial elections in the years immediately preceding the changes.

The most well-known controversy took place in Maine in the 1879 gubernatorial election.[60] No candidate won a majority, but the Republican candidate, Daniel Davis, won a significant plurality.[61] Given that unofficial election returns showed that Republicans would have a sizable majority in both chambers of the legislature, it was likely that Davis would be elected.[62] But incumbent Democratic Governor Alonzo Garcelon and the Democratic-controlled state executive council sought to eliminate the likely Republican majority by invalidating votes and issuing certificates to Democratic and Greenback candidates.[63] When Garcelon refused to comply with the state supreme court's ruling that he had no authority to invalidate votes, and when two competing legislatures organized, a state constitutional crisis developed that nearly engulfed the state in armed violence.[64] Joshua Chamberlain, a Union General in the Civil War and a former Republican Governor of Maine, was brought in to keep the peace, and the Democratic–Greenback legislature eventually conceded to the Republican legislature's authority and Davis was elected.[65] That year, the legislature amended the constitution to eliminate the majority requirement for gubernatorial elections.[66]

Similar events took place in Connecticut and Rhode Island. Following a series of gubernatorial elections in which no candidate won a majority and the legislature had to step in,[67] two gubernatorial elections took place in which the legislature was unable to decide a winner, resulting in the incumbent governor continuing to serve. In the 1890 Connecticut

59 *Personal and Political*, *supra* note 57.

60 EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 163–69 (2016).

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *See* Clarence Saunders Brigham, *The Last Four Decades*, *in* 1 STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS AT THE END OF THE CENTURY: A HISTORY, *supra* note 21, at 375, 387; MELBERT B. CARY, THE CONNECTICUT CONSTITUTION 36 (1900).

gubernatorial election, no candidate won a majority and the two chambers of the legislature were controlled by different parties.[68] "The Democratic-controlled Senate voted for [Democratic nominee Luzon] Morris's election, but the Republican-controlled House refused to vote for anyone."[69] Morris filed a writ of *quo warranto* with the state supreme court of errors, but the court, noting that the situation could still be resolved by the legislature, refused to grant the writ and recognized incumbent Republican Governor Morgan Bulkeley as the *de jure* governor of the state.[70] Following the debacle, a statewide movement to abolish the majority requirement developed.[71] The 1899 and 1901 legislatures approved a constitutional amendment providing for plurality elections over the objection of prominent Republicans like Bulkeley.[72] The *Hartford Courant* endorsed the amendment, noting the value of a majority requirement while also recognizing that it was inoperable in practice.[73] The amendment was overwhelmingly adopted at the 1901 general election, which saw comparatively low turnout.[74]

Just three years later, a similar situation developed in Rhode Island. Incumbent Republican Governor Russell Brown ran for re-election in the 1893 gubernatorial election against Democratic nominee David Baker, and the result was a close election in which no candidate won a majority—depending on how selectively vote totals were calculated, either party had

68 Kevin Murphy, Crowbar Governor: The Life and Times of Morgan Gardner Bulkeley 120 (2011).

69 Wesley W. Horton, *Law and Society in Far-Away Connecticut*, 8 Conn. J. Int'l L. 547, 555 (1993); *see* Murphy, *supra* note 68, at 121; *see also* Kevin Alexander, *The Key to a Successful Democracy: Crowbars*, Yale Daily News (Oct. 7, 2004), https://yaledailynews.com/blog/2004/10/07/the-key-to-a-successful-democracy-crowbars/.

70 *See* State *ex rel.* Morris v. Bulkeley, 23 A. 186, 192–93 (Conn. 1892).

71 Cary, *supra* note 67, at 36–40.

72 *E.g.*, *For State Reform: Hartford Hearing*, Meriden Daily J., Apr. 3, 1901, at 8; *The Plurality Amendment*, Hartford Courant, Apr. 4, 1901, at 10; *The Amendments on Monday*, Hartford Courant, Oct. 3, 1901, at 10.

73 *See The Amendments on Monday*, *supra* note 72 ("The present requirement of a clean majority to elect state officers has long been the subject of attack and the fact that members of Congress and of the Legislature are elected by plurality has been so loudly presented that the feeling has become widespread that the majority rule must go. Now its time has come. It could be defended, but in the hurry of these hustling times it is not wanted and it can be spared."); *see also Plurality Elections in Connecticut*, Hartford Courant, Nov. 10, 1900, at 10 ("The logic of the majority rule is invincible. It prevails in caucuses and can be defended all day in argument. But in regular use it is inconvenient, takes up valuable time, and is not necessary; and so it should move off among the things that have been.").

74 Antonia C. Moran, *The Period of Peaceful Anarchy: Constitutional Impasse, 1890–1892*, 29 Conn. Hist. Rev. 91, 103–06 (1988); *Vote Is Light—Opposition to Constitutional Changes*, Journal (Meriden, Conn.), Oct. 7, 1901, at 3.

a valid claim that their nominee had won a plurality of the vote[75]—and so the election was thrown to the legislature. However, like in Connecticut, control of the legislature was split between the two parties, with Democrats controlling the House and Republicans controlling the Senate, and the legislature did not meet in joint convention.[76] Accordingly, Governor Brown continued in office until the next election.[77] The controversy over the move, which effectively allowed Rhode Island Republicans to stonewall the process and install their nominee as governor through extra-constitutional means, gave greater force to a proposed constitutional amendment to switch to plurality elections.[78] Accordingly, in that year's legislative session, the two chambers agreed to put a constitutional amendment on the November 1893 ballot to repeal the majority requirement.[79] Scheduled at the end of November, when Providence held its municipal elections, the amendment attracted little attention.[80] Rumors abounded that prominent Republicans secretly opposed it—that higher-ups in the party were furtively campaigning against it,[81] and that the Republican legislative leaders had only agreed to put it up for a vote because of internal pressure in their caucus[82]—but little

75 HERMAN F. ESCHENBACHER, THE UNIVERSITY OF RHODE ISLAND: A HISTORY OF LAND-GRANT EDUCATION IN RHODE ISLAND 63 (1967).

76 *See* MICHAEL J. DUBIN, PARTY AFFILIATIONS IN THE STATE LEGISLATURES: A YEAR BY YEAR SUMMARY, 1796-2006, at 162–69 (2007).

77 *See* Brigham, *supra* note 67, at 387.

78 *Rhode Islanders See Light: Anxious to Get Rid of the Majority Election System*, N.Y. TIMES (May 17, 1893), https://timesmachine.nytimes.com/timesmachine/1893/05/17/106824145.html?pageNumber=1.

79 *See Favor a Plurality*, BOS. GLOBE, Mar. 30, 1893, at 2; Editorial Notes, NEWPORT MERCURY, Nov. 4, 1893, at 4.

80 *See* Editorial Notes, *supra* note 79 ("The date is that of the regular municipal election in Providence, but to all the rest of the state it will be a special."); *The Plurality Amendment*, NEWPORT MERCURY, Dec. 2, 1893, at 1.

81 *Rhode Island Elections to Come on 28th—Constitutional Amendment Will Be Put to Popular Test*, BOS. GLOBE, Nov. 13, 1893, at 4 [hereinafter *Popular Test*] ("Secretly, it is said, the great majority of the republican party leaders, including US Senators Aldrich and Dixon, and Gen[eral] P. R. Brayton, are opposed to the adoption of the constitutional amendment of plurality in elections."); *see also Reform Triumph: Rhode Island Adopts the Plurality Amendment*, BOS. GLOBE, Nov. 29, 1893, at 2 ("The republican effort to secretly organize and defeat the amendment was a flat failure . . . .").

82 *See Popular Test*, *supra* note 81 ("The leaders in the legislature which decided to submit the question to the people were also against the change, but the rank and file of the general assembly believed differently and voted according to their own wishes, irrespective of the leading members, and regardless of the wishes of the US senators.").

evidence exists for these claims.[83] In the end, in a low-turnout election,[84] the amendment overwhelmingly passed.[85]

The change in New Hampshire, which took place in 1912, was not so dramatic. Though the state had endured many elections in which no candidate won a majority,[86] the most recent such election in 1906 resulted in the plurality winner being elected.[87] Nonetheless, at the 1912 constitutional convention, the committee on the executive branch recommended that the provision be abolished, with one of the delegates on the committee noting that when "the spectacle is presented to us . . . and the election is thrown into our legislature," there is "the chance of a partisan advantage being taken there, one way or another."[88] The convention approved the amendment and it was overwhelmingly approved by the voters that year.[89] However, a controversy developed over the application of the amendment to that year's gubernatorial election, in which Democratic nominee Samuel Felker had won a convincing plurality, but fell far short of a majority because of the presence of a Progressive candidate on the ballot.[90] Democrats contended that the amendment took effect immediately, but Republicans argued that, for one last time, the election needed to be decided by the legislature, which they expected to control.[91] But though the governor was ultimately elected by the legislature, a last-minute coalition between Democrats and Progressive Republicans nonetheless allowed Felker to win.[92]

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83 For example, at a meeting of the Republican Party of Rhode Island, the members adopted a resolution endorsing the amendment: "We sincerely believe that its adoption is necessary to the material interests of the state, and unhesitatingly and earnestly urge the Republican voters to support at the polls the adoption of this amendment to the constitution." *Rhode Island Republicans*, Newport Daily News, Nov. 18, 1893, at 3.

84 *See The Plurality Amendment*, *supra* note 80.

85 Brigham, *supra* note 67, at 387.

86 *See supra* note 29 and accompanying text; *see also* Yeargain, *supra* note 43 at 344, 360–63.

87 *See, e.g.*, *New Hampshire's Governor: Charles M. Floyd, Republican, Elected by the Legislature*, N.Y. Times, Jan. 3, 1907, at 1; *No Election in N. H.: Charles M. Floyd Lacks 10 Votes—Rumor of Coalition*, N.Y. Trib., Nov. 9, 1906, at 2.

88 N.H. Const. Convention, Journal of the Convention to Revise the Constitution: June, 1912, at 445 (1912).

89 State of N.H., Manual for the General Court: 1913, at 281, 311 (1913).

90 *See id.* at 130.

91 *Claim Cannot Be Maintained: Edwin Jones Says Amendment Adoption Doesn't Elect Felker*, Portsmouth Herald, Nov. 16, 1912, at 2; *Col. Bartlett Gives Opinion: Says Legislature Must Make Selection of Candidates for Governor*, Portsmouth Herald, Dec. 30, 1912, at 8; *see Think Felker Legally Chosen Governor: Opinions of Legal Lights Favorable to Plurality Election of Democratic Candidate*, Portsmouth Herald, Dec. 30, 1912, at 3.

92 James Wright, The Progressive Yankees: Republican Reformers in New Hampshire, 1906–1916, at 143 (1987).

2. Indirect Elections

Unlike the majority-vote requirements, indirect gubernatorial elections were repealed much more quickly—and none exist today. The first round of repeals followed the ratification of the U.S. Constitution and may well have been inspired by the (mostly) direct manner in which the President was elected. Pennsylvania was the first to transition to direct elections. Its 1790 constitution, adopted shortly after the U.S. Constitution was ratified, abandoned its unique Supreme Executive Council and instead provided for a bicameral legislature and a directly elected governor.[93] Delaware followed shortly thereafter in 1792.[94]

Georgia modified its method of indirect election considerably before abolishing it in 1824. The state had originally created a unicameral legislature under its 1777 constitution, which was solely responsible for electing the governor.[95] When the 1789 constitution added a second chamber,[96] the gubernatorial selection process was changed—under this constitution, the House of Representatives would nominate three candidates for governor, one of whom was selected by the Senate.[97] This process didn't last long; a 1795 amendment, which was continued in the 1798 rewrite of the constitution, required all legislative elections to be by joint ballot. [98] Then, an 1824 amendment eliminated the process altogether and provided for direct election.[99]

Beginning in the 1830s, in response to a growing national movement in favor of democratization, state constitutions were amended to eliminate indirect election altogether.[100] North Carolina and Maryland both did so in the 1830s,[101] with Maryland's transition occurring following popular discontent at the state's undemocratic institutions, as part of a broader, significant constitutional change.[102] Following similar discontent, New Jersey

93 PA. CONST. of 1776, ch. II, § 3; PA. CONST. of 1790, art. I, § 1; *id.* art. II, § 2.

94 *See* DEL. CONST. of 1792, art. II, § 1; *id.* art. III, § 2.

95 GA. CONST. of 1777, art. II.

96 GA. CONST. of 1789, art. I, §§ 1, 6.

97 *Id.* art. II, § 2.

98 GA. CONST. of 1789, art. II (amended 1795); *see* GA. CONST. of 1798, art. II, § 2.

99 GA. CONST. of 1798, art. II, § 2 (amended 1824).

100 *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 883–85 (2021).

101 *See* Harold J. Counihan, *The North Carolina Constitutional Convention of 1835: A Study in Jacksonian Democracy*, 46 N.C. HIST. REV. 335, 335, 354–55, 361 (1969).

102 Yeargain, *supra* note 43, at 338–39. *See generally* A. Clarke Hagensick, *Revolution or Reform in 1836: Maryland's Preface to the Dorr Rebellion*, 57 MD. HIST. MAG. 346, 347 (1962) (discussing the 1836 election as a precipitating cause for the 1837 constitutional amendment).

and Virginia followed in 1844 and 1850, respectively.[103] South Carolina transitioned to a directly elected governor only in 1865, after the Civil War concluded, and with strong Northern influence in drafting its re-admission constitution.[104]

But even these changes occurred unevenly. *Direct* election didn't always translate to guaranteeing a *democratic* election. In Maryland, for example, the 1837 constitutional amendment providing for a directly elected governor also severely restricted the manner in which the election took place. The amendment created three "gubernatorial districts," and provided that each district would take turns in electing the governor, who would be from the district voting for governor that year.[105] The provision was incorporated into the 1851 constitution[106] and lasted until the 1864 Civil War-era constitution.[107] The impact was felt beyond Maryland's borders, however. At the 1850 Virginia Constitutional Convention, delegates proposed splitting the state into two gubernatorial districts—which roughly reflect the modern-day boundaries of Virginia and West Virginia—and providing for a similar mode of election, but the measure wasn't ultimately adopted.[108]

Only two states that joined the Union after the ratification of the Constitution provided for indirectly elected governors. The first was Kentucky. Its first constitution, adopted in 1792, provided for an indirectly elected governor,[109] but widespread public dissatisfaction with the indirectly elected governor *and* the indirectly elected senate resulted in the adoption of its second constitution in 1799, which made both the governor and the state senate directly elected.[110] Louisiana, the second state, adopted a bizarre, indirect election–direct election hybridized system when it became a state in 1812. Under its first constitution, the state's voters ostensibly cast ballots

103 *See* John J. Dinan, The Virginia State Constitution 11–12 (2011); *see also* Leonard B. Irwin & Herbert Lee Ellis, New Jersey: The Garden State 94–95 (1962).

104 Paul E. Herron, Framing the Solid South: The State Constitutional Conventions of Secession, Reconstruction, and Redemption, 1860–1902, at 145 (2017).

105 Md. Const. of 1776, §§ 18, 20 (amended 1837).

106 Md. Const. of 1851, art. II, § 5.

107 *See* Md. Const. of 1864, art. II, § 3 ("[T]he person having the highest number of votes, and being Constitutionally eligible, shall be the Governor . . . ."); *Governor: Origin & Functions*, Md. State Archives: Md. Manual On-Line, https://msa.maryland.gov/msa/mdmanual/08conoff/html/01govf.html (last visited Oct. 15, 2021).

108 Va. Const. Convention, Journal, Acts and Proceedings of a General Convention of the State of Virginia, Assembled at Richmond on Monday the Fourteenth Day of October, 1850, at 295–96 (1850) [hereinafter 1850 Virginia Constitutional Convention Journal].

109 Ky. Const. of 1792, art. II, § 2.

110 Robert M. Ireland, The Kentucky State Constitution 7–8 (2011).

in a gubernatorial contest—but the results of the contest merely served to *nominate* candidates for governor. After canvassing the votes, the legislature would choose between the top two candidates, regardless of whether either of them won a majority.[111] Somewhat surprisingly, during the period of time in which this provision was in effect, the legislature *always* elected the gubernatorial candidate who had received the most votes.[112] The system was ultimately abolished in 1845 in favor of a directly elected governor.[113] With the exception of these two states, every other state since admitted to the Union has provided for the direct election of governors.

II. THE MODERN RE-EMERGENCE OF MAJORITY-VOTE REQUIREMENTS

As mentioned previously, the imposition of majority-vote requirements in early American history almost exclusively took place in New England. While most of these requirements have since been largely abolished, they were resurrected in various forms beginning in the late nineteenth century.[114] This Section addresses the contemporary use of majority-vote requirements (a) in Southern states as a means of disenfranchising Black voters; (b) in Vermont, where the provision remains in full force; (c) in U.S. territories, where majority vote requirements have been imposed by congressional directives and by discrete constitutional amendments; and (d) in the adoption of "top-two" primaries in three states. This Section addresses the use of majority-vote requirements.

111 LA. CONST. of 1812, art. III, § 2 ("[T]he members of the two houses shall meet in the House of Representatives, and immediately after the two candidates who shall have obtained the greatest number of votes, shall be balloted for and the one having a majority of votes shall be governor.").

112 *See* Yeargain, *supra* note 43, at 365–66.

113 LA. CONST. of 1845, tit. III, art. 38 ("The qualified electors for representatives shall vote for a governor and lieutenant-governor, at the time and place of voting for representatives . . . . The person having the greatest number of votes for governor shall be declared duly elected . . . .").

114 It is relevant to note that Arizona briefly adopted a majority-vote requirement, coupled with a runoff election if no candidate won a majority, in 1988 after the impeachment of Governor Evan Mecham. *See generally* JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION 150 (2011). Mecham had won the 1986 gubernatorial election with just 40% of the vote, so the effort was likely meant to prevent candidates like him from sneaking into office again. *Id.* When the majority-vote requirement was applied for the first time in the 1990 gubernatorial election, the leading candidate narrowly fell short of a majority and a runoff election took place a few months later. *Id.* The delay in the final election result delayed the transition (at significant cost), resulting in the repeal of the majority-vote requirement in 1992. TONI MCCLORY, UNDERSTANDING THE ARIZONA CONSTITUTION 113 (2d ed. 2010).

A. *Majority-Vote Requirements as Disenfranchisement*

Following Reconstruction, the emergence of Jim Crow-era laws in the South saw the recreation of majority-vote requirements—with the explicit goal of disenfranchising Black voters and perpetuating white supremacy.[115] These statutory and constitutional provisions, as adopted in the usual case, required majorities in party primaries, not general elections.[116] In the absence of a majority-vote winner, state election law in the South required a runoff primary election.[117] The purpose of this requirement was primarily to prevent a Black candidate from winning the Democratic Party's nomination with a plurality of the vote; requiring a majority of the vote allowed (fully enfranchised) white voters to artificially outnumber (mostly disenfranchised) Black voters.[118]

Very few southern states enacted majority requirements for general elections.[119] On a practical level, they didn't need to—with the Republican Party virtually nonexistent in the South, prior to the mid-twentieth century, the real contests were Democratic primaries.[120] For most of the twentieth century, so long as Black residents in the South were disenfranchised, general-election majority-vote requirements would have been dead letters.[121]

Nonetheless, Georgia has continued its majority-vote requirement since 1824. From 1824 to 1976, the failure to win a majority of the vote meant that the legislature was tasked with electing the governor.[122] However, this method of legislative election was only used once, in 1966, when the Democratic General Assembly elected Lester Maddox, the Democratic nominee, the plurality-vote loser, and a staunch segregationist, over Bo Callaway, the Republican nominee, the plurality-vote winner, also a staunch

115 Laughlin McDonald, *The Majority Vote Requirement: Its Use and Abuse in the South*, 17 Urb. Law. 429, 430–32 (1985); *see also* Graham Paul Goldberg, Note, *Georgia's Runoff Election System Has Run Its Course*, 54 Ga. L. Rev. 1063, 1069–73 (2020).

116 *See* McDonald, *supra* note 115, at 431 ("With the demise of two-party politics in the South and the general disenfranchisement of blacks, the system further insured that the Democratic nominee, almost always white, would invariably win in the general election.").

117 *See id.*

118 *See id.* at 431–33.

119 *See infra* notes 122–34 and accompanying text.

120 *See* McDonald, *supra* note 115, at 430–32.

121 During this period of time, the Republican Party was all but dead in the South, and Democratic primary elections were usually tantamount to election.

122 Ga. Const. of 1798, art. II, § 2 (amended 1824); Ga. Const. of 1865, art. III, § 2; Ga. Const. of 1868, art. IV, § II; Ga. Const. of 1877, art. V, § 1, para. V; Ga. Const. of 1945, art. V, § 1, para. IV; Ga. Const. of 1976, art. V, § 1, para. IV.

segregationist.[123] The 1976 constitution maintained the majority-vote requirement, but eliminated the legislative-election component, instead opting for a runoff election where no candidate won a majority.[124] Though obviously adopted in 1824, before the idea of Black suffrage was taken seriously in the South, it is difficult to wash away the role that disenfranchising Black voters likely played in the majority-vote requirement's perpetuation.[125]

Outside of primary runoff elections and Georgia's perpetuation of its 1824 majority-vote requirement, Mississippi serves as the strongest example of how the requirement served to perpetuate white supremacy. At Mississippi's 1890 constitutional convention, the ultimate constitution established a majority-vote requirement for statewide offices, but conditioned the majority requirement not just on winning a majority of the statewide vote, but a majority of state house districts,[126] which effectively operates as an electoral college at the state level.[127] If no candidate won majorities under both criteria, the legislature would pick the winner.[128]

Though this Article is not about the efforts of Jim Crow-era, southern state constitutional conventions to entrench white supremacy, the extent to which Mississippi's 1890 constitution was perpetuated specifically to disenfranchise Black voters is worth highlighting—not least because its most pernicious provisions are still in effect today—and should not be relegated to a footnote. Soloman Saladin Calhoon, the President of the 1890 Convention, published a pamphlet outlining, quite explicitly, his opposition to Black suffrage.[129] At the convention, Calhoon noted that the "ballot system must be so arranged as to effect one object": minority-white rule.[130] For all of Calhoon's bluster, however, the bigger cudgel wielded by white voters as they dominated the state's politics were the runoff elections and disenfranchisement provisions. Mississippi's double-majority-vote requirement operated more

123 ROBERT MICKEY, PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA'S DEEP SOUTH, 1944–1972, at 330 (2015); JASON SOKOL, THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945–1975, at 232 (2006); *see also* GUIDE TO U.S. ELECTIONS, *supra* note 29, at 1639–40 (noting that the 1966 election was the first one in which no candidate won a majority of the vote).

124 *See* GA. CONST. of 1976, art. V, § 1, para. IV.

125 *See, e.g.*, LAUGHLIN MCDONALD, A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA 206–08 (2003).

126 MISS. CONST. art. V, § 140 (amended 2020).

127 Akhil Reed Amar, *America's Constitution, Written and Unwritten*, 57 SYRACUSE L. REV. 267, 283 n.17 (2007).

128 MISS. CONST. art. V, § 141 (repealed 2020).

129 CHRISTOPHER WALDREP, JURY DISCRIMINATION: THE SUPREME COURT, PUBLIC OPINION, AND A GRASSROOTS FIGHT FOR RACIAL EQUALITY IN MISSISSIPPI 223 (2010).

130 *See* William Alexander Mabry, *Disenfranchisement of the Negro in Mississippi*, 4 J.S. HIST. 318, 324 n.16 (1938).

as a symbolic threat to Black voters electing the candidate of their choice more than it represented an actual one. It theoretically came into play in the state's 1991 and 1995 lieutenant-gubernatorial elections, but the second-place finisher conceded to the plurality winner.[131] In 1999, the provision was triggered for the first time in a gubernatorial election—no candidate won a majority and the Republican nominee, Mike Parker, who placed second to Ronnie Musgrove, the Democratic nominee, refused to concede.[132] However, the Democratic-dominated legislature ended up voting in favor of Musgrove.[133] Despite the repeated close calls, however, the perceived closeness of the 2019 gubernatorial election suggested that this provision might well have affected the outcome of the 2019 election,[134] even though it ultimately did not.

Elsewhere in 2019, Democratic nominee Andy Beshear narrowly defeated incumbent Republican Governor Matt Bevin in Kentucky's gubernatorial election.[135] Bevin initially, and baselessly, claimed that there was widespread fraud in the election and Republican State Senate President Robert Stivers suggested that the legislature could install Bevin as governor despite his apparent loss.[136] After Republican legislative leaders distanced themselves from the idea,[137] Bevin backed off, eventually conceding.[138] But the closeness of the election—along with the extent to which Beshear's support in Kentucky was hyper-concentrated in just a few counties and metropolitan areas—led some to suggest an alternative method of election. Kelli Ward, the Chair of the Arizona Republican Party, tweeted out maps of the Kentucky gubernatorial election, along with the Virginia State Senate elections that simultaneously took place, and asked, "Should we look toward

131 Harrison, *supra* note 5.

132 *See id.*

133 *Id.*

134 *See, e.g.*, Ian Millhiser, *How a Jim Crow Law Still Shapes Mississippi's Elections*, Vox, https://www.vox.com/2019/10/11/20903401/mississippi-jim-crow-law-rig-election-electoral-college-jim-hood-tate-reeves (Nov. 5, 2019).

135 Tara Golshan & Li Zhou, *Kentucky's Republican Governor Matt Bevin Lost Reelection, but Isn't Conceding Just Yet*, Vox (Nov. 6, 2019), https://www.vox.com/policy-and-politics/2019/11/6/20952144/kentucky-republican-governor-matt-bevin-recanvass-concession.

136 *See id.*

137 *See, e.g.*, Joe Sonka & Deborah Yetter, *Senate President Says Bevin Should Concede Election if Recanvass Doesn't Alter Vote Totals*, Courier J. (Nov. 8, 2019) (updated Nov. 9, 2019), https://www.courier-journal.com/story/news/politics/elections/kentucky/2019/11/08/kentucky-senate-president-bevin-should-concede-if-votes-unchanged/2530822001/.

138 Ed Kilgore, *Bevin Concedes After Republicans Decline to Help Him Steal the Election*, N.Y. Mag. (Nov. 14, 2019), https://nymag.com/intelligencer/2019/11/bevin-concedes-after-republicans-wont-overturn-his-defeat.html.

an #ElectoralCollege type system at the state level?"[139] It's not difficult to see Ward's "suggestion" as an argument that popular vote systems should be restructured to provide greater representation to land than people—which is a fairly explicit argument that indirect election should be used to counter the will of the electorate.

B. *The Majority-Vote Requirement in Vermont*

Since the adoption of Vermont's first constitution in 1777, the state has imposed a majority-vote requirement in gubernatorial elections—and elections for all other state executive offices—with the legislature picking the winner if no candidate wins a majority.[140] This requirement has been triggered with some amount of frequency. According to a 2003 estimate, 70 different elections have resulted in no majority winner: "twenty-two races for Governor, twenty-six for Lieutenant-Governor, and seventeen for state Treasurer," and five other races, including the Secretary of State, Auditor of Accounts, and Attorney General.[141] Since 2003, there have been two gubernatorial elections and one lieutenant-gubernatorial election that have produced no majority winner.[142]

Though historically the Vermont Legislature frequently elected

139 Kelli Ward (@kelliwardaz), TWITTER (Nov. 6, 2019), https://twitter.com/kelliwardaz/status/1192279093909192704; *see also* Chris Cillizza, *Debunking Two Viral (and Deeply Misleading) 2019 Maps*, CNN, https://www.cnn.com/2019/11/07/politics/kentucky-map-electoral-college/index.html (Nov. 7, 2019).

140 Sanford & Gillies, *supra* note 44, at 786–90.

141 *See id.* at 784.

142 Terri Hallenbeck, *Milne Not Ready to Concede*, BURLINGTON FREE PRESS, Nov. 7, 2014, at C1; Nancy Remsen, *'Regular Guy' Phil Scott Sworn in as Lt. Governor*, BURLINGTON FREE PRESS, Jan. 7, 2011, at 4 (noting that, in the 2010 election, "[t]he final decision about [governor and lieutenant governor] bounced to the Legislature after neither Shumlin nor Scott received more than 50 percent of the votes cast on Election Day"). Of note, elections for auditor have resulted in plurality winners thrice in recent decades—in 1990, 1996, and 2006. *Election Results Archive*, VT. SEC'Y STATE: ELECTIONS DIV., https://electionarchive.vermont.gov/elections/search/year_from:1989/year_to:2020/office_id:13/stage:General (last visited Aug. 4, 2021). However, an opinion from the Vermont Attorney General concluded that the Constitution "specifies that a majority is required to elect only the Governor, Lieutenant Governor, and the Treasurer[,]" and that the *statute* requiring the "[Auditor win] a majority of the votes cast . . . was repealed in 1978" and was not replaced. Memorandum from Andrew W. MacLean, Vt. Assistant Att'y Gen., to Paul Gillies, Vt. Deputy Sec'y of State (Jan. 4, 1990); *see also* Susan Allen, *Legislature Won't Decide Auditor Race*, BRATTLEBORO REFORMER, Jan. 8, 1991, at 3. Shortly thereafter, the Attorney General's opinion as to the inapplicability of majority-vote requirements was extended to elections for Attorney General and Secretary of State. Sanford & Gillies, *supra* note 44, at 794.

second-place finishers—and in the case of the 1837 state treasurer election, it actually selected a *third*-place finisher—this habit has largely been broken in the modern era.[143] During the last hundred years, only in the 1976 lieutenant-gubernatorial election did the legislature choose a second-place finisher over a plurality winner. And in that election, the legislature had good reason to do so—Democrat John Alden, the plurality winner, was suspected of insurance fraud, and so the legislature instead elected Republican T. Garry Buckley. Alden was convicted shortly thereafter.[144]

Accordingly, the legislature has increasingly viewed its constitutional power to elect the governor if no candidate receives a majority as a formality. This has led to the legislature electing the plurality winner as a matter of course—even if the plurality winner is of a different party. In 2010, for example, a Democrat was the plurality winner of the gubernatorial election and a Republican was the plurality winner of the lieutenant-gubernatorial election. Both were selected by the legislature with bipartisan majorities in favor of each—and without any controversy.[145] The implication of this common practice has been that second-place finishers in elections with no majority winner have largely refused to campaign before the state legislature. The most notable exception remains Scott Milne, the 2014 Republican nominee for governor. Governor Peter Shumlin narrowly edged out Milne in the race but remained thousands of votes short of a majority. Milne refused to concede and instead openly campaigned for the legislature to elect him[146]—which it didn't.[147]

Milne notwithstanding, the common practice of the second-place finisher conceding to the plurality winner, thereby rendering the legislature's vote a formality, has likely prevented any serious movement to revise the state constitution. The legislature's selection of Buckley over Alden, because of genuine concerns about Alden's competence and ability to serve, might even be seen as comparable to the role that the Electoral College *theoretically* plays in presidential elections when an unqualified, objectionable candidate would otherwise win the election.[148] Nonetheless, Milne's rejection of the common practice, as well as growing partisan polarization nationally, may suggest that the practice is eroding—which may well mean that the constitutional provision is either eliminated altogether or used for partisan gain.

143 Sanford & Gillies, *supra* note 44, at 795–96.

144 *Id.* at 795.

145 *See* Remsen, *supra* note 142.

146 *See* Dave Gram, *Milne Claims His Chances at Governorship 'Getting Better,'* Rutland Daily Herald, Jan. 4, 2015, at A1.

147 Goswami, *supra* note 45.

148 *See, e.g.*, The Federalist No. 68, at 346 (Alexander Hamilton) (Ian Shapiro ed., 2009).

C. *Majority-Vote Requirements in American Territories*

The governments of the territories currently incorporated[149] under the jurisdiction of the United States are frequently omitted from state constitutional scholarship. Taken literally, this makes sense—territories aren't states and their system of government is imposed on them by an affirmative act of Congress.[150] But instead of being a shortcoming that justifies their omission from the discussion, they instead provide a unique insight into the dominant theories motivating state constitutional changes. If territorial organic acts are drafted and modified by Congress, and if Congress acts conservatively in approving territorial constitutions, then we might reasonably view the systems of government either created or approved by Congress as frozen-in-time reflections of the dominant view of state governments.

In this light, it is significant to note the extent to which majority-vote requirements have proliferated in American territories. Of the six current territories, four have majority-vote requirements for their gubernatorial elections, with runoff elections conducted in the event that no candidate wins a majority.[151] Originally, territories had unelected, presidentially appointed, governors,[152] but beginning in the mid-twentieth century, Congress began amending territorial organic acts to provide for directly elected governors.[153] It began in 1947 with Puerto Rico, but established no majority-vote

149 "Incorporated" is an overly formal word to use in this context, but "organized" is, in the territorial context, something of a term of art. The U.S. Department of the Interior reasonably refers to an "organized territory" as an "insular area for which the United States Congress has enacted an organic act." *Definitions of Insular Area Political Organizations*, U.S. DEP'T INTERIOR, OFF. INSULAR AFFS., https://www.doi.gov/oia/islands/politicatypes (last visited May 24, 2021).

150 *See Developments in the Law, Territorial Federalism*, 130 HARV. L. REV. 1632, 1632 (2017); *see also* Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1634 (2019).

151 *See* N. MAR. I. CONST. art. III, § 4; *see also* Guam Elective Governor Act, Pub. L. No. 90-497, § 1, 82 Stat. 842, 842–43 (1968) (codified as amended at 48 U.S.C. § 1422); Virgin Islands Elective Governor Act, Pub. L. No. 90-496, § 4, 82 Stat. 837, 837 (1968) (codified as amended at 48 U.S.C. § 1591); AM. SAMOA CODE ANN. § 4.0104 (2020). *But see* P.R. CONST. art. IV, § 1 (establishing no majority-vote requirement for governor); D.C. CODE § 1-204.21(a) (2021) (establishing no majority-vote requirement for mayor). The District is a defined administrative division of the United States government, superseded only by the federal government, and organized under an organic act. Though it may nominally be a city, it operates as a municipality–state (or municipality–territory) hybrid—and as a territory in the ways that matter most for this discussion.

152 Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 877 (1990).

153 *Id.* at 868–70.

requirement for the governor.[154] The Puerto Rican Constitution, adopted in 1952, similarly didn't require majority votes in statewide elections.[155] The majority-vote requirement was similarly omitted from mayoral elections for the District of Columbia.[156]

But in the decades that followed, with respect to the remaining territories—Guam, the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands—majority-vote requirements were imposed, either by Congress or by territorial constitutions. In 1968, the Elective Governor Acts, which amended the organic acts for Guam and the Virgin Islands, were passed. They served the dual purpose of providing both territories with democratically elected governors and imposing a majority-vote requirement in territorial gubernatorial elections. Because neither territory has adopted a constitution, the organic acts remain the source of government in both cases.[157] In the Commonwealth of the Northern Mariana Islands and American Samoa, which do have constitutions, majority-vote requirements were added to their constitutions in 2007 and 1977, respectively.[158]

The near-uniform imposition of majority-vote requirements in American territories lacks a clear explanation. For example, the Guam and Virgin Islands Elective Governor Acts were approved in tandem by Congress in 1968, and both imposed majority-vote requirements with runoffs if no candidate won a majority.[159] But both bills were adopted with only a thin legislative record. At the House Committee on Interior and Insular Affairs'

154 *See* Act of Aug. 5, 1947, Pub. L. No. 80-362, § 1, 61 Stat. 770, 770–71 ("At the general election in 1948 and each such election quadrennially thereafter the Governor of Puerto Rico shall be elected by the qualified voters of Puerto Rico . . . .").

155 *See* P. R. Const. art. IV, § 1 ("The executive power shall be vested in a Governor, who shall be elected by direct vote in each general election.").

156 *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 421, 87 Stat. 774, 789–90 (1973) (codified as amended at D.C. Code § 1-204.21).

157 The incorporation of these provisions as amendments to territorial organic acts—as opposed to voter-initiated and approved amendments to their territorial constitutions—deprives them of any democratic legitimacy. Organic acts function as constitutional equivalents, but unlike voters in virtually every other state, voters in Guam and the U.S. Virgin Islands have no meaningful say in how their territory's governing document is constructed. It may be the case that the voters of both territories *want* majority-vote requirements. Indeed, in the U.S. Virgin Islands' case, it has embraced the majority-vote requirement and kept it in its latest proposed constitution. *See* V.I. Const. art. VI, § 2 (proposed 2009). The absence of any meaningful expression of the voters' democratic will—and support for these provisions—is worth noting.

158 Am. Sam. Const. art. IV, § 2 (amended 1977); N. Mar. I. Const. art. III, § 4 (amended 2007).

159 Guam Elective Governor Act § 1; Virgin Islands Elective Governor Act, Pub. L. No. 90-496, § 4, 82 Stat. 837, 837 (1968) (codified as amended at 48 U.S.C. § 1591).

hearing on the Guam Elective Governor Act, Alberto Lamorena, a former member of the Guam Legislature, testified in support of the majority requirement. Lamorena argued that, because "there seems to be three parties here in the island of Guam" and the risk of a governor winning with a small plurality was high, a majority-vote requirement was wise.[160]

But that logic—that, in a multiparty democracy, a majority-vote requirement ought to be imposed—was entirely inapplicable in the U.S. Virgin Islands. There, the same House committee heard uncontroverted testimony that the Virgin Islands was, politically, "a monolithic society," with "one strong Democrat[ic] Party that is divided into two factions, locally and vocally known as the Unicrats, Donkey Democrats, or Independent Democrats," and a Republican Party that only "exist[s] on paper[.]"[161] Yet despite the different political realities, Congress approved Elective Governor Acts for both territories that imposed identical majority-vote requirements.

Meanwhile, in the CNMI and American Samoa, change came from the territories themselves. The Secretary of the Interior approved a 1977 amendment to the Constitution of American Samoa, which made the governor directly elected.[162] Though the text of the amendment didn't itself specify how the governor would be elected,[163] its approval triggered the enactment of an act passed by the territorial legislature that imposed a majority-vote requirement.[164]

And when the Northern Mariana Islands joined the United States, its original constitution did not include a majority-vote requirement.[165]

160 *Guam Elective Governor Act: Hearing on H.R. 7329 and Related Bills to Provide for the Popular Election of the Governor of Guam, and for Other Purposes Before the Subcomm. on Territorial & Insular Affs. of the H. Comm. on Interior & Insular Affs.*, 90th Cong. 12 (1968) (statement of Alberto Lamorena, former Guam State Legislator).

161 *Election of Virgin Islands Governor: Part I: Hearings on H.R. 7330 and Related Bills and Matters Relating to Election Procedure and Economic Affairs in the Virgin Islands Before the Subcomm. on Territorial & Insular Affs. of the H. Comm. on Interior & Insular Affs.*, 90th Cong. 16 (1967) (statement of C. Lloyd W. Joseph, Chairman, St. Croix District Republican Club).

162 AM. SAM. CONST. art. IV, § 2 (amended 1977) ("The Governor and the Lieutenant Governor of American Samoa shall, commencing with the first Tuesday following the first Monday of November 1977, be popularly elected and serve in accordance with the laws of American Samoa."); Elected Governor and Lieutenant Governor of American Samoa, 42 Fed. Reg. 48,398 (Sept. 23, 1977); *see also* Lawson, *supra* note 152, at 869 n.89.

163 *See* AM. SAM. CONST. art. IV, § 2 (amended 1977).

164 S.20, 15th Leg., 2d Spec. Sess. (Am. Sam. 1977) (codified at AM. SAMOA CODE ANN. § 4.0104 (2020)).

165 N. Mar. I. Const. art. III, § 4 (amended 2007); *see also* N. MAR. I. CONST. CONVENTION, ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 75–76 (1976), www.nmhcouncil.org/nmhc_archives/NMI%20Constitutional%20Conventions/1st%20Con-Con%20Directory/1976%2012%20

Briefing papers provided to delegates at the 1976 constitutional convention only briefly discussed the issue, primarily pointing out that the Hawaiian and Puerto Rican constitutions did not impose such a requirement.[166] In the decades that followed, however, the need for a majority-vote requirement became apparent. Between 1997 and 2005, gubernatorial elections in the commonwealth were decided by smaller and smaller pluralities,[167] with the winner of the 2005 election winning just shy of 28% of the vote, trailed closely by his opponents with 27%, 26%, and 18% of the vote.[168] In the next legislative session, the legislature approved an amendment to the constitution requiring a runoff election if no candidate won a majority, which the voters ratified in 2007.[169]

D. *Majority-Vote Requirements and Top-Two Primaries*

Outside of these majority-vote requirements, which largely applied to primary elections, not general elections, several states have adopted new statewide election regimes that have partially adopted majority-vote requirements. California, Louisiana, and Washington have all adopted blanket primaries, in which all candidates of all parties run on the same ballot, and a runoff election takes place among the top two candidates.[170] Under Louisiana law, if a candidate wins a majority of the vote in the

06%20Analysis%20of%20the%20Constitution-A.pdf ("There is no requirement that a ticket receive a majority of the votes cast to be elected.").

166 N. Mar. I. Const. Convention, Briefing Paper No. 8: Eligibility to Vote and Election Procedures 34 (1976).

167 *2005 Election Results*, Commonwealth Election Comm'n, https://www.votecnmi.gov.mp/archive/97-archive/election-results/138-2005-election-results (last visited Oct. 6, 2020); Edith G. Alejandro, *GOP in Landslide CNMI Victory: Babauta Governor*, Pac. Islands Rep. (Nov. 6, 2001), http://www.pireport.org/articles/2001/11/06/gop-landslide-cnmi-victory-babauta-governor (summarizing results of 1991 gubernatorial election); Zaldy Dandan, *'It's Teno-Pepero!*,' Marianas Variety (Nov. 4, 1997), https://evols.library.manoa.hawaii.edu/bitstream/10524/51064/Marianas%20Variety%20Vol.%2025%2c%20No.%20162%2c%201997-11-04.pdf (summarizing results of 1997 gubernatorial election).

168 *2005 Election Results*, *supra* note 167.

169 *2007 Election Results*, Commonwealth Election Comm'n, https://www.votecnmi.gov.mp/archive/97-archive/election-results/118-2007-election-results (last visited Oct. 6, 2020); Marconi Calindas, *Modest Turnout for CNMI Elections*, Pac. Daily News (Agana Heights, Guam), Nov. 4, 2007, at 3 ("Residents will also decide on two legislative initiatives . . . . The other proposes to require a runoff election if no gubernatorial team obtains a majority vote — 50 percent plus one — in an election.").

170 *See, e.g.*, Chenwei Zhang, Note, *Towards a More Perfect Election: Improving the Top-Two Primary for Congressional and State Races*, 73 Ohio State L.J. 615, 624–33 (2012).

blanket primary, no runoff election is held,[171] but runoffs in California and Washington take place regardless.

Louisiana's blanket primary was adopted with a multi-fold purpose in mind—with Republicans becoming increasingly competitive in the state, Democrats reasoned that it was unduly expensive to have their statewide nominees endure *three* election contests (namely, a primary, primary runoff, and general election), so a blanket primary with a potential runoff eased the burden.[172] Moreover, the blanket primary cut costs significantly.[173] At the time, there were few voices arguing that the blanket primary would increase public participation in the political process, though it undoubtedly served to do so.

In California, meanwhile, the adoption of a top-two primary with a mandatory runoff was more explicitly predicated on allowing independent and unaffiliated voters to more actively participate in state elections; Washington also implemented a top-two primary.[174] The practical benefits conferred by the top-two primary system are dubious,[175] and at least more

171 This wasn't always the case, however. Under the 1975 version of the law, a second election, called a "general" election, was *always* held. Act of May 30, 1975, 1975 La. Acts 1, 24. In effect, if a candidate won a majority of the vote in the primary, they were declared the winner, but nonetheless ran again as a formality in the general election. *See id.* ("Any person who, in a primary election held under this Part, receives a majority of the votes cast for the office for which he was a candidate shall be declared the sole and only nominee elected for that office, and his name shall be listed on the ballot in the general election as the candidate or nominee for such office."). In 1975, that meant that incumbent Democratic Governor Edwin Edwards appeared as the only gubernatorial candidate in the general election. *See Election to Fill Two Top Offices*, SHREVEPORT TIMES, Dec. 7, 1975, at 8 (noting that Edwin Edwards, along with several other statewide candidates, won "new four-year terms without a runoff"). The costliness and inefficiency of this process led the next year's legislature to change the primary's operation to the current system.

172 Stella Z. Theodoulou, *The Impact of the Open Elections System and Runoff Primary: A Casestudy of Louisiana Electoral Politics, 1975–1984*, 17 URB. LAW. 457, 459 (1985); John R. Labbé, Comment, *Louisiana's Blanket Primary After* California Democratic Party v. Jones, 96 NW. U. L. REV. 721, 743–45 (2002).

173 *See* Theodoulou, *supra* note 172, at 459; *see also* Labbé, *supra* note 172, at 743.

174 *See, e.g.*, Zhang, *supra* note 170, at 624–33.

175 There is limited support for the proposition that the top-two primary has resulted in more moderates being elected to office, *see* Seth Masket, *Polarization Interrupted? California's Experiment with the Top-Two Primary*, *in* GOVERNING CALIFORNIA: POLITICS, GOVERNMENT, AND PUBLIC POLICY IN THE GOLDEN STATE 1 (Ethan Rarick ed., 3d ed. 2013); Eric McGhee & Boris Shor, *Has the Top Two Primary Elected More Moderates?*, 15 PERSPS. ON POL. 1053, 1062–64 (2017), and some support for the idea that it may, combined with other changes, affect voter turnout, *see* Seth J. Hill & Thad Kousser, *Turning Out Unlikely Voters? A Field Experiment in the Top-Two Primary*, 38 POL. BEHAV. 413, 429 (2016).

than occasionally tend to penalize parties when too many of their candidates run in a given election and "split" the vote.[176] Nonetheless, in both states, the top-two primary has radically altered the method in which gubernatorial elections take place. The 2018 California gubernatorial election—the first open seat since the adoption of the top-two primary—was close to being a one-party affair in the general election. Democrats were optimistic that two of their candidates would finish in the top two, depriving Republicans of a robust statewide campaign that would encourage down-ballot participation.[177] However, a timely intervention by national Republicans enabled one of their candidates to win a spot in the runoff.[178]

E. *Conclusion*

The methods through which governors were selected at planned events—namely, elections—have undergone significant transformation since the United States' independence in 1776. The governorship has been converted from a position largely filled by the legislature, either explicitly or when there was a failure to elect, to a position elected and chosen by the voters of their state. The constitutional changes in the composition and selection of governors run hand in hand with the equally significant constitutional changes in the powers of governors. The expansion of gubernatorial appointment powers, the veto, and countless other constitutional and statutory powers, makes sense in the context of the role's transformation from a mere appendage of the legislature to a fully independent state official elected to implement the electorate's desires.

176 *See, e.g.*, Russell Berman, *The Democrats Barely Pull It Off in California*, Atlantic (June 6, 2018), https://www.theatlantic.com/politics/archive/2018/06/the-democrats-close-call-in-california/562178/; Li Zhou, *Washington Has a Top-Two Primary. Here's How It Works.*, Vox (Aug. 7, 2018), https://www.vox.com/2018/8/7/17649564/washington-primary-results.

177 *See* Alexei Koseff, *California Republicans Confront a Dire Election Scenario: No GOP Choice for Governor*, Sacramento Bee (Apr. 16, 2018) (updated Apr. 21, 2018), https://www.sacbee.com/latest-news/article208854384.html; Alejandro Lazo, *California Gubernatorial Primary Eyed for Its Impact on House Races*, Wall St. J., https://www.wsj.com/articles/california-gubernatorial-primary-eyed-for-its-impact-on-house-races-1527854401 (June 1, 2018).

178 *See* Adam Nagourney & Alexander Burns, *Gavin Newsom and John Cox to Compete in California Election for Governor*, N.Y. Times (June 6, 2018), https://www.nytimes.com/2018/06/06/us/politics/california-primary.html.

III. MODERN REFORMS (AND THE POSSIBILITY FOR MORE)

The current state of gubernatorial selection reflects two centuries' worth of constitutional changes that largely standardized gubernatorial elections around the country. Today, no state has an indirectly elected governor—and only four states (Georgia, Louisiana, Mississippi, and Vermont) and four territories (American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands) impose majority-vote requirements, with all but Vermont requiring runoff elections if no candidate wins a majority. While these state constitutional revisions occurred in the specific context of local politics and concerns, they have also created an unprecedented degree of uniformity in gubernatorial selection.

But still, many states take their license to serve as laboratories of democracy quite seriously. The continued existence of majority-vote requirements in the eight states and territories mentioned above reflect some amount of local innovation—for good *and* bad. But this degree of innovation extends beyond merely imposing majority-vote requirements. In recent decades, an increasing number of states have adopted—or have *considered* adopting—additional electoral reforms, primarily top-two primaries and ranked-choice voting.

These innovations, coupled with similar governmental and electoral reforms and the universal presence of explicit constitutional amendment procedures, suggest that state political systems exist in a constant state of flux. Accordingly, in laying out the full history of gubernatorial selection, it is appropriate to consider what the next era of gubernatorial election should look like.

This Article commits to that ambitious undertaking here, in Part III, by considering some of the recently proposed reforms and how state constitutions might revise how they organize their systems of government. In so doing, it does not specifically advocate for the adoption of any one particular method of election, instead discussing the potential merits of different approaches.

Section A begins by elaborating on the movements toward top-two primaries and ranked-choice voting at the statewide level. Section B then considers how current state constitutions—especially the eight that still maintain majority-vote requirements—should treat gubernatorial elections. Section C then identifies several reforms, like a move to state-level parliamentary governments or commission-style governments, that have not been (recently) proposed, but may warrant merit.

A. *Modern Reforms*

As noted in the previous Section, in the past two decades, California and Washington have adopted "top-two" primaries. In a top-two primary, all candidates from all parties run in the same primary, with the top two candidates—regardless of party, and regardless of whether the leading candidate won a majority—advancing to the general election.

In both states, the top-two primary is rooted in the blanket primary that both states previously used. In the early twentieth century, as states began adopting primary elections, Washington enacted a blanket primary.[179] Under this system, all candidates from all parties ran in the same primary, with the top candidate from each party advancing to the general election.[180] California adopted a similar system in 1996.[181] However, the California Democratic Party challenged the constitutionality of the state's blanket primary on First Amendment grounds, arguing that its constitutional right to associate was infringed. In *California Democratic Party v. Jones*, the Supreme Court agreed, striking down the state's primary system.[182]

After *Jones*, the Washington State Democratic Party challenged the blanket primary in its state, which the Ninth Circuit struck down in 2003 on the same grounds.[183] Following the Ninth Circuit's ruling in *Democratic Party of Washington State v. Reed*, Washington reverted to partisan primaries—which it hadn't experienced since 1934.[184] Popular dissatisfaction with this outcome led to the adoption of the top-two primary in 2004,[185] which has been in place since. And in 2010, California once again joined Washington, adopting a top-two primary.

Since the adoption of top-two primaries in California and Washington, other states have considered adopting similar procedures, but none has successfully done so. The closest that any other state has gotten was Florida, where Amendment 3, on the ballot in 2020, would have created a top-two primary for state offices, but it was defeated in the general election.[186]

179 Zhou, *supra* note 176.

180 Deidra A. Foster, Comment, *Partisanship Redefined: Why Blanket Primaries Are Constitutional*, 29 Seattle U. L. Rev. 449, 452, 463 (2005).

181 *Id.*

182 Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000).

183 *See* Democratic Party of Wash. v. Reed, 343 F.3d 1198, 1207 (9th Cir. 2003).

184 Foster, *supra* note 180, at 449, 460, 466–70.

185 *Id.* at 466–70; *see also* Sally Ousley, *Primary Ballots Prompt Flurry of Angry Calls*, Daily News (Longview, Wash.), Aug. 28, 2004, at A1.

186 *See Florida Amendment 3 Election Results: Establish Top-Two Open Primary System*, N.Y. Times, https://www.nytimes.com/interactive/2020/11/03/us/elections/results-florida-amendment-3-establish-top-two-open-primary-system.html (Nov. 17, 2020); Zhang,

The movement in favor of ranked-choice voting is far more interesting, however, because it represents a potentially seismic shift in how American elections are conducted. Though many cities have used ranked-choice voting[187] in local elections for decades,[188] no states have followed suit until recently. In 2016, Maine became the first state to adopt ranked-choice voting when its voters approved Question 5, a ballot initiative.[189] The path following the initiative's vote of approval was rocky.[190] Following an advisory opinion of the state supreme court as to its permissibility under the state constitution, the initiative was only partially implemented in 2018—it was largely restricted to primaries for all offices and general elections for district offices. But in 2020, it was implemented in all elections, making it the first time in history that a presidential election at the state level used ranked-choice voting.

Several other states considered adopting electoral forms that merged together the idea of a top-two primary and ranked-choice voting. Alaska, Arkansas, and North Dakota all saw voter-initiated constitutional amendments that sought to implement top-*four* primaries. As the proposals were written, all candidates of all parties would appear on the same primary ballot. The top four candidates would advance to the general election, where voters would vote a ranked-choice ballot. The effort ended up passing in Alaska,[191] but it was removed from the ballot in Arkansas and North Dakota by their state supreme courts on largely technical grounds.[192] The implementation of the top-four primary in Alaska was unsuccessfully

supra note 170.

187 For an explanation of how ranked-choice voting works, see generally Sarah Almukhtar et al., *How Does Ranked-Choice Voting Work in New York?*, N.Y. TIMES (Apr. 22, 2021), https://www.nytimes.com/interactive/2021/nyregion/ranked-choice-voting-nyc.html.

188 Amanda Zoch, *The Rise of Ranked-Choice Voting*, NAT'L CONF. STATE LEGISLATURES (Sept. 2, 2020), https://www.ncsl.org/research/elections-and-campaigns/the-rise-of-ranked-choice-voting.aspx.

189 *Ranked Choice Voting in Maine*, ME. STATE LEGISLATURE (Oct. 7, 2020), https://legislature.maine.gov/lawlibrary/ranked-choice-voting-in-maine/9509.

190 *See, e.g.*, Matthew R. Massie, Note, *Upending Minority Rule: The Case for Ranked-Choice Voting in West Virginia*, 122 W. VA. L. REV. 323, 337–43 (2019); *see also Ranked Choice Voting in Maine*, *supra* note 189.

191 Kelsey Piper, *Alaska Voters Adopt Ranked-Choice Voting in Ballot Initiative*, VOX (Nov. 19, 2020), https://www.vox.com/2020/11/19/21537126/alaska-measure-2-ranked-choice-voting-results.

192 *See* Miller v. Thurston, 605 S.W.3d 255, 256, 260 (2020) (removing constitutional amendment from the ballot because the petition sponsors did not certify that their canvassers had passed background checks); Haugen v. Jaeger, 948 N.W.2d 1, 2, 4 (2020) (removing constitutional amendment from the ballot because the petition did not include the full text of the measure).

challenged in state court,[193] representing a potentially significant shift in how elections could be conducted.

B. *Rethinking the Majority Requirement*

At its core, requiring that a candidate for statewide office receive a majority of the vote makes sense. Allowing a mere plurality to be sufficient to win creates the possibility of minority rule, or a replay of the 2005 gubernatorial election in the Northern Mariana Islands, where the winning candidate received just *27 percent* of the vote.[194] Other elections in the past several decades have produced similar results—though none as extreme. Since 1990, nine gubernatorial elections have seen the plurality winner receive less than 40 percent of the vote.[195] In most of these elections, the circumstances giving rise to such a small plurality win were highly localized; a unique combination of personally popular independent candidates or the short-lived burst of success for third parties can explain most of these results.[196] Most states do not have strong third parties—though Alaska, Maine, and Minnesota are possible exceptions—and therefore only rarely confront the reality of plurality-winner gubernatorial elections.[197] The situation is slightly different in American territories, which either have more political parties or have a greater tradition of independent candidates, and therefore are likelier to have statewide elections where no candidate receives a majority. Indeed, in the 2020 Puerto Rico gubernatorial election, the winning candidate won with just 33 percent of the vote against a crowded field,[198] triggering some to suggest that Puerto Rico needed to adopt runoff

193 James Brooks, *Alaska Supreme Court Upholds Elections Ballot Measure, State Will Use Ranked-Choice Voting*, Anchorage Daily News (Jan. 19, 2022), https://www.adn.com/politics/2022/01/19/alaska-supreme-court-upholds-elections-ballot-measure-state-will-use-ranked-choice-voting-in-november/.

194 *2005 Election Results*, *supra* note 167.

195 Specifically, 1994 in Maine (35 percent); 2010 in Rhode Island (36 percent); 1994 in Connecticut (36 percent); 1994 in Hawai'i (37 percent); 1998 in Minnesota (37 percent); 2006 in Maine (38 percent); 2010 in Maine (38 percent); 1990 in Alaska (39 percent); and 2006 in Texas (39 percent). *See* Guide to U.S. Elections, *supra* note 29, at 1675–1743.

196 *See, e.g.*, Kevin B. Smith & Alan Greenblatt, Governing States and Localities 176–78 (6th ed. 2017).

197 *E.g.*, Russell Berman & Andrew McGill, *The States Where Third-Party Candidates Perform Best*, Atlantic (Aug. 2, 2016), https://www.theatlantic.com/politics/archive/2016/08/third-party-candidates-2016-clinton-trump-johnson/493931/.

198 Dánica Coto, *Pedro Pierluisi Wins Gubernatorial Race in Puerto Rico*, ABC News (Nov. 7, 2020), https://abcnews.go.com/International/wireStory/pedro-pierluisi-wins-gubernatorial-race-puerto-rico-74084001.

elections.[199]

Nonetheless, regardless of where it occurs, the possibility that a candidate could win a gubernatorial election with *less than 40 percent of the vote*, even as little as *27 percent*, is concerning. In hardly any other context is such a slim plurality—with a large majority voting for another candidate—sufficient to give the winner a true popular mandate. As the *Hartford Courant* noted in the early twentieth century, even as it endorsed the repeal of Connecticut's majority-vote requirement, "[t]he so-called 'majority rule' needs no defender in the absolute logic of it. When a man has not a majority for him[,] he has a majority against him. The man who has a majority of the votes against him is not the choice of the people."[200]

In the abstract, it makes sense to impose a majority-vote requirement. Such a requirement guarantees that the winner emerges with some semblance of a mandate from the electorate instead of representing just a narrow slice of it. But imposing a majority-vote requirement is only half of the equation.

If a majority is required, *what is done to enforce that requirement?* Under the systems currently in place, and that were in place in some states prior to the twentieth century, there are two possible enforcement mechanisms: a runoff election or legislative selection.[201] But, even compared to the ills of a thin plurality winner in a gubernatorial election, a runoff election isn't desirable, either—runoff elections frequently see lower turnout than the original election, have an altogether different electorate, and are frequently scheduled at times when voters aren't used to elections being held.[202] There's also no guarantee that the two candidates who advance to the runoff are the most palatable or popular candidates of the bunch.[203] Of course, legislative

199 *See, e.g.*, Natalia Rodríguez Medina, *Rochester's Puerto Rican Community Keeps Close Eye on Island Election*, DEMOCRAT & CHRON. (Nov. 7, 2020), https://www.democratandchronicle.com/story/news/2020/11/07/rochesters-puerto-rican-community-keeps-close-eye-island-election/6187502002/.

200 *Needed Constitutional Changes*, HARTFORD COURANT, May 10, 1899, at 10.

201 *Supra* Section I.B., Part II.

202 Tyler Yeargain, *The Legal History of State Legislative Vacancies and Temporary Appointments*, 28 J.L. & POL'Y 564, 632–33 (2020); Nathaniel Rakich & Geoffrey Skelley, *The Case for Republicans in Georgia vs. the Case for Democrats*, FIVETHIRTYEIGHT (Jan. 4, 2021) https://fivethirtyeight.com/features/the-case-for-republicans-in-georgia-vs-the-case-for-democrats/.

203 *See, e.g.*, Laurent Bouton & Gabriele Gratton, *Majority Runoff Elections: Strategic Voting and Duverger's Hypothesis*, 10 THEORETICAL ECON. 283, 285–86 (2015) ("[R]egarding the idea that majority runoff elections should ensure a large mandate to the winner, we show that even when there are more than two serious candidates in the first round, *the Condorcet winner is not guaranteed to participate in the second*. Therefore, the fact that the eventual winner of the election obtains more than 50% of the votes in the second

selection is also a bad idea—it effectively just deputizes the legislative majority to select its candidate. If we had a greater degree of certainty that a legislature would exercise its power to elect a winner based on some objective set of criteria, we might have greater faith in that as an option. But, with the narrow exception of how the Vermont General Assembly has exercised its constitutional power in recent decades,[204] we have no such cause for certainty.

Of course, as explained in the previous section, these aren't the only two options. As laboratories of democracy, states are empowered to set up different methods of election. More states could set up ranked-choice (or instant-runoff) voting—as Maine has—or a system like Alaska's, which fuses together ranked-choice voting and a top-*four* primary.[205] These systems are both very new to statewide elections in the United States and there's reason to suspect that they will continue to face serious legal challenges as they're implemented.[206] Cities, however, have historically been the main innovators in rethinking electoral procedures, however, and in recent years, they have been increasingly creative. In 2018, Fargo, North Dakota, adopted an "approval voting" system, the first American city to do so.[207] In 2020, the voters of St. Louis, Missouri, approved a similar system,[208] which was used for the first time in the 2021 mayoral election.[209] And, most prominently of

round cannot be considered a strong proof of legitimacy. *This only ensures that a potential Condorcet loser never wins*." (emphases added)).

204 *See* Sanford & Gillies, *supra* note 44, at 794–95.

205 *E.g.*, Matthew Barakat, *Ranked-Choice Voting, Approved in Alaska and Maine, Gets a Look Nationwide*, Anchorage Daily News (Mar. 16, 2021), https://www.adn.com/nation-world/2021/03/16/ranked-choice-voting-in-effect-in-alaska-and-maine-gets-a-look-nationwide/.

206 *E.g.*, Brooks, *supra* note 193 (noting challenge to Alaska's top-four primary).

207 Kelsey Piper, *This City Just Approved a New Election System Never Tried Before in America*, Vox (Nov. 15, 2018), https://www.vox.com/future-perfect/2018/11/15/18092206/midterm-elections-vote-fargo-approval-voting-ranked-choice. Though the mechanics of approval voting differ depending on the jurisdiction in which it is used, in its purest form, "voters are allowed to vote for ('approve of') as many candidates as they wish," and "[t]he winner is the candidate with the greatest vote total." Steven J. Brams & Peter C. Fishburn, *Approval Voting*, 72 Am. Pol. Sci. Rev. 831, 831 (1978).

208 Mark Schlinkmann, *Overhaul of St. Louis Election System Passes, Residency Rule Repeal Fails*, St. Louis Post-Dispatch (Nov. 3, 2020), https://www.stltoday.com/news/local/govt-and-politics/overhaul-of-st-louis-election-system-passes-residency-rule-repeal-fails/article_d37f0b73-c0b6-56d7-b093-8d069c314813.html.

209 Nathaniel Rakich, *In St. Louis, Voters Will Get to Vote for as Many Candidates as They Want*, FiveThirtyEight (Mar. 1, 2021), https://fivethirtyeight.com/features/in-st-louis-voters-will-get-to-vote-for-as-many-candidates-as-they-want/. St. Louis's system of approval voting differs from the traditional model; as used in St. Louis, voters can "approve of" as many candidates as they want, with the two most approved-of candidates advancing to a runoff election. *See* Rachel Lippmann, *St. Louis Gears Up for*

all, New York City conducted its municipal primary elections in 2021 with a ranked-choice system—raising the issue to nationwide attention.[210]

But regardless of the specific reform in mind—as well as how any legal challenges to the reforms adopted in Alaska and Maine play out—the basic idea underlying all of them is worthy of consideration. These reforms would be particularly applicable in the states and territories that currently employ majority-vote requirements. Admittedly, the institutional opposition to such a radical shift shouldn't be understated in a state like Georgia, where the Republican establishment has traditionally benefitted from the runoff-election requirement.[211] In Guam and the U.S. Virgin Islands, gubernatorial elections are governed by organic acts approved by Congress—and any modifications to the majority-vote requirement would be required to come from *Congress*, not the territorial legislature. Similarly, in American Samoa, though the territory has its own constitution and isn't subject to an organic act, the Secretary of the Interior is required to approve any constitutional amendments.[212] There's good reason to doubt that Congress or the Secretary would approve these kinds of ambitious reforms.

But a reform like this wouldn't be unreasonable to implement in a territory like the Northern Mariana Islands (CNMI) or Puerto Rico. Both territories have their own constitutions and can approve any changes without approval from Congress or the Department of the Interior[213]—unlike American Samoa, Guam, or the U.S. Virgin Islands.[214] Relevantly, both territories already employ unusual and innovative methods of *legislative* elections. In Puerto Rico, the territorial legislature is composed of both district-level and at-large legislators;[215] in the CNMI, the territorial legislature

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First Election Using Approval Voting, ST. LOUIS PUB. RADIO (Mar. 1, 2021), https://news.stlpublicradio.org/government-politics-issues/2021-03-01/st-louis-gears-up-for-first-election-using-approval-voting.

210 Maya King & Zach Montellaro, *New York's 'Head-Swirling' Mistake Puts Harsh Spotlight on Ranked-Choice Voting*, POLITICO (July 6, 2021), https://www.politico.com/news/2021/07/06/new-york-ranked-choice-voting-498221.

211 *See, e.g.*, Rakich & Skelley, *supra* note 202 ("Outside of one 1998 runoff for a seat on the state's public service commission, Republicans have always gained at least a little ground in the runoff compared to the general election.").

212 *See* Exec. Order No. 10,264, 3 C.F.R. 765 (1949–1953); Sean Morrison, *Foreign in a Domestic Sense: American Samoa and the Last U.S. Nationals*, 41 HASTINGS CONST. L.Q. 71, 87–88 (2013); *see also* 48 U.S.C. § 1662a ("Amendments of, or modifications to, the constitution of American Samoa, as approved by the Secretary of the Interior pursuant to Executive Order 10264 as in effect January 1, 1983, may be made only by Act of Congress.").

213 *See* N. MAR. I. CONST. art. XVIII, §§ 1–5; *see* P.R. CONST. art. VII, §§ 1–2.

214 *Supra* notes 211–12 and accompanying text.

215 P.R. CONST. art. III, § 3.

has multi-member districts in which legislators are elected to rotating terms.[216] These procedures reflect forward-thinking, innovative philosophies in how to administer elections that suggest that both territories are fertile ground for reforms in their gubernatorial elections.

C. *A Return to Indirect Election?*

One of the most interesting, and underdiscussed, aspects of state constitutional law is the manner in which old ideas, once abolished, are refreshed and adopted anew. As this Article explains, majority-vote requirements were once fairly widespread in New England gubernatorial elections but were largely abolished by the early twentieth century.[217] But that didn't stop other states and territories—for problematic reasons and for reasons rooted in the specific contexts of subnational political cultures—from adopting similar requirements.[218] These new requirements, however, were *usually* more protective of democratic will than their ancestors.[219] Likewise, several New England states originally opted to fill state legislative vacancies by appointment, not special elections.[220] As these systems crashed and burned, they were eliminated in state constitutions—but have seen a re-emergence in the last century, again with more democratic protections.[221] To a lesser extent, a similar trend exists with unicameral legislatures. They originally existed in Georgia, Pennsylvania, and Vermont, but were nonexistent by the mid-nineteenth century.[222] A burst of renewed interest in unicameralism occurred in the early twentieth century, during the height of the Progressive Era,[223] though only Nebraska[224] (and later, Guam and the U.S. Virgin Islands[225]) adopted a unicameral legislature.

It's possible that a similar resurgence could occur with respect to indirectly elected governors. Admittedly, few people are seriously suggesting that gubernatorial elections should be removed from ballots and that we

216 *See* N. Mar. I. Const. art. II, § 2(a), (b) ("The term of office for senator shall be four years except that the candidate receiving the third highest number of votes in the first election in each senatorial district shall serve a term of two years.").

217 *Supra* Section I.B.1.

218 *Supra* Section II.A.

219 *Supra* Sections I.B.2, II.C.

220 Yeargain, *supra* note 43, at 345–55.

221 Yeargain, *supra* note 202, at 588–601.

222 Demitrios M. Moschos & David L. Katsky, Note, *Unicameralism and Bicameralism: History and Tradition*, 45 B.U. L. Rev. 250, 260–62 (1965).

223 *Id.* at 263–69.

224 *Id.* at 265.

225 48 U.S.C. §§ 1423(a), 1571(a).

should return to the Revolutionary War-era system of indirect gubernatorial elections.[226] But there's a way to rethink that idea and to significantly improve on it.

During the Progressive Era, reformers advanced a wide variety of suggested improvements on state and national systems of government.[227] Many of these suggestions were regionally focused or state-specific in nature, and it's difficult to conflate localized suggestions with national progressive support.[228] The movement, after all, was not monolithic. Generally speaking, progressive reformers didn't focus much on radically altering gubernatorial elections.[229] To the extent that governorships needed to be reformed, progressives largely focused on expanding governors' executive authority, including governors' appointment powers.[230]

However, at least two prominent reformers—Governor George Hodges of Kansas and William S. U'Ren of Oregon—proposed a shift in how governors operated in state systems of government.[231] Under their proposals, bicameral state legislatures would be shrunk to just one chamber, with the governor an *ex officio* member and the presiding officer.[232] It was, intentionally or not, evocative of how many early state governorships were organized. And it ultimately went nowhere.[233]

Few reformers ever seriously suggested the adoption of a parliamentary form of government in any state.[234] The early-state governorships, as mentioned before,[235] and the Hodges–U'Ren approach[236] both came *close*, but were different in several material ways. Though some early-state constitutions included the governor as a member of the legislature, as Hodges and U'Ren suggested, most didn't—and none *required* that the legislature choose one of its own members.[237] Moreover, governors were elected for set terms, unlike prime ministers or regional premiers, and a vote of no-confidence was impossible.[238] And in any event, the legislature

226 *See, e.g.*, Ward, *supra* note 139.
227 Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 496–98 (2017).
228 *See id.*
229 *See id.*
230 *Id.*
231 Yeargain, *supra* note 202, at 625–26.
232 *Id.*
233 *Compare id.*, *with supra* Section I.A.
234 *See* Jonathan Zasloff, *Why No Parliaments in the United States?*, 35 U. PA. J. INT'L L. 269, 291–92 (2013).
235 *See supra* Section I.A.
236 Yeargain, *supra* note 202, at 625–26.
237 *Id.*
238 Yeargain, *supra* note 39.

was similarly elected to a specified term, which couldn't be cut short if the governor wished to call a snap election.[239] So even the most serious ideas that got the *closest* to a parliamentary system nonetheless fell short of actually doing so.

Today, some suggest the idea of parliamentary state governments semi-seriously. Largely abstract think pieces have been written on how, with some incredibly unlikely changes to the U.S. Constitution, such a move might upend the existing party system.[240] Some commentators have speculated that Oregon—with its strong initiative movement and willingness to try democratic experiments—would be the likeliest place to launch such an effort,[241] but again, no serious effort to do so has emerged.[242]

But though the idea has not *yet* been seriously proposed, there's no reason to suspect that it may not be at some point in the near future. State constitutional development is constantly in flux. In recent decades, the biggest changes to state constitutions have been the restructuring of elected executive offices, the abolition of certain positions—like state treasurers—or broadening the franchise with increased voting rights. While a shift to a parliamentary government is not necessarily the next step, the changes that have taken place—maximizing the efficiency of state government and making it more directly representative—are at least supportive of such a shift. And while the idea of a quasi-parliamentary democracy might sound like a more left-leaning idea, some recent statements on American democracy from prominent Republicans,[243] as well as the cynical suggestion of returning to a gubernatorial electoral college,[244] suggest that returning to

239 *See id.*

240 *E.g.*, Dylan Matthews, *Justin Trudeau Isn't Magic, Liberals. Parliaments Make It Easier to Pass Laws.*, Vox (May 18, 2016), https://www.vox.com/2016/5/18/11692402/parliaments-better-presidents-liberal; Akhilesh Pillalamarri, *America Needs a Parliament*, Nat'l Int. (Aug. 2, 2016), https://nationalinterest.org/feature/america-needs-parliament-17220; Ari Shapiro, *Would the U.S. Be Better Off with a Parliament?*, NPR (Oct. 12, 2013), https://www.npr.org/sections/itsallpolitics/2013/10/12/232270289/would-the-u-s-be-better-off-with-a-parliament; Michael Tomasky, Opinion, *If America Had a Parliament*, N.Y. Times (Dec. 7, 2018), https://www.nytimes.com/2018/12/07/opinion/america-politics-parliament.html.

241 Matthews, *supra* note 240.

242 *See generally* Zasloff, *supra* note 234 (noting the complete absence of an organized movement in favor of a shift to a parliamentary democracy).

243 *See, e.g.*, Zack Beauchamp, *Sen. Mike Lee's Tweets Against "Democracy," Explained*, Vox (Oct. 8, 2020), https://www.vox.com/policy-and-politics/21507713/mike-lee-democracy-republic-trump-2020; Joseph Morton, *Sasse Proposes Ending Direct Election of U.S. Senators*, Omaha World-Herald (Sept. 10, 2020), https://omaha.com/news/state-and-regional/govt-and-politics/sasse-proposes-ending-direct-election-of-u-s-senators/article_ad1f0116-d3ec-5248-932a-b48c5e231525.html.

244 Ward, *supra* note 139.

legislatively elected governors might find some Republican support—if it could be used to their advantage.[245]

CONCLUSION

During the last two centuries, governors, as political institutions, have undergone tremendous change—in terms of how they are selected, how they are succeeded, and what powers they have once in office. These changes are reflective of broader societal movements in American democracy and of fundamental changes in state constitutional law. But governors, like all other political institutions, are not done changing. The cautious movement by state-level reformers to adopt wide-ranging changes in the methods of gubernatorial election—from the abolition of Jim Crow-era restrictions to top-two or top-four primaries to ranked-choice voting—demonstrate that there is no value in complacency. The ultimate challenge of American democracy is to continue seeking the best, most democratically legitimate methods of conducting and deciding elections. While these efforts may not *begin* with gubernatorial elections, and though they certainly shouldn't *end* with gubernatorial elections, they must *include* gubernatorial elections.

245 Following the made-up controversy surrounding the 2020 presidential election and the authoritarian-lite efforts by Republican members of Congress to reject the results of the Electoral College, Republican Congressman Thomas Massie issued a statement opposing those efforts. *See* Press Release, Congressman Thomas Massie, Joint Statement Concerning January 6 Attempt to Overturn the Results of the Election (Jan. 3, 2021), https://massie.house.gov/news/email/show.aspx?ID=Z5MPA3CVK5FYZQ3KBYQIDSAWB4. Massie made it *very clear* that he wanted nothing to do with any effort to delegitimize the Electoral College because "[f]rom a purely partisan perspective, Republican presidential candidates have won the national popular vote only once in the last 32 years. They have therefore depended on the electoral college for nearly all presidential victories in the last generation. If we perpetuate the notion that Congress may disregard certified electoral votes—based solely on its own assessment that one or more states mishandled the presidential election—we will be delegitimizing the very system that led Donald Trump to victory in 2016, and that could provide the only path to victory in 2024." *Id.*