

THE MADISONIAN CASE FOR RANKED CHOICE VOTING: *FEDERALIST NO. 10*, PREFERENTIAL VOTING, AND THE AMERICAN DEMOCRATIC TRADITION

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INTRODUCTION

Among the many conclusions and takeaways drawn from the November 2020 U.S. elections, there is one in particular that should inspire optimism in election reform advocates. A once little-known voting system—ranked choice voting—is on the rise. In November 2020, a record number of Americans voted on proposals to implement ranked choice voting for local and statewide elections.¹ At the same time, Maine became the first U.S. state to successfully conduct statewide national elections using the system.² Alaska will join Maine in future elections, after voting in November 2020 to adopt the system statewide.³ Five different U.S. cities also approved ranked choice voting ballot measures for municipal races.⁴ This surge in popularity was not unique to 2020; over the last ten years, an increasing number of jurisdictions have proposed and adopted the voting system, from small counties to major cities, like New York and San Francisco.⁵ In the last five years alone, ranked choice ballot proposals have more than doubled across the country.⁶

In the U.S., the term “ranked choice voting” has come to refer to any system of voting in which voters rank candidates in order of preference, otherwise known as “preferential voting.” Unlike the more common “first-past-the-post” system—in which voters select one option and the candidate with the most votes wins—ranked choice voting allows voters to choose and rank multiple candidates to determine the election winner(s). Each voter’s first choice selection is tabulated in an initial counting round. If, after the first round of counting, no candidate has secured enough votes to win the election, the ballots

1. See *Ranked Choice Voting 2020 Ballot Measures*, FAIRVOTE, https://www.fairvote.org/rcv_ballot_measures (last visited May 21, 2021) [<https://perma.cc/86F2-VVTB>] (Ballot measures appear in two states and five cities. Including an election in Portland, Maine earlier in 2020, this represents the “most jurisdictions voting on RCV in one year in American history”).

2. See *Maine Election Results*, WASH. POST, <https://www.washingtonpost.com/elections/election-results/maine-2020/> (last visited May 21, 2021) [[HTTPS://PERMA.CC/UTN3-8D2V](https://perma.cc/UTN3-8D2V)]; Jon Kamp, *Maine Becomes First State to Use Ranked-Choice Voting in a Presidential Election*, WALL ST. J. (Oct. 30, 2020, 9:00 AM), <https://www.wsj.com/articles/maine-becomes-first-state-to-use-ranked-choice-voting-in-a-presidential-election-11604062812>.

3. See *Ranked Choice Voting 2020 Ballot Measures*, FAIRVOTE, *supra* note 1.

4. *Id.*

5. *Details About Ranked Choice Voting: Where is Ranked Choice Voting Used?*, FAIRVOTE, https://www.fairvote.org/rcv#where_is_ranked_choice_voting_used (last visited May 22, 2021) [[HTTPS://PERMA.CC/2LK3-XQBN](https://perma.cc/2LK3-XQBN)].

6. AMANDA ZOCH, *The Rise of Ranked Choice Voting*, 28 NAT’L CONF. ST. LEGISLATURES: LEGISBRIEF 1 (Sept. 2, 2020), <https://www.ncsl.org/research/elections-and-campaigns/the-rise-of-ranked-choice-voting.aspx> [[HTTPS://PERMA.CC/M3XZ-KBZD](https://perma.cc/M3XZ-KBZD)].

cast for the last place candidate are redistributed to their respective second choice votes. There are various methods of accomplishing this, but the process always repeats until there is a winner or winners.⁷ Far from an untested system, ranked choice voting is already used in major elections in much of the English-speaking world, including in Australia, Ireland, New Zealand, Northern Ireland, and Scotland.⁸ Advocates of the voting method say it elects candidates with wider support; gives voters greater choice; discourages negative campaigning; cuts through extreme party polarization; and lessens the need for “strategic voting,” a phenomenon in which voters choose a candidate other than their favorite candidate, because they do not believe their favorite can win.⁹

As jurisdictions increasingly turn to ranked choice voting, its adoption will likely engender both excitement and hostility. Advocacy and implementation have not gone unopposed. Maine’s Republican legislators, for example, strongly objected to the system change.¹⁰ Republican Governor Paul LePage called ranked choice a “one person, five votes” system “repugnant to the Constitution.”¹¹ A year later, a former Republican state senator took the system to court, where he made an unsubstantiated appeal to the “force of history”¹² as militating against RCV, calling ranked choice voting “exotic.”¹³ Massachu-

7. See *How RCV Works*, FAIRVOTE, https://www.fairvote.org/rcv#how_rcv_works (last visited May 22, 2021) [[HTTPS://PERMA.CC/4QRR-FK6M](https://perma.cc/4QRR-FK6M)].

8. *Details About Ranked Choice Voting: Where is Ranked Choice Voting Used?*, FAIRVOTE, *supra* note 5.

9. See *Benefits of RCV*, FAIRVOTE, <https://www.fairvote.org/rcvbenefits> (last visited May 22, 2021) [<https://perma.cc/2FXF-DQGZ>]; Anne-Marie Slaughter, Francis Fukuyama & Larry Diamond, *Ranked-Choice Voting*, POLITICO, <https://www.politico.com/interactives/2019/how-to-fix-politics-in-america/polarization/ranked-choice-voting> (last visited May 26, 2021) (describing ranked choice voting’s ability to cut through party polarization); Michael Osterholm & Andy Slavitt, *Only Ranked-Choice Voting Could Save American Democracy Now*, STAR TRIB. (Oct. 16, 2020, 5:54 PM), <https://www.startribune.com/only-ranked-choice-voting-could-save-american-democracy-now/572776201/> (proposing ranked choice voting as a solution to the “polarization and dysfunction plaguing our democracy”).

10. See Steve Mistler, *In Tight Race, Maine Republican Sues to Block State’s Ranked-Choice Voting Law*, NPR (Nov. 13, 2018, 1:15 PM), <https://www.npr.org/2018/11/13/667435326/facing-defeat-maine-republican-sues-to-block-states-ranked-choice-voting-law> [<https://perma.cc/7SEU-5U7A>]; Katharine Q. Seelye, *Ranked-Choice Voting System Violates Maine’s Constitution, Court Says*, N.Y. TIMES (May 23, 2017), <https://www.nytimes.com/2017/05/23/us/maine-ranked-choice-elections-voting.html>.

11. First Amended Complaint at 10, *Baber v. Dunlap*, 376 F. Supp. 3d 125 (D. Me. 2018) (18-cv-0465).

12. *Baber v. Dunlap*, 376 F. Supp. 3d 125, 134 (D. Me. 2018).

13. First Amended Complaint, *supra* note 11, at 2.

setts Republicans have similarly expressed skepticism toward ranked choice voting.¹⁴

Despite this opposition, opportunity still exists for ranked choice voting to achieve bipartisan support. Historically, ranked choice voting drew opposition from political parties across the spectrum fearful of losing power under an unfamiliar new status quo.¹⁵ Yet in recent years, the opposition has developed a more partisan bent: resistance to ranked choice voting is now far more common within the Republican Party than the Democratic Party, as Democratic politicians and jurisdictions have become increasingly open to its adoption.¹⁶ Still, ranked

14. Republican Massachusetts Governor Charlie Baker came out in opposition. See Nik DeCosta-Klipa, *Charlie Baker Comes Out Against Ranked Choice Voting Ballot Measure in Massachusetts*, BOSTON.COM (Oct. 27, 2020), <https://www.boston.com/news/politics/2020/10/27/charlie-baker-ranked-choice-voting-massachusetts-question-2> [HTTPS://PERMA.CC/3UYS-9JH7]. Massachusetts Republican Party Chairman Jim Lyons also strongly opposed the measure. See Erin Tiernan, *Massachusetts Republican Party Says Ranked-Choice Voting 'Raises' Potential for Rigged Elections*, BOSTON HERALD (Oct. 12, 2020, 7:26 PM), <https://www.bostonherald.com/2020/10/12/massachusetts-republican-party-says-ranked-choice-voting-raises-potential-for-rigged-elections/> [HTTPS://PERMA.CC/BH55-HLWC].

15. See David Cobb, Patrick Barrett & Caleb Kleppner, *Preserving and Expanding the Right to Vote: Ranked-Choice Voting*, 1 CONST. FOR LAW & POL'Y ADVANCE 107, 116 (2007) (describing how party elites strive to maintain the status quo). An excellent example of this is a 2020 lawsuit by six sitting New York City Councilmembers, who have thus far unsuccessfully challenged the city's implementation of ranked choice voting by arguing that efforts to educate New York voters have been insufficient. See *Complaint, Adams v. City of New York*, No. 160662-2020 (N.Y. Sup. Ct. Dec. 18, 2020). Critics believe the lawsuit is merely an effort by establishment politicians to prevent an electoral reform that may curtail their power. See Russell Berman, *The Democrats are Trying to Overturn an Election*, ATLANTIC (Dec. 22, 2020), <https://www.theatlantic.com/politics/archive/2020/12/democrats-election-ranked-choice-voting-new-york/617461/> [https://perma.cc/Q8G4-V24U].

16. See Louis Jacobson, *The Rise of Ranked Choice Voting*, UNIV. VA. CTR. FOR POL. (July 20, 2020), <https://centerforpolitics.org/crystalball/articles/the-rise-of-ranked-choice-voting/> [HTTPS://PERMA.CC/GHE7-JS9A] (reporting that Democrats are more open to ranked choice voting than Republicans and citing specific stark partisan divides in Maine and Minnesota). On the other side, a number of Democratic presidential candidates supported ranked choice voting. See *infra* p. 117. Republican skeptics include political groups, like the Alaska and Minnesota Republican parties, as well as conservative organizations, like the Heritage Foundation and the Independent Women's Law Center. See *Alaska Policy Forum Exposes Alarming Ramifications to Ranked Choice Voting*, ALASKA REPUBLICANS (Oct. 8, 2020), <https://alaskagop.net/alaska-policy-forum-exposes-alarming-ramifications-to-ranked-choice-voting/> [https://perma.cc/C6TX-QWKU]; see also Jennifer C. Bracer, *Ranked-Choice Voting Threatens to Distort Election Outcomes*, BOSTON GLOBE (Dec. 12, 2019, 12:00 AM), <https://www.bostonglobe.com/2019/12/12/opinion/no-it-threatens-distort-election-outcomes/> [https://perma.cc/N68A-CU22]; Hans A. von Spakovsky & J. Christian Adams, *Ranked Choice Voting is a Bad Choice*, HERITAGE FOUND. (2019); Hans A. von Spakovsky, *Ranked Choice Voting Should be Slotted as Dead Last as Election Reform*, HERITAGE FOUND. (Oct. 16, 2019), <https://www.heritage.org/election-integrity>

choice voting has yet to become as irredeemably polarized as other hot-button issues in the U.S., especially in democracy reform.¹⁷ One need only look to the November elections for evidence: the “red state” of Alaska approved ranked choice voting while the “blue state” of Massachusetts did not. Nor are all Republicans opposed to the system for all purposes; the Indiana and Utah Republican parties, for example, used ranked choice for their 2020 conventions.¹⁸ There thus remains room for building consensus around its adoption.

Facing this opportunity for bipartisan agreement, advocates will need tools to persuade ranked choice skeptics. Some discomfort with the system may stem from its perceived unfamiliarity. Some might feel that the system is “exotic” or foreign to the American understanding of democracy. To counter this notion, this Note will turn to a foundational American text¹⁹ and popular source among conservative thinkers²⁰: James Madison’s *Federalist No. 10*. This Note will demonstrate how the essay may be used by ranked choice advocates to dispel general public misgivings about the foreignness of ranked choice voting, persuade constitutional traditionalist judges in court, and appeal specifically to conservative skeptics by locating ranked choice voting within the larger American constitutional tradition. While at least one election reform organization has noted the connection between *Federalist No. 10* and ranked choice voting, none has elaborated upon it in any length.²¹ This Note aims to fill that gap.

While ranked voting may feel less familiar than voting for a single candidate, its goals are, in many ways, a logical extension of the political theory espoused at the nation’s founding. James Madison’s *Federalist No. 10* serves as an ideal gateway for understanding this connection. The philosophy underpinning ranked choice voting uncan-

commentary/ranked-choice-voting-should-be-slotted-dead-last-election-reform [https://perma.cc/J2UG-2ZFT].

17. Jason Kwak, *Ranked Choice Voting: Promising Signs of Bipartisan Support*, FAIRVOTE (Feb. 27, 2020), https://www.fairvote.org/rcv_promising_signs_of_bipartisan_support [HTTPS://PERMA.CC/4LCH-RCF6].

18. Matthew Oberstaedt, *Republican Officials Make Strides with Ranked Choice Voting in 2020*, FAIRVOTE (July 22, 2020), https://www.fairvote.org/republican_officials_make_strides_with_ranked_choice_voting_in_2020 [https://perma.cc/9MQ4-AQTB].

19. See, e.g., Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473, 474 (1988); ALBERT FURTWANGLER, *THE AUTHORITY OF PUBLIUS: A READING OF THE FEDERALIST PAPERS* 112 (1984) (“[*Federalist 10*] is the *Federalist* essay most often anthologized, taught, studied, and remembered in this century.”).

20. See *infra* p. 125-27.

21. See Drew Penrose, *The Violence of Faction: Partisanship Hardens in 2016*, FAIRVOTE (Dec. 5, 2016), https://www.fairvote.org/the_violence_of_faction [https://perma.cc/5NSF-4B6Z].

nily mirrors Madison's views on factions, the tyranny of the majority, and the benefits of a pluralistic society. *Federalist No. 10* remains a seminal, celebrated Founding text to this day; it is a document some scholars even believe to be a "proof-text" of the American Constitution.²² Because of the essay's role in the American political imagination, support from *Federalist No. 10* lends unique persuasive value to any proposed change to the structure of American government, including ranked choice voting. Indeed, the Supreme Court has repeatedly quoted *Federalist No. 10* in election law cases,²³ and a federal district court in Maine has even cited to the essay while specifically upholding the constitutionality of ranked choice.²⁴ This Note will therefore situate ranked choice voting in the American democratic ethos by demonstrating the extent to which Madisonian theory supports its goals. In doing so, it offers election reform advocates a rhetorical tool that may reduce mistrust in ranked choice voting and minimize political polarization over its adoption.

Like *Federalist No. 10*, ranked choice voting strives to disrupt the negative influences of what Madison terms "factions," ideologically aligned groups of citizens that share a passionate cause and work together against the interests of other citizens or the common good.²⁵ As this Note will demonstrate, our current system has a great number of factions, including opposing political parties; ideologically divided groups within political parties; incumbent politicians versus new candidates; establishment political parties versus third parties; and racially-cohesive voting blocs that prevent minority voting groups from achieving political power. Ranked choice voting, like *Federalist No. 10*, aims specifically to prevent oppression of minority political groups when any of these factions achieve majority control. And like *Federalist No. 10*, it aims to do so through an expansion of the polity, increasing the number of interest groups and political parties that participate in the political process and allowing the resulting diversity of

22. See, e.g., Rakove, *supra* note 19, at 474.

23. *Infra* p. 125.

24. *Baber v. Dunlap*, 376 F. Supp. 3d 125, 137 (D. Me. 2018) ("In the final analysis, RCV is not invalidated by Article I because there is no textual support for such a result and because it is not inherently inconsistent with our Nation's republican values. In fact, the opposite is true . . . In discussing the dangers of political factions to a 'well constructed Union,' James Madison made some observations that are worth considering when evaluating the bona fides of ranked-choice voting.").

25. See THE FEDERALIST NO. 10 (James Madison) ("By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community.").

groups to counterbalance oppressive majoritarian impulses.²⁶ Ranked choice voting achieves this by disrupting incumbent and two-party control, encouraging the rise of third parties, and incentivizing candidates to reach broader swaths of voters, including those outside their own parties. This Note will also address two possible sources of tension between ranked choice voting and Madisonian theory, dismissing each in turn.

Part I of this Note functions as a primer on ranked choice voting. It will elaborate on the history and mechanics of the voting system and describe its recent surge in popularity. Part II will provide background on *The Federalist Papers*, describe the significance of *Federalist No. 10* to the American conception of democracy, and demonstrate the importance of *Federalist No. 10* to conservative thinkers. Finally, Part III will outline the many ways in which *Federalist No. 10* reinforces arguments for ranked choice voting, illustrating the essay's potential to operate as a powerful persuasive device for advocates. It will do so by defining the essay's terms, expounding upon its meaning, and analyzing its philosophical support of ranking choice voting.

PART I: RANKED CHOICE VOTING: A PRIMER

Our comparative analysis of Madisonian theory and ranked choice voting cannot proceed without first discussing the fundamentals of both. This Part will provide a primer on ranked choice voting, describing its history, how it functions, and the arguments for and against its adoption. It will then discuss its current status, including information on its increased implementation.

The ranked choice system has a long history in the U.S., originating partly out of the Massachusetts Institute of Technology (MIT) in the 1870s.²⁷ Although current ranked choice opponents have tried to

26. See, e.g., Douglas Sitler, *The Consequences of Ranked Choice Voting*, UNIV. BUFFALO: NEWS CTR. (Jan. 6, 2020), <http://www.buffalo.edu/news/tipsheets/2020/001.html>. (explaining that ranked choice voting provides a “broader field of candidates and voters”); Daniel Stid, *Recovering a Madisonian Congress*, in *A MADISONIAN CONSTITUTION FOR ALL* 57, 66 (Nat’l Constitution Ctr. 2017) (“The first pathway involves mitigating the effects of factions, in particular polarization and hyper-partisanship, that too often work to inflame passions and grind things in Congress to a halt. . . . An emerging reform that may hold more promise is ‘ranked choice voting’ (RCV). This election format gives voters more choices. . .”).

27. Jacey Fortin, *Why Ranked-Choice Voting Is Having a Moment*, N.Y. TIMES (Feb. 10, 2020), <https://www.nytimes.com/2020/02/10/us/politics/ranked-choice-voting.html> (describing the origins of ranked choice voting); see also *Dudum v. Arntz*, 640 F.3d 1098, 1103 (9th Cir. 2011) (“First developed in the 1870s by W.R. Ware, a professor at the Massachusetts Institute of Technology, instant runoff (or ‘ranked-

label the system new or foreign,²⁸ in fact many U.S. jurisdictions began employing ranked choice as far back as the turn of the twentieth century.²⁹ The use of the ranked choice voting decreased in the 1950s due to changes in vote tabulation technology, but modern voting machines have removed technological barriers and the ranked choice system has once again surged in popularity.³⁰ Ranked choice voting has the potential to significantly improve a number of deeply-rooted flaws in the modern electoral system, such as party polarization, negative campaigning, and the need to vote strategically.³¹ As recent attention from national newspapers and major politicians shows,³² the system will likely remain one of the most prominent issues for election reform advocates in the years to come.

A: The History and Mechanics of Ranked Choice Voting

Ranked choice or preferential voting, as a general matter, describes a system of democratic elections in which voters rank candidates in order of preference and the rankings determine winning candidates.³³ While there are several methods of counting ranked votes, instant runoff voting (IRV) and single transferrable vote (STV)—explained in more detail below—are the two most commonly employed by U.S. jurisdictions. Nevertheless, given common U.S. election parlance, this Note will refer to all tabulation systems under the umbrella term “ranked choice voting,” unless otherwise necessary.

Ranked choice voting existed long before the twenty-first century. In 1861, John Stuart Mill, one of the most influential political

choice’ or ‘alternative vote’) systems have been used in the United States and elsewhere at various times since then.”).

28. See First Amended Complaint, *supra* note 11, at 25; Scott Thistle, *State House Leaders Allow Opposing Bills to Address Ranked-choice Voting*, PRESS HERALD (May 25, 2017), <https://www.pressherald.com/2017/05/25/state-house-leaders-admit-two-opposing-bills-to-address-ranked-choice-voting/> (quoting Maine Republican leadership as saying the ranked choice voting law is “unAmerican”).

29. Krist Novoselic, *A Brief History of Ranked Choice Voting*, FAIRVOTE (Aug. 26, 2015), <https://www.fairvote.org/a-brief-history-of-ranked-choice-voting> (describing ranked choice voting’s history in the United States); Jack Santucci, *Party Splits, Not Progressives: The Origins of Proportional Representation in American Local Government*, 45 AM. POL. RSCH. 494 (2016).

30. See ZOCH, *supra* note 6; *Voting Systems and RCV*, FAIRVOTE, https://www.fairvote.org/voting_systems_and_rcv (last visited May 24, 2021).

31. See *Benefits of RCV*, FAIRVOTE, *supra* note 9; Slaughter et al., *supra* note 9 (describing ranked choice voting’s effect on party polarization).

32. See *infra* ps. 17–18.

33. *How RCV Works*, FAIRVOTE, *supra* note 7.

economists of the nineteenth century, promoted an early version³⁴ for multi-seat elections (races that elect multiple winners for two or more open positions in the same role³⁵). About a decade later, MIT professor William Ware developed a version for single-winner elections (races with one winner for a single position, like those for governor or president).³⁶ Various U.S. jurisdictions have employed this voting system since the turn of the twentieth century.³⁷ Interest in ranked choice voting grew between 1890 and 1920, a time when both the federal government and state lawmakers enacted a number of major progressive voting reforms, such as women’s suffrage and direct election of U.S. senators by voters, as opposed to appointment by state legislatures.³⁸ During this period, a number of jurisdictions adopted ranked choice voting, including cities in New York, Massachusetts, and Ohio.³⁹ Many jurisdictions subsequently abandoned ranked choice voting, though not because it failed on the merits. Its use initially fell out of favor in the 1950s with the advent of ballot counting machines that could only process single-choice votes.⁴⁰ Twenty-first century technology has, however, once again shifted the methods and manners of vote tabulation, allowing for machine-operated, computerized, and manual counting of ranked choice votes.⁴¹

34. JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 139–40 (1861). *See also* James Endersby & Michael J. Towle, *Making Wasted Votes Count: Turnout, Transfers, and Preferential Voting in Practice*, 33 *ELECTORAL STUD.* 144, 145 (2014).

35. One example of a multi-seat election would be an at-large City Council race in which voters elect two councilmembers from a pool of ten candidates.

36. Fortin, *supra* note 27 (describing the origins of ranked choice voting); *see also* *Dudum v. Arntz*, 640 F.3d 1098, 1103 (9th Cir. 2011) (“First developed in the 1870s by W.R. Ware, a professor at the Massachusetts Institute of Technology, instant runoff (or “ranked-choice” or “alternative vote”) systems have been used in the United States and elsewhere at various times since then.”).

37. Novoselic, *supra* note 29, at 1 (describing ranked choice voting’s history in the United States); Santucci, *supra* note 29, at 494–526.

38. Novoselic, *supra* note 29, at 2 (describing ranked choice voting’s history in the United States). The Constitution originally contemplated the selection of senators by state legislatures. *See* U.S. CONST. art. I, § 3. The Seventeenth Amendment, passed in April 1913, changed this and required the direct election of senators nationwide. *See Direct Election of Senators*, U.S. SENATE https://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm (last visited May 24, 2021) [<https://perma.cc/KHQ8-SBHA>].

39. *Id.*

40. Zoch, *supra* note 6, at 1.

41. *RCV and Election Administration: Voting Systems and RCV*, FAIRVOTE, https://www.fairvote.org/rcv_administration#voting_systems_and_rcv (last visited June 14, 2021).

Recent trends now show ranked choice voting once again growing in popularity in the U.S.⁴² The nation's first modern, major ranked choice voting breakthrough came in November 2016, when Maine became the first state to implement a ranked choice system for statewide elections.⁴³ Via ballot initiative, Maine voters passed the Ranked Choice Voting Act, which mandates preferential voting for all primary and general elections for governor, state legislature, and federal congressional offices.⁴⁴ Since then, ranked choice voting has only grown in popularity. According to the National Conference of State Legislatures, lawmakers in 2020 introduced sixty-seven ranked choice voting bills in twenty-two states and Washington, D.C, a marked increase from 2017, when lawmakers introduced only thirty-one bills in seventeen states.⁴⁵ In November 2020, both Alaska and Massachusetts voted on joining Maine in implementing the system statewide.⁴⁶ Although the Massachusetts proposal failed at the ballot box, Alaska's measure succeeded, meaning two states will now use ranked choice voting for national elections.⁴⁷

Jurisdictions use two primary methods for counting ranked votes: instant runoff voting (IRV) and single transferrable vote (STV). In single winner elections, such as for mayor or governor, election officials typically employ instant runoff voting (IRV).⁴⁸ Each voter first ranks the candidates in order of preference, and vote tabulation distributes the votes according to first choices.⁴⁹ If, after this distribution, no candidate has a majority of votes, the system eliminates the candidate with the fewest number of votes and transfers her ballots to each of her voters' second-choice candidates. The process of eliminating the worst-performing candidate and redistributing the ballots repeats until

42. See Fortin, *supra* note 27, at 1 (“ . . . ranked-choice voting has been gaining converts across the United States in recent years.”).

43. *Ranked Choice Voting in Maine*, ME. STATE LEGISLATURE, <http://legislature.maine.gov/lawlibrary/ranked-choice-voting-in-maine/9509> (last visited May 24, 2021) [<https://perma.cc/X4HX-Z77C>].

44. *Timeline of Ranked Choice Voting in Maine*, FAIRVOTE, https://www.fairvote.org/maine_ballot_initiative (last visited Jan. 31, 2020).

45. ZOCH, *supra* note 6, at 2.

46. Nik DeCosta-Klipa, *Question 2: What to Know About the Massachusetts Ranked Choice Voting Ballot Measure*, BOSTON.COM (Sep. 21, 2020), <https://www.boston.com/news/politics/2020/09/21/massachusetts-ballot-question-2-ranked-choice-voting>; ZOCH, *supra* note 6, at 2.

47. See *Ranked Choice Voting 2020 Ballot Measures*, FAIRVOTE, *supra* note 1.

48. See *How RCV Works*, FAIRVOTE, *supra* note 7.

49. See *Instant Runoff Voting: How Does it Work?*, FINDLAW, <https://www.findlaw.com/voting/how-u-s—elections-work/instant-runoff-voting—how-does-it-work.html> (last updated Mar. 17, 2020).

one candidate has a majority of votes.⁵⁰ The system seeks to rid elections of “spoilers”—candidates who split the vote and create a winning candidate who only achieved a plurality of votes.⁵¹ Because candidates cannot win with only a plurality vote share in an IRV election, voters are more likely to see their second or third choice win than their last. This means their next-best candidate wins the election, rather than their least favorite candidate.

For multi-winner elections, as in at-large city council or multi-seat legislature races, officials count ranked choice votes through a process known as single transferrable vote (STV). Its methodology and goals substantially overlap with IRV. Like with IRV, each voter ranks candidates in order of preference and votes are first distributed to voters’ number one choices.⁵² Candidates must reach or surpass a certain threshold of votes in order to win a seat.⁵³ If the first round of votes does not fill all seats, the system eliminates the candidates with the lowest totals and transfers ballots that ranked those candidates first to their designated second-choice candidate. Additionally, any candidate that receives more than enough votes to win—per the designated threshold—has their surplus ballots transferred to a second choice. Jurisdictions use a variety of methods to determine which surplus ballots to transfer, many of which involve algorithms and versions of random sampling.⁵⁴ The process repeats until each seat is filled. Although the process presents more complexity than a single-seat IRV election, voting rights advocates say it provides more accurate proportional representation than the current status quo.⁵⁵ It has also worked in practice for decades: Cambridge, Massachusetts has used STV since 1941, and more than twenty-one other cities have employed it at some point.⁵⁶

Ranked choice voting—whether IRV or STV—offers an alternative to the current U.S. election status quo, single-choice or “first-past-

50. See Jeffrey C. O’Neill, *Everything that Can Be Counted Does Not Necessarily Count: The Right to Vote and the Choice of a Voting System*, 2006 MICH. ST. L. REV. 327, 334 (2006).

51. 6 CHESTER JAMES ANTIEAU, ANTIEAU ON LOCAL GOVERNMENT LAW, § 87.10 (2nd ed. 2013).

52. See *How Proportional Representation Elections Work*, FAIRVOTE, https://www.fairvote.org/how_proportional_representation_elections_work (last visited May 24, 2021).

53. This is often referred to as the Droop quota. The Droop quota represents the “smallest integer quota such that no more than K candidates can have a quota of votes.” Nicolaus Tideman, *The Single Transferable Vote*, 9 J. ECON. PERSP. 27, 30 (1995).

54. See *id.* at 33–35.

55. See, e.g., O’Neill, *supra* note 50, at 336–37.

56. *Id.* at 337.

the-post” voting, which Americans inherited largely unquestioningly from Great Britain.⁵⁷ In most single-choice systems, every voter can select only one candidate and the candidate with the largest number of total votes wins, with or without a majority of the votes.⁵⁸ Some single-choice jurisdictions do still require a candidate to receive a majority of the vote, but this requires a second, single-choice run-off election between the two candidates who received the most votes.⁵⁹ Single-choice voting has the benefit of simplicity and ease of administration. Voters need only choose one candidate, not rank multiple selections, while officials need only do one vote count, avoiding the vote transfers required of preferential voting. The system also generally offers finality, for the candidate with highest vote total wins without subsequent rounds of counting.⁶⁰ With little difficulty, voters can understand for whom their vote is cast and how that vote will be counted.

However, single-choice voting also has deep flaws. First, in single-choice systems, candidates can win—and often do win—with a mere plurality of the vote. Second, the system creates a perverse incentive structure that can cause election results to deviate substantially from what individual voters and the larger polity actually prefer.⁶¹ For instance, a voter, believing her vote would go to waste if cast for a candidate unlikely to win, might forgo voting for the underdog candidate she prefers and instead vote for a candidate she favors less but thinks is likely to beat a candidate she most dislikes. This is known as strategic voting. Moreover, a candidate ideologically furthest from the majority of voters may actually win an election due to “vote splitting,” a phenomenon in which two candidates divide voter support, preventing a critical mass from favoring either of the candidates and therefore allowing a less popular third candidate to prevail.⁶²

57. See *First Past the Post*, ACE PROJECT, <https://aceproject.org/main/english/es/esd01.htm> (last visited May 24, 2021); Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked Choice Voting*, 109 CAL. L. REV. 1773 (2021).

58. Pildes & Parsons, *supra* note 57, at 1780–81.

59. *Id.* at 1782–83; see also, e.g., GA. CODE ANN. § 21-2-501 (2020) (“ . . . no candidate shall be nominated for public office in any primary or special primary or elected to public office in any election or special election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office.”).

60. Of course, there are still recounts and instances of election litigation, but this is not the norm for single-choice elections. See Pildes & Parsons, *supra* note 57, at 1781.

61. See THE LEAGUE OF WOMEN VOTERS OF WASHINGTON, A REVIEW OF VARIOUS ELECTION METHODS 4 (2020).

62. See Pildes & Parsons, *supra* note 57, at 1781.

Ranked choice voting strives to remedy the problems associated with single-choice. The system allays the problem of “vote splitting” by allowing voters to choose and rank multiple candidates, as described above.⁶³ Split vote totals will be consolidated as the system eliminates low-vote candidates and transfers second choice votes. Additionally, because voters may select and rank multiple candidates, preferential voting minimizes strategic voting and reduces incentives to vote only for a less-preferred candidate with a perceived greater likelihood of winning.⁶⁴ Both features lessen the likelihood a polity will elect a candidate not actually preferred by the majority of its voters.

Ranked choice voting has other benefits too. Its structure, for one, helps cut through the polarized two-party nature of U.S. politics.⁶⁵ Because candidates must achieve an actual majority of the vote, it prevents cohesive, ideologically extreme voting blocs in the minority from prevailing over more politically diverse majorities.⁶⁶ Advocates say the system also incentivizes candidates to conduct outreach and appeal to a broader cross-section of voters in the hopes of obtaining second-choice votes. Empirical research shows that this also leads campaigns to be more positive in tone because candidates must avoid alienating their opponents’ supporters.⁶⁷ FairVote, the leading

63. See Adam Ginsburg, *No More “Splitting the Vote” with Ranked Choice Voting*, FAIRVOTE (May 8, 2020), https://www.fairvote.org/no_more_splitting_the_vote_with_ranked_choice_voting [<https://perma.cc/S3QZ-MSK5>].

64. Andrew Spencer, Christopher Hughes & Rob Richie, *Escaping the Thicket: The Ranked Choice Voting Solution to America’s Districting Crisis*, 46 CUMB. L. REV. 377, 393 (2015).

65. See, e.g., Russell Berman, *A Step Toward Blowing Up the Presidential-Voting System*, ATLANTIC (Sept. 20, 2019), <https://www.theatlantic.com/politics/archive/2019/09/ranked-choice-voting-2020/598303/>; RACHEL KLEINFELD, RICHARD YOUNGS & JONAH BELSER, CARNEGIE ENDOWMENT FOR INT’L PEACE, RENEWING U.S. POLITICAL REPRESENTATION: LESSONS FROM EUROPE AND U.S. HISTORY 27 (2018); Grant Tudor, *More Information Is More Representation: An Argument for Ranked-Choice Voting*, KENNEDY SCH. REV. (May 2, 2019), <https://ksr.hkspublications.org/2019/05/02/argument-for-ranked-choice-voting/> [<https://perma.cc/S64Y-LCXK>].

66. Tudor, *supra* note 65.

67. See Todd Donovan, Caroline Tolbert & Kellen Gracey, *Campaign Civility Under Preferential and Plurality Voting*, 42 ELECTORAL STUD. 157, 157–63 (2016) (“Our surveys of voters indicate that people in cities using preferential voting were significantly more satisfied with the conduct of local campaigns than people in similar cities with plurality elections. People in cities with preferential voting were also less likely to view campaigns as negative, and less likely to respond that candidates were frequently criticizing each other.”); KLEINFELD ET AL., *supra* note 65, at 27 (“Ranked-choice voting enables more extreme candidates to receive a hearing, but it favors candidates who campaign to reach the broadest number of voters as a second- or third-choice candidate. A study conducted for the advocacy organization FairVote found that ranked-choice voting reduces negative campaigns, which would likely help re-

ranked choice voting election reform advocacy group in the U.S., lists several other benefits of the system, including increased candidate choice for voters, increased political party choice for voters,⁶⁸ and better representation for racial and ethnic minority groups that are politically overwhelmed by cohesive white plurality voting blocs in single-choice elections.⁶⁹ As such, ranked choice voting provides representation that better reflects the entire community's true electoral preferences.

Opponents of ranked choice voting point to the complexity of the voting and tabulation process. They argue that voter confusion may depress turnout or inadvertently result in the disqualification of large numbers of ballots because of completion errors.⁷⁰ Others point to a more tenuous argument about "ballot exhaustion," which occurs when a voter's ballot must be discarded before the final candidate selection,⁷¹ either because: (1) a voter did not rank enough candidates and her preferred candidates were eliminated; or (2) the jurisdiction limited the number of candidates voters may rank and a voter's preferred candidates were eliminated.⁷² While some argue this creates a potential crisis of legitimacy,⁷³ the phenomenon is hardly different from when a voter chooses a losing candidate in a single-choice election.⁷⁴ A voter's vote still counts, even if her preferred candidate does not win.

duce polarization."); *see also* Pildes & Parsons, *supra* note 57, at 1785 ("Supporters of RCV also claim that it exerts a greater moderating influence on the tenor and tone of campaigns because RCV incentivizes the building of broader coalitions than does SCV.").

68. *Third Party and Independent Representation*, FAIRVOTE, https://www.fairvote.org/third_party_and_independent_representation (last visited May 24, 2021) [<https://perma.cc/2T6Q-DJQA>] ("RCV allows supporters of third parties and minor candidates to sincerely rank their preferred candidate first without feeling like their votes are wasted.")

69. *See Minority Representation*, FAIRVOTE, https://www.fairvote.org/minority_representation (last visited May 24, 2021) [<https://perma.cc/Y3NK-UBAG>].

70. Pildes & Parsons, *supra* note 57, at 1785–86.

71. *Id.* at 1786–87; Simon Waxman, *Ranked-Choice Voting Is Not the Solution*, DEMOCRACY J., (Nov. 3, 2016, 3:03 PM), <https://democracyjournal.org/arguments/ranked-choice-voting-is-not-the-solution/>; Craig M. Burnett & Vladimir Kogan, *Ballot (and Voter) "Exhaustion" Under Instant Runoff Voting: An Examination of Four Ranked-Choice Elections*, 37 ELECTORAL STUD. 41, 42 (2015), <https://cpb-us-w2.wpmucdn.com/u.osu.edu/dist/e/1083/files/2014/12/ElectoralStudies-2fupfhd.pdf>.

72. Pildes & Parsons, *supra* note 57, at 1786.

73. *See* Burnett & Kogan, *supra* note 71, at 48 ("... the possibility that exhaustion might tip the balance in the final round poses a serious risk to the democratic legitimacy of the method and of the outcomes it produces. . .").

74. Pildes & Parsons, *supra* note 57, at 1787–87.

B: Election Reform on the Rise: The Current Status of Ranked Choice Voting

Before the November 2020 election, more than fifteen U.S. cities and the state of Maine relied on ranked choice voting for local, city, or federal elections.⁷⁵ Additional jurisdictions joined this number in 2021⁷⁶ and the total will only increase by the next election, as jurisdictions that voted for adoption continue to implement the system. Additionally, twenty-four U.S. states have used the system for at least one type of election, including local and city elections,⁷⁷ presidential primaries, military and overseas voting, party elections, and special elections.⁷⁸ As of July 2021, almost 10 million people in the U.S. live in jurisdictions that use a ranked choice system.⁷⁹ New York City has also recently adopted ranked choice voting by ballot referendum and its 2021 primary election was the largest citywide ranked choice election in U.S. history.⁸⁰ Globally, much of the English-speaking world has begun using ranked choice voting for major elections, including Australia, Ireland, New Zealand, Northern Ireland, and Scotland.⁸¹

Ranked choice voting continues to grow in popularity in the United States. In 2019, nine new American cities adopted the system for the first time.⁸² The year 2020 also marked the largest number of jurisdictions in U.S. history to put ranked choice on the ballot.⁸³ Six

75. See DETAILS ABOUT RANKED CHOICE VOTING: *Where is Ranked Choice Voting Used?*, FAIRVOTE, *supra* note 5.

76. *Id.* (citing 23 cities that used ranked choice for the first time in 2021, including New York City and 19 cities in Utah).

77. Such as in Oregon, California, Utah, Colorado, New Mexico, Tennessee, Florida, Michigan, Wisconsin, Maryland, and Massachusetts. See *id.*

78. *Id.*

79. *Data on Ranked Choice Voting*, FAIRVOTE, https://www.fairvote.org/data_on_rcv#research_snapshot (last visited May 24, 2021) [<https://perma.cc/9ELQ-43BL>].

80. Anna Purna Kambhampaty, *New York City Voters Just Adopted Ranked-Choice Voting in Elections. Here's How It Works*, TIME (Nov. 6, 2019, 5:45 PM), <https://time.com/5718941/ranked-choice-voting>; Elena Gilbertson Hall, *Success in Biggest City-wide Ranked Choice Voting Election in American History*, FAIRVOTE (Jun. 25, 2021), https://www.fairvote.org/success_in_biggest_ranked_choice_voting_election_in_history.

81. DETAILS ABOUT RANKED CHOICE VOTING: *Where Is Ranked Choice Voting Used?*, FAIRVOTE, *supra* note 5.

82. Nancy Lavin, *Ranked Choice Voting Reform on the Rise in 2019*, FAIRVOTE (Jan. 28, 2019), https://www.fairvote.org/franked_choice_voting_reform_on_the_rise_in_2019 [<https://perma.cc/2AC3-JWJS>].

83. See *Ranked Choice Voting 2020 Ballot Measures*, FAIRVOTE, *supra* note 1 (Ballot measures appears in two states and five cities. Including an election in Portland, Maine earlier in 2020, this represents the “most jurisdictions voting on RCV in one year in American history”).

cities and one state voted to adopt the system. Even before the November 2020 elections, the Democratic presidential primary candidates weighed in. Former Democratic Party hopeful Andrew Yang formally added ranked choice voting to his platform,⁸⁴ Senator Bernie Sanders openly endorsed it,⁸⁵ and Senator Elizabeth Warren voiced support.⁸⁶ Furthermore, at least two bills were introduced in Congress in 2020: Democratic Congressman Jamie Raskin's H.R. 4464, the Ranked Choice Voting Act,⁸⁷ and Democratic Congressman Donald Beyer's H.R. 4000, the Fair Representation Act.⁸⁸

Major publications have also begun to recognize the system's surge in popularity and, in some cases, even voice support for its implementation.⁸⁹ The *New York Times*, for example, wrote in early 2020 that ranked choice voting was "having a moment."⁹⁰ Its Editorial Board later recommended ranked voting for all political primaries.⁹¹ More recently, the *Washington Post* published an editorial calling for ranked choice voting in Washington D.C. after the city's 2020 election featured an at-large City Council race with twenty-three candidates vying for only two seats.⁹²

84. *Ranked Choice Voting*, YANG 2020, <https://www.yang2020.com/policies/rankedchoice/> (last visited May 24, 2021) [<https://perma.cc/7ZWZ-A8HR>].

85. Adam Ginsburg, *Sen. Bernie Sanders, at New Hampshire Town Hall, Endorses Ranked Choice Voting*, FAIRVOTE (Jan. 10, 2020), https://www.fairvote.org/sen_berniesanders_at_new_hampshire_town_hall_endorses_ranked_choice_voting [<https://perma.cc/RW2U-N47N>].

86. Nik Decosta-Klipa, *Elizabeth Warren Sounds Very Open To Ranked Choice Voting*, Boston.com (June 11, 2019), <https://www.boston.com/news/politics/2019/06/11/Elizabeth-Warren-Ranked-Choice-Voting>.

87. H.R. 4464, 116th Cong. (2019).

88. H.R. 4000, 116th Cong. (2019).

89. See, e.g., Sean McMorris, *There's a Better Way to Vote: Choose More Than One Candidate and Rank Them*, L.A. TIMES, (Mar. 18, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-03-18/ranked-choice-vote-early-voting-primary-elections-wasted-votes>; Osterholm & Slavitt, *supra* note 9; Peter Fromuth, *Ranked Choice Voting Is Easier Than It Sounds. Maybe It Would Cure Our Awful Politics*, USA TODAY (Sept. 6, 2018, 5:00 AM), <https://www.usatoday.com/story/opinion/2018/09/06/ranked-choice-voting-elevate-moderates-reduce-polarization-column/1196693002/> [<https://perma.cc/HGZ7-ECVH>].

90. Fortin, *supra* note 27.

91. Editorial, *The Primaries Are Just Dumb*, N.Y. TIMES (Feb. 26, 2020), <https://www.nytimes.com/2020/02/26/opinion/democrats-primary-south-carolina.html> [<https://perma.cc/FMP6-V44X>].

92. Editorial, *This Year's D.C. Council Elections Show Why the City Should Adopt Ranked-Choice Voting*, WASH. POST (Nov. 11, 2020), https://www.washingtonpost.com/elections/opinions/this-years-dc-council-elections-show-why-the-city-should-adopt-ranked-choice-voting/2020/11/11/840cf148-238e-11eb-952e-0c475972cfc0_story.html. [hereinafter *City Should Adopt Ranked-Choice*] [<https://perma.cc/RD2L-CC74>] ("That far more people voted against the two candidates than for them under-

As with any new, large-scale policy, increased adoption also leaves ranked choice voting open to legal challenges. Thus far, ranked choice has not been widely litigated, despite its growing use in politics around the country, leaving courts without developed guidelines or consensus on the issue.⁹³ Two cases—in Maine and Massachusetts—have challenged ranked choice under state constitution plurality provisions, which specify that a candidate with a “plurality” of the vote must win in state elections.⁹⁴ In both cases, ranked choice opponents argued that multiple rounds of counting, aimed at achieving a majority, contravenes the requirement that a candidate who achieves a plurality of the vote wins the election. Although the Massachusetts court rejected this rationale, the Maine court agreed and struck down ranked choice voting in state elections. Even so, the federal District Court in Maine upheld the voting system under the Federal Constitution.⁹⁵ Preferential voting is therefore used for all state and federal primaries in Maine, but only for federal—not state—general elections.

It remains unclear how similar challenges in other states would fare. Litigants have brought other challenges under various federal laws—namely, the First Amendment, Fourteenth Amendment, Elections Clause, Guarantee Clause, and Voting Rights Act.⁹⁶ Litigants raised these issues in California,⁹⁷ Maine,⁹⁸ Massachusetts,⁹⁹ Michi-

scores the need for the District to follow the lead of other cities in adopting ranked-choice voting.”).

93. See Pildes & Parsons, *supra* note 57, at 1778 n. 9–11 (describing six federal and two state constitutional challenges to ranked choice voting).

94. *Id.* at 1803. Plurality provisions say that a candidate with the plurality of the vote wins the election.

95. See *Timeline of Ranked Choice Voting in Maine*, FAIRVOTE, *supra* note 44; *Baber v. Dunlap*, 376 F. Supp. 3d 125, 134 (D. Me. 2018). Maine Republicans filed suit again in 2020, but this suit was unsuccessful. See Scott Thistle, *Maine Republicans Seek to Repeal Ranked-Choice Voting in Presidential Elections*, PRESS HERALD (Feb. 4, 2020), <https://www.pressherald.com/2020/02/04/maine-republicans-seek-to-repeal-ranked-choice-voting-in-presidential-elections/>; Marina Villeneuve, *Maine To Allow Ranked Votes in General Presidential Election*, AP NEWS (Sept. 6, 2019), <https://apnews.com/article/legislature-us-news-elections-voting-maine-188531d476214dadaed5fd1eaf75bca3>.

96. See *Dudum v. Arntz*, 640 F.3d 1098, 1103 (9th Cir. 2011) (Fourteenth Amendment); *Minnesota Voters All. v. City of Minneapolis*, 766 N.W.2d 683, 697 (Minn. 2011) (First and Fourteenth Amendments); *McSweeney v. City of Cambridge*, 422 Mass. 648, 652–54 (1996) (Fourteenth Amendment); *Stephenson v. Ann Arbor Bd. of Canvassers*, No. 75–10166 AW (Mich. Cir. Ct. Nov. 1975) (Fourteenth Amendment); *Baber*, 376 F. Supp. 3d at 134 (Fourteenth Amendment, Elections Clause, First Amendment, Voting Rights Act); *Hile v. City of Cleveland*, 107 Ohio St. 144, 150 (1923) (Guarantee Clause).

97. *Dudum*, 640 F.3d at 1104.

98. *Baber*, 376 F. Supp. 3d at 125.

99. *McSweeney*, 422 Mass. at 648.

gan,¹⁰⁰ Minnesota,¹⁰¹ and Ohio.¹⁰² None successfully blocked ranked choice voting. Even so, without extensive testing in court, especially at the state level, ranked choice voting remains susceptible to litigation.¹⁰³

Moving forward, as ranked choice voting proliferates, advocates will need methods to persuade skeptical politicians, voters, and courts that preferential voting aligns with the values undergirding American democracy. Situating the voting system within our larger understanding of American constitutional theory will help accomplish this. By demonstrating that Founding political theory supports the goals of ranked choice voting, advocates can appeal to conservative traditionalists, make constitutional values-based arguments to courts, and demonstrate to the broader public that the voting system is not foreign to American democratic ideals. For that reason, this Note will next turn to theory and begin its exploration of Madison's *Federalist No. 10*.

PART II:

THE SIGNIFICANCE OF FEDERALIST NO. 10

This Part will provide background on *The Federalist Papers* and illustrate the theoretical, social, and legal significance of *Federalist No. 10*. In doing so, it will set the stage for a comparison between Madisonian philosophy in *Federalist No. 10* and modern arguments for ranked choice voting. Although there are certainly other political philosophies with ties to ranked choice voting,¹⁰⁴ none compares to

100. *Stephenson*, No. 75–10166 AW.

101. *Minnesota Voters All.*, 766 N.W.2d at 694.

102. *Hile v. City of Cleveland*, 107 Ohio St. 144, 150 (1923).

103. Alaska, for example, faced a legal challenge to ranked choice voting almost immediately after passing it in the November 2020 election. See James Brooks, *Law-suit Challenges Alaska's New Ranked-Choice Voting Ballot Measure*, ANCHORAGE DAILY NEWS (Dec. 1, 2020), <https://www.adn.com/politics/2020/12/01/lawsuit-challenges-alaskas-new-ranked-choice-voting-ballot-measure/> [<https://perma.cc/MG5C-ZT7B>]. Additionally, New York City faced a challenge right before its first election using the system, despite ranked choice voting receiving seventy-four percent of the vote. See Dana Rubinstein, Jeffery C. Mays & Emma G. Fitzsimmons, *Why Some N.Y.C. Lawmakers Want to Rethink Ranked-Choice Voting*, N.Y. TIMES (Apr. 23, 2021), <https://www.nytimes.com/2020/12/09/nyregion/ranked-choice-lawsuit-voting.html>. Maine also continued to face legal challenges in 2020 even after multiple rounds of litigation in 2018. See Jacob Posik, *New Lawsuit Seeks to End the Use of Ranked-Choice Voting in Maine*, MAINE WIRE (July 27, 2020), <https://www.themainewire.com/2020/07/new-lawsuit-seeks-to-end-the-use-of-ranked-choice-voting-in-maine/>.

104. See, e.g., Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775 (2000).

Federalist No. 10, especially given its unparalleled influence on American political theory. The tenth *Federalist* is one of eighty-five essays that comprise *The Federalist Papers*, arguably the most influential essay collection in American history. Indeed, few documents provide as rich fodder for constitutional interpretation as *The Federalist Papers*. Legal scholars have dedicated much effort to describing the Supreme Court’s “peculiar deference” to the essays.¹⁰⁵ That one of its authors, James Madison, is widely regarded as “the Father of the Constitution” only advances its position in the interpretative canon.¹⁰⁶ This Part will first chronicle the history of *The Federalist Papers* before specifically focusing on *Federalist No. 10*. It will then illustrate *Federalist No. 10*’s rhetorical value by describing its significance to popular conceptions of American democracy, constitutional interpretation, and conservative political thought. Each of these aspects of *Federalist No. 10* can be used by ranked choice advocates to appeal to voters, judges, and politicians unconvinced of the value of ranked choice voting.

A: *The Federalist Papers*

The Federalist Papers began not as a single essay collection, but as a set of distinct newspaper columns published in coordination to generate support for a new U.S. Constitution. The authors—Alexander Hamilton, James Madison, and John Jay—wrote under the pen name “Publius” and published eighty-five essays in multiple newspapers in 1787 and 1788.¹⁰⁷ The project began in October 1787, only three weeks after the close of the Second Constitutional Convention.¹⁰⁸ While delegates to the Convention had in September successfully agreed upon a new document—what we know today as the U.S. Constitution—to replace the then-governing Articles of Confederation, the new document still required adoption by the states. As champions of democratic theory, the delegates chose to present the document directly to the people, who would then elect ratifying conventions in each state. Implementation of the Constitution required ratification by nine out of the thirteen states that comprised the union at the time.¹⁰⁹

105. J. Christopher Jennings, *Madison’s New Audience: The Supreme Court and the Tenth Federalist Visited*, 82 B.U. L. REV. 817, 819 (2002).

106. *Who’s The Father of the Constitution?*, LOC WISE GUIDE, <https://www.loc.gov/wiseguide/may05/constitution.html> (last visited May 24, 2021).

107. Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 802 (2007).

108. *Id.* at 807.

109. LANCE BANNING, *FOUNDING VISIONS: THE IDEAS, INDIVIDUALS, AND INTERSECTIONS THAT CREATED AMERICA* 133 (2014).

Certain states looked more favorably upon the Constitution than others. New York, a state that fared well under the Articles of Confederation, reigned chief among skeptics.¹¹⁰ Objections to the Constitution ranged from honorable demands for a bill of rights to a self-serving desire to protect local politicians and institutions that maintained considerable power under the current status quo.¹¹¹ Alexander Hamilton, as one of New York's delegates to the Constitutional Convention, led the task of persuading New Yorkers to support the new Constitution.¹¹² Shortly after the Convention, he conceived of the essay project which would later become known as *The Federalist Papers*.¹¹³ Hamilton then recruited Jay and Madison to aid him in writing the essays to inspire support for the proposed Constitution.¹¹⁴ Madison was a helpful addition; not only had he played an integral role in the drafting of the Constitution, but he had also kept detailed notes of the debates.¹¹⁵ Well-versed in political theory, Madison undertook the task of explaining the history and philosophy of republics and confederacies, and advocating for the anatomy of new American government.¹¹⁶ *The Federalist Papers* evolved over time into much more than a political campaign aimed at late 18th century New Yorkers. Within the lifetime of its authors, the essays became *the de-*

110. Under the Articles of Confederation, New York was able to tax international imports at its port, a power that would be taken away under the Constitution. New York was also set to have fewer representatives in Congress than Virginia under the new constitution. *See id.* at 133–34; RON CHERNOW, *ALEXANDER HAMILTON* 244 (2004). New York's opposition likely came as no surprise to Convention delegates: New York Governor George Clinton publicly and avowedly opposed the proposed Constitution, and two of New York's three delegates to the Convention had withdrawn from the Convention in protest midway through. BANNING, *supra* note 109, at 134; CHERNOW, *supra* note 110, at 244.

111. CHERNOW, *supra* note 110 at 244.

112. *Id.* at 134–35.

113. He initially aimed the essays at New York voters. Hamilton authored the first Federalist Paper in October 1787, addressing his piece “To the People of the State of New York.” *THE FEDERALIST* No. 1 (Alexander Hamilton), (Clinton Rossiter ed., 1961).

114. Historian Ron Chernow argues that Hamilton specifically enlisted Madison for his intricate knowledge of the Convention's proceedings. CHERNOW, *supra* note 110, at 247. He also worked to recruit a number of other authors, including William Duer and Gouverneur Morris, though none panned out. BANNING, *supra* note 109, at 135; CHERNOW, *supra* note 110, at 247.

115. James W. Ducayet, *Publius and Federalism: On the Use and Abuse of The Federalist in Constitutional Interpretation*, 68 N.Y.U. L. REV. 821, 841–42 (1993) (“Madison played a pivotal role in Philadelphia, as his detailed notes of the convention attest.”). These notes aided the men in producing essays at a rapid rate of about three per week. BANNING, *supra* note 109, at 136.

116. CHERNOW, *supra* note 110, at 248. Jay's essays centered on foreign relations, and Hamilton's on the governing role of the executive, judiciary, and the Senate.

finitive commentary on the U.S. Constitution.¹¹⁷ In writing *The Federalist Papers*, the authors indelibly shaped and defined many central constitutional theories, including separation of powers, checks and balances, executive power, and federalism.¹¹⁸

Because of their utility in constitutional interpretation, *The Federalist Papers* are a darling of the courts.¹¹⁹ The essay collection as a whole endures as one of the most-cited non-legal texts in the judicial system,¹²⁰ and academics and jurists cite to *The Federalist Papers* as proof of original constitutional meaning more than any other text.¹²¹ In the 1821 case *Cohens v. Virginia*, Chief Justice Marshall succinctly described *The Federalist Papers*' unique elucidative value:

It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank, and the part two of its authors [i.e., Hamilton and Madison] performed in framing the constitution, put it very much in their power to explain the views with which it was framed.¹²²

Since the mid-twentieth century, the Supreme Court has increasingly turned to *The Federalist Papers* as a trusted guide for interpreting the Constitution.¹²³ More than 150 years after Chief Justice Marshall penned his celebration of *The Federalist Papers*, Justice David Souter gave perhaps their most full-throated endorsement in the 1997 case *Printz v. United States*, where he all but called *The Federalist Papers* dispositive: "In deciding these cases," he wrote, "it is the Federalist that finally determines my position."¹²⁴

B: *Federalist No. 10*

Federalist No. 10 stands out as one of the collection's most significant essays. It survives as a seminal founding work with contem-

117. BANNING, *supra* note 108, at 142. Thomas Jefferson once lauded *The Federalist Papers* as the some of the best political theory he had ever read. *Id.* at 141. See also Ducayet, *supra* note 115, at 822. Theodore Roosevelt, generations later, called it "on the whole the greatest book" on practical politics. CHERNOW, *supra* note 109, at 249.

118. BANNING, *supra* note 109, at 142.

119. See Jennings, *supra* note 105, at 819.

120. Maggs, *supra* note 107, at 802 ("In the aggregate, academic writers and jurists have cited the Federalist Papers as evidence of the original meaning of the Constitution more than any other historical source except the text of the Constitution itself.").

121. *Id.*

122. *Cohens v. Virginia*, 19 U.S. 264, 418 (1821).

123. Pamela C. Corley, Robert M. Howard & David C. Nixon, *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RSCH Q. 329, 333 (2005).

124. *Printz v. United States*, 521 U.S. 898, 971 (1997).

porary value in both politics and law, making it a useful persuasive tool for modern policy advocates. This section will provide brief background on the essay, before describing the growth of its significance in American political thought, its use in Supreme Court election law cases, and the historical reverence shown to it by American conservative thinkers. Each of these facets of *Federalist No. 10* make it an especially valuable philosophical text for ranked choice voting advocates.

The first of Madison's contributions to *The Federalist Papers*, *Federalist No. 10* appeared initially on November 22, 1787 in the New York newspaper *Daily Advertiser*.¹²⁵ The essay primarily functions as an argument in favor of the large, multi-state republican form of government set forth in the U.S. Constitution. In brief, Madison contends that a large polity best ameliorates the negative effects of "faction," which he defines as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."¹²⁶ In Madison's view, a large republic allows for a variety of factions to flourish, preventing any one faction from becoming too powerful and oppressing other factions. Part III of this Note will provide a more in-depth discussion of the arguments put forth in *Federalist No. 10*.

Of Madison's contributions to the *Federalist Papers*, *Federalist No. 10* now sits among the most famous and oft cited. Historian Albert Furtwangler named it "the *Federalist* essay most often anthologized, taught, studied, and remembered in this century."¹²⁷ Madison scholar David F. Epstein went further, arguing that the essay enjoys the most esteem of all American political writings.¹²⁸ Scholars also credit *Federalist No. 10* with originating and shaping a number of concepts crucial to American political philosophy. Chiefly, *Federalist No. 10* has led political scientists to credit Madison with originating American pluralism.¹²⁹ Pluralism, as Madison conceived of it, refers to a political society that functions with a variety of dispersed and interacting factions, in which public policy emerges as the end result

125. FURTWANGLER, *supra* note 19, at 114.

126. THE FEDERALIST No. 10, *supra* note 25, at 43 (James Madison).

127. FURTWANGLER, *supra* note 19, at 112.

128. DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 59 (1984).

129. See, e.g., William A. Galston, *Constitutional Surprises: What James Madison Got Wrong*, in WHAT WOULD MADISON DO?: THE FATHER OF THE CONSTITUTION MEETS MODERN AMERICAN POLITICS, BROOKINGS INSTITUTION 38 (Pietro S. Nivola & Benjamin Wittes eds., 2015).

of push-and-pull between those factions.¹³⁰ Pluralism plays a key role in the U.S. Constitution, providing the roots of American federalism and governmental checks and balances.

Unsurprisingly, *Federalist No. 10* also retains special value in the world of law. Legal scholars turn to the essay when faced with questions of constitutional interpretation. As a seminal Founding text, it carries exceptional interpretive value. Historian Jack N. Rakove has called *Federalist No. 10*, along with Madison's *Federalist 51*, the "proof-texts" of the Constitution. They function, he argues, as the fundamental entry-points for any investigation into American constitutional theory.¹³¹ For these reasons, the latter half of the twentieth century saw *Federalist No. 10* gain traction in court as a legal authority. Since the 1970s, the Supreme Court alone has cited *Federalist No. 10* in nearly twenty of its opinions.¹³² Lower federal courts and state courts have also relied on the text in over one hundred cases.¹³³ The Supreme Court most recently used *Federalist No. 10* in 2016 in *Evenwel v. Abbott*, a "one-person, one-vote" case arising out of Texas.¹³⁴ Between the opinion and concurrence, the justices cited *Federalist No. 10* three times, and *The Federalist Papers* at large ten times.¹³⁵

Beyond *Federalist No. 10*'s overall legal and political significance, there are other characteristics of the essay that render it espe-

130. See Jennifer L. Hochschild, *Pluralism, Identity Politics, and Coalitions: Toward Madisonian Constitutionalism*, in *THE FUTURE OF AMERICAN DEMOCRATIC POLITICS: PRINCIPLES AND PRACTICES* 11–28 (Gerald Pomper & Marc Weiner eds., 2003).

131. Rakove, *supra* note 19 at 474.

132. *Storer v. Brown*, 415 U.S. 724, 736 (1974); *Brown v. Hartlage*, 456 U.S. 45, 56 (1982); *Anderson v. Celebrezze*, 460 U.S. 780, 813 (1983); *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271 (1984); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 523 (1989); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 692, 710 (1990); *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 389 (1991); *Norman v. Reed*, 502 U.S. 279, 299 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1072 (1992); *Adarand Constructors v. Pena*, 515 U.S. 200, 251 (1995); *Gutierrez De Martinez v. Lamagno*, 515 U.S. 417, 428 (1995); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 368 (1997); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 424 (2000); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 591 (2000); *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 876 (2009); *Evenwel v. Abbott*, 136 S. Ct. 1120, 1138 (2016).

133. This number is based on the author's search results on Westlaw and Lexis.

134. Justice Thomas cited the essay in his concurrence for two propositions: first, that the Framers wished to protect property-holders from the tyranny of the majority; and second, that individual voting rights must sometimes "yield to countermajoritarian checks." *Evenwel*, 136 S. Ct. 1120, 1133 (2016) (Thomas, J., concurring).

135. *Evenwel*, 136 S. Ct. at 1127, 1137–40.

cially useful in ranked choice voting advocacy. For one, the Supreme Court uses *Federalist No. 10* frequently in election and voting rights opinions, setting historical precedent for the essay's value in those spaces. This makes ranked choice voting litigation the precise type of legal action most likely to inspire appeals to *Federalist No. 10*. Nearly two-thirds of the Supreme Court cases citing *Federalist No. 10* are election law and voting rights decisions.¹³⁶ The first Supreme Court citation of *Federalist No. 10*, for example, was in *Storer v. Brown* in 1974.¹³⁷ In *Storer*, the Court upheld a California statute that blocked independent candidates from appearing on the ballot in a general election if they had been a registered member of a political party at any time in the prior year. Justice White, writing for the Court, used *Federalist No. 10* to support the state's interest in regulating the ballot, arguing that the Founding Fathers warned of the dangers of "splintered parties and unrestrained factionalism."¹³⁸ *Timmons v. Twin Cities Area New Party* repeated this interpretation of *Federalist No. 10*, as did the dissent in *Anderson v. Celebrezze*.¹³⁹ This pattern of *Federalist No. 10* use by the Supreme Court lends greater persuasive power to the essay in election law cases specifically. Ranked choice voting, as an election law issue, thus presents the type of litigious opportunity most favorable to use of *Federalist No. 10*.

The essay possesses another benefit for ranked choice advocates: American conservatives exhibit distinct fondness toward *Federalist No. 10*. Conservative judges and right-leaning organizations often cite and celebrate the essay—a fascination that should work in favor of ranked choice voting advocacy, especially given recent opposition to the voting system originating largely in right-leaning circles.¹⁴⁰ By

136. This calculation is based on my own analysis of the legal issues in the Supreme Court cases that cite *Federalist No. 10*. For a lengthier description of these cases, see Jennings, *supra* note 105, at 833–50.

137. *Storer*, 415 U.S. at 736.

138. *Id.* It is not entirely clear from where in *Federalist 10* Justice White took the notion that "splintered parties" are bad. Nevertheless, this interpretation has been repeated in several other Supreme Court decisions.

139. *Timmons*, 520 U.S. at 368; *Anderson*, 460 U.S. at 813 (J. Rehnquist, dissenting).

140. Jeff Jacoby, Opinion, *Why Ranked Choice Is the Wrong Choice*, BOS. GLOBE (Sept. 20, 2020, 3:00 AM), <https://www.bostonglobe.com/2020/09/20/opinion/why-ranked-choice-is-wrong-choice/> (opinion piece written by a conservative columnist); Bruce Mohl, *Mass. GOP Opposes Ranked-Choice Voting*, COMMONWEALTH (Oct. 12, 2020), <https://commonwealthmagazine.org/politics/mass-gop-opposes-ranked-choice-voting/>; Ben Chin, *Republicans' Baseless, Baffling War on Ranked-Choice Voting*, BEACON (Apr. 6, 2018), <https://mainebeacon.com/republicans-baseless-baffling-war-on-ranked-choice-voting/>; JACOBSON, *supra* note 16; Spakovsky & Adams, *supra* note 16.

turning to *Federalist No. 10*, ranked choice advocates can utilize a text already extolled by the conservative community.

This overwhelming support of *Federalist No. 10* is rooted, in part, in conservative legal philosophy, something advocates can use to their advantage. In recent decades, Republican politics and conservative legal thought has embraced “originalism,” a theory of constitutional interpretation that emphasizes the intent of the Constitution’s Framers.¹⁴¹ One method of ascertaining such intent involves looking at contemporary documents by the Constitution’s authors, including, of course, *The Federalist Papers*, which is perhaps the most significant source of this kind.¹⁴² The essays thus maintain a special status in originalist, conservative circles. A 2005 analysis of all Supreme Court citations to *The Federalist Papers* supports this, showing a positive correlation between conservative ideology in justices and their number of citations to *The Federalist Papers*.¹⁴³ Among the essays, *Federalist No. 10* receives special attention. In the early twentieth century, conservatives opposed to progressive political and economic reforms used the essay as a rhetorical tool to support their legal positions.¹⁴⁴ Modern right-wing political and media organizations have continued that conservative tradition. Some have explained the ways in which Madison’s theory is “timeless,” while others have chastised “the left” for not appreciating *Federalist No. 10*’s value.¹⁴⁵ It is additionally worth noting that *Federalist No. 10*’s conservative popularity exists not only among political figures and academics, but also among jurists. Seventeen of the eighteen Supreme Court decisions that cite to *Federalist No. 10* include such citation in an opinion, concurrence, or

141. See Keith E. Whittington, *Originalism 2.0: The Twenty-Ninth Annual Federalist Society National Student Symposium on Law and Public Policy*, 34 HARV. J.L. & PUB. POL’Y 29, 29 (2011) (“Originalism as an approach to constitutional theory and constitutional interpretation is often associated with conservative politics.”).

142. See, e.g., Maggs, *supra* note 107, at 802; Ben W. Heineman Jr., *The Supreme Court: ‘Originalism’s’ Theory and the Federalist Papers’ Reality*, ATLANTIC (Jan. 22, 2011), <https://www.theatlantic.com/politics/archive/2011/01/the-supreme-court-originalisms-theory-and-the-federalist-papers-reality/69158/>.

143. Corley et al., *supra* note 123, at 333.

144. See Ian Bartrum, *Constructing the Constitutional Canon: The Metonymic Evolution of Federalist 10*, 27 CONST. COMMENT. 9, 18, 29 (2010) (citing the work of Charles Beard and writing that “Federalist 10 emerged as a powerful metonymic tool in at least two modalities of academic constitutional argument”).

145. GianCarlo Canaparo & Kaitlynn Samalis-Aldrich, Commentary, *James Madison’s Timeless Advice for Congress*, HERITAGE FOUND. (Oct. 2, 2019), <https://www.heritage.org/the-constitution/commentary/james-madisons-timeless-advice-congress>; Robert Curry, *No. 10 is the Best Federalist Paper, and That’s Why the Left Hates It So Much*, FEDERALIST (Apr. 9, 2019), <https://thefederalist.com/2019/04/09/no-10-best-federalist-paper-thats-left-hates-much/>.

dissent from a Republican-nominated justice.¹⁴⁶ Ranked choice voting advocates can therefore use *Federalist No. 10* to reach conservatives on their own terms and employ originalist logic to advance arguments in favor of vote reform.

In sum, *Federalist No. 10* serves as a hallmark of the American constitutional tradition and maintains value as a salient text in election law jurisprudence. It is a favorite of conservative lawmakers and jurists who turn to “originalist” sources for constitutional interpretation. Each of these considerations give the essay great persuasive significance in American policymaking. Because the ideology of *Federalist No. 10* supports ranked choice voting, as will be demonstrated in the following Part, election reform advocates should wield the essay as an important rhetorical tool to persuade politicians, judges, and American voters.

PART III:
21ST CENTURY MADISONIANISM? THE PHILOSOPHY OF
RANKED CHOICE VOTING

In 2016, the advocacy organization FairVote drew an explicit link between ranked choice voting and Madisonian theory, writing, “In the *Federalist Papers*, James Madison warned about ‘the violence of faction.’ The design of the republic was intended to accommodate a plurality of factions, so that none could control the government to the detriment of the public good.”¹⁴⁷ However, its discussion of Madison ends there, failing to recognize the extent to which ranked choice voting functions as a twenty-first century articulation of the tenets put forth in *Federalist No. 10*. Moreover, no other organizations or scholars have closely examined this ideological compatibility. This Note aims to fill that void.

146. Justices include Thomas, Kennedy, Rehnquist, Scalia, Souter, Blackmun, O’Connor, White, Brennan, and Stevens. See *Brown v. Hartlage*, 456 U.S. 45, 56 (1982); *Anderson v. Celebrezze*, 460 U.S. 780, 813 (1983); *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271 (1984); *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 452 (1988); *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 523 (1989); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 692, 710 (1990); *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 389 (1991); *Norman v. Reed*, 502 U.S. 279, 299 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1072 (1992); *Adarand Constructors v. Pena*, 515 U.S. 200, 251 (1995); *Gutierrez De Martinez v. Lamagno*, 515 U.S. 417, 428 (1995); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 368 (1997); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 424 (2000); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 591 (2000); *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 876 (2009); *Evenwel v. Abbott*, 136 S. Ct. 1120, 1138 (2016).

147. Penrose, *supra* note 21.

This Part will do so first by outlining in Section A Madison's basic argument in *Federalist No. 10*, which will provide a high-level summary to guide the remainder of the discussion. This Part will then conduct a more in-depth analysis, and divide Madison's argument into two overarching components: the primary problem – the negative effects of “faction” on popular government,¹⁴⁸ and a solution to this problem – what Madison terms “extend[ing] the sphere.”¹⁴⁹ Section B of this Part will examine factions, defining what Madison means by the term “faction” and identifying the ills Madison attributes to factions. Madison expresses particular concern about political or interest groups in the majority that wield disproportionate power over political or interest groups in the minority. Section B will then demonstrate that ranked choice voting is, like *Federalist No. 10*, primarily concerned with factions, as Madison defined them, and with oppression of smaller political groups by powerful, majority factions. Such factions include polarized political parties, intra-party divisions within political parties, new candidates and incumbent politicians, third parties and establishment parties, and racially-cohesive voting blocs that thwart the political influence of minority voting groups. Section B will also show that ranked choice voting's majoritarian goals do not run counter to *Federalist No. 10*'s fear of majority rule.

Section C will address Madison's proposal to “extend the sphere” of government to lessen the negative effects of faction. When Madison writes of “extend[ing] the sphere,”¹⁵⁰ he means that republican governments should grow in size, incorporating more people and new groups into the polity, and allowing a multitude and variety of factions to flourish.¹⁵¹ The resulting diversity of interests, Madison argues,

148. THE FEDERALIST No. 10, *supra* note 25, at 42 (James Madison) (“Among the numerous advantages promised by a well constructed union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.”).

149. *Id.* at 48 (James Madison) (“Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens. . .”); see also Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 S. Ct. Rev. 301, 316 (1990) (“Madison argued that the greatest danger to liberty in a Republic came from ‘the violence of faction’. . .he argued that political factions might be controlled by increasing the size of an electoral district, thus increasing the number and diversity of the electors, so no single interest could actually obtain a majority.”).

150. THE FEDERALIST No. 10, *supra* note 25, at 48 (James Madison).

151. See *id.* at 47 (James Madison) (“The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and

will prevent a tyrannical majority from seizing power, for there will be too many dispersed groups for any single one to act as a tyrannical majority. Similarly, ranked choice voting calls for structural change that allows a greater variety of factions to arise and thrive. Like *Federalist No. 10*, proponents of ranked choice voting see increased diversity of factions as a method to undermine majority faction control. Finally, under a ranked choice system, increased diversity occurs through growth of political choice and the political spectrum, akin to Madison's "expansion of the sphere." While *Federalist No. 10* most explicitly focuses on expanding the physical size of a polity, this Note will demonstrate that Madison's theory also encompasses expansion of the political process, like that observed in a ranked choice voting system.

A: The Basic Argument of Federalist No. 10

To facilitate analysis of the overlap between *Federalist No. 10* and ranked choice voting, this section will provide a very basic, general outline of Madison's argument in *Federalist No. 10*. In doing so, it will highlight both the chief problem Madison identifies and his principal proposed remedy, two areas that will be explored more in-depth in Sections B and C.¹⁵²

Madison opens *Federalist No. 10* by arguing that the existence of factions is a near-inevitability in popular forms of government. Any "friend of popular government" must take steps to ensure that the negative influences of faction are controlled and cured.¹⁵³ Madison de-

interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens. . ."); see also EPSTEIN, *supra* note 128, at 100 ("In an extended sphere there will be more different impulses at work, and each will "probabl[y]" be felt by less than a majority. This depends on the "variety" of a large country. . . The fact that Madison speaks here of the variety of "parties and interests" indicates that a diversity of passionately opinionated groups (as well as interest groups) is expected in the extended sphere."); MARK G. SPENCER, DAVID HUME AND EIGHTEENTH-CENTURY AMERICA 175 (2005) ("Madison thought that in a 'large Society' polarization might be avoided because 'the people are broken into so many interests and parties, that a common sentiment is less likely to be felt, and the requisite concert less likely to be formed, by a majority of the whole.'").

152. As a reminder, the primary problem is the negative influences of faction and, specifically, majority faction. The major proposed remedy is extending the sphere of government and growing the number of factions participating in the political process.

153. THE FEDERALIST NO. 10, *supra* note 25, at 42 (James Madison) ("Among the numerous advantages promised by a well constructed union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it.").

finer faction as, “a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”¹⁵⁴ This definition may apply to any group of people who share a passionate ideology, whether they comprise a majority or minority of the political community.¹⁵⁵ This definition will be further elaborated upon in Section B. According to Madison, factions, when given too much power, pose a threat to governance by sowing division and creating instability. This may lead to injustice, as governing bodies sacrifice commitment to the public good to the whims of an overbearing faction.¹⁵⁶ Most concerning are majority factions, which have the ability to subjugate “the rules of justice” and the rights of minority groups to the overbearing will of a majority.¹⁵⁷

Madison writes that there exist two methods of remedying the negative effects of faction: removing its causes or mitigating its effects.¹⁵⁸ Removing its causes, he first concludes, is not possible or advisable. To Madison, one can remove the causes of faction in two manners: by destroying the liberty and freedoms that allow factions to arise or by creating a society in which every member possesses the same opinions.¹⁵⁹ The latter presents an entirely infeasible option because, in short, humans inherently possess varying motivations and interests.¹⁶⁰ The former, Madison famously argues, is a cure “worse

154. *Id.* at 43 (James Madison).

155. *Id.*

156. *Id.* at 42 (James Madison) (“Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties. . .”); *see also* EPSTEIN, *supra* note 128, at 61 (“The friend of popular governments is ‘alarmed’ at the effect off action on the ‘character and fate’ of such governments. Faction has introduced ‘instability, injustice, and confusion’ in the public councils, and these have “in truth, been the mortal diseases under which popular governments have everywhere perished. . . .”).

157. THE FEDERALIST NO. 10, *supra* note 25, at 42 (James Madison) (“[M]easures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.”).

158. *Id.* at 43 (James Madison) (“There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.”).

159. *Id.* at 43 (James Madison) (“There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.”).

160. This includes differences of opinion caused by what Madison sees as the necessary differences in property ownership. *Id.* at 43 (James Madison) (“The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of

than the disease.”¹⁶¹ Liberty, as the lifeblood of democratic government, must be maintained, even if it allows for the formation of factions.

Because the answer lies not in removing the causes of faction, Madison next turns to ameliorating the effects. Whether a faction constitutes a minority or majority helps determine how harmful its effects will be. If a faction does not comprise a majority, the basic mechanisms of democratic government, including regular votes, can keep its impulses in check. When a faction comprises a majority, on the other hand, popular government allows it to sacrifice “public good” and the “rights of other citizens” to its “ruling passion.”¹⁶²

Madison once again suggests two solutions to this problem: either the structure of government must prevent the same passion from existing in a majority at the same time or, should such a passion exist in a majority, the majority must be so dispersed or so numerous that it is unable to effectuate “schemes of oppression.”¹⁶³ In other words, the structure of popular government must make it difficult for majority factions to form. Madison argues that pure democracy, in which citizens assemble to directly rule in person, cannot achieve this.¹⁶⁴ On the other hand, republican government, by which Madison means a democratic system that uses representatives to govern,¹⁶⁵ possesses two features that make it better at preventing majority factions from forming.

acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.”).

161. *Id.* (“It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.”).

162. *Id.* at 45 (James Madison).

163. *Id.* at 45 (James Madison) (“Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression.”).

164. *Id.* at 46 (James Madison) (“From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself. . .”).

165. *Id.* at 46 (James Madison) (“A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking.”).

First, Madison argues that representative democracy itself renders majority factions less likely, though as this Note does not challenge representative democracy, this argument will not be discussed at length.

Second, because republican government does not require in-person, direct rule, it can be large in size, either by number of citizens, by its geography, or both.¹⁶⁶ Madison argues for popular government to become larger, a growth he terms “extend[ing] the sphere.”¹⁶⁷ The greater the number of people in a polity, and the greater the territory they inhabit, the more difficult it will be for a factious majority to arise. Madison puts it best himself:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority. . . the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.¹⁶⁸

In this extended sphere, there will be a greater number and greater variety of passions and impulses. This variety will lessen the likelihood that any singular majority that shares an identical passion will form.¹⁶⁹ Madison sees this extension occurring through growth in the number of people, interests, and groups in a polity, as well as through territorial expansion that causes geographic dispersal of the population. The nuances of extending the sphere will be discussed in Section C. With this outline of *Federalist No. 10* in mind, the next section provides a deeper analysis of the essay’s application to ranked choice voting.

B: The Threat of Faction

Madison does not obscure the central focus of *Federalist No. 10*; rather, he introduces the concept of “faction” in the very first sentence

166. See EPSTEIN, *supra* note 128, at 99.

167. THE FEDERALIST No. 10, *supra* note 25, at 48 (James Madison) (“Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.”).

168. *Id.* 47–48 (James Madison).

169. See EPSTEIN, *supra* note 128, at 100.

of the essay, signaling how fundamental the term is to his argument.¹⁷⁰ Fleshing out Madison's view of factions is crucial to understanding its overlap with ranked choice voting. This section will thus proceed first by defining what a faction entails and then by describing the negative effects Madison attaches to factions, including Madison's specific fear that a faction with majority power will oppress minority political and ideological groups.¹⁷¹ A successful governmental structure, Madison argues, must neutralize this potential. This section will then illustrate how Madison's definition of factions and its effects map onto the ideological motivations of ranked choice voting advocates. The principal purpose of both *Federalist No. 10*'s arguments and the implementation of ranked choice voting is to overcome the negative effects of faction and temper the power of majority faction. Finally, this Section will address and dismiss two potential points of conflict, demonstrating that ranked choice voting's commitment to both majority rule and the existence of political parties does not cause tension with Madisonian theory.

1. *The Madisonian Definition of Factions*

For *Federalist No. 10* to best provide philosophical support for ranked choice voting, Madison's definition of faction must include a wide variety of groups. As will be elucidated below, ranked choice voting is aimed at lessening the power of several types of political factions—political parties, political incumbents, and ideological interest groups. Thankfully, analysis of Madison's definition of faction demonstrates its broad applicability. Although Madison himself provides only vague notions about the precise form or institutional structure that might constitute a faction, it is clear from his writing that the term is meant to encompass multiple types of political groups, parties, and associations.

As cited above, Madison gives the term a definition in the body text of *Federalist No. 10*: “[A] number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of

170. THE FEDERALIST NO. 10, *supra* note 25, at 42 (James Madison) (“Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.”).

171. *Id.* at 45 (James Madison) (“When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.”).

the community.”¹⁷² This definition loosely features three requirements. First, faction must comprise a group, though it may be of any number, including a minority or a majority of the polity.¹⁷³ Second, the group must not merely share characteristics, but must unite under a “common impulse of passion,” or possess a shared motivating interest that guides their political or legislative goals.¹⁷⁴ Third, the group must demonstrate self-interest, in some way “adversed to the rights of other citizens.” This broad definition can encompass a multitude of different types of groups and organizations; no distinction need be drawn between political parties, political associations, and other types of ideologically aligned interest groups pushing specific legislative goals.

In contrast to this, some scholars have made much ado over whether Madison’s definition of faction does or does not include formal political parties, or whether it *only* includes political parties. Political scientist James Yoho, for example, argues that “faction” more aptly describes interest groups with specific ideological overlaps, but not modern political parties, because the structure and breadth of present-day political parties do not mirror the types of factions present in Madison’s world.¹⁷⁵ On the other side of the spectrum, some scholars have argued faction is simply synonymous with political party.¹⁷⁶ German political scientist and *Federalist Paper* scholar Gottfried Dietze, for example, compares Madison’s use of the words “faction” and “party” in *Federalist No. 10* and *Federalist 50* and concludes that Madison uses the words in identical manners. He supplements his thesis by pointing¹⁷⁷ to Hamilton and Jay’s interchangeable use of the

172. *Id.* at 43 (James Madison).

173. EPSTEIN, *supra* note 128, at 25 (“Any number can be a faction.”).

174. *See id.* at 71 (“As Madison’s definition of faction indicates, a mere opinion is not a sufficient impulse to unite and actuate a faction. An opinion needs the assistance of passion to become politically forceful. At the same time, passions may equally depend on opinions for a political object to which to attach themselves.”).

175. James Yoho, *Madison on the Beneficial Effects of Interest Groups: What Was Left Unsaid in “Federalist” 10*, 27 POLITY 587 (1995). There are also some scholars who simply assume a faction is a special interest group and thus make no mention of parties. *See* Peter H. Schuck, *Against (And For) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL’Y REV. 553 (1997) (equating factions to “special interests, vested interests, lobbies, pressure groups, and . . . single-issue groups”).

176. *See, e.g.*, Richard Hofstadter, *The Idea of a Party System 2* (1969).

177. GOTTFRIED DIETZE, *THE FEDERALIST* 119 (1999).

words¹⁷⁸ and the fact that *Federalist No. 10* itself, in one instance, seems to define “party” as a “faction.”¹⁷⁹

The correct approach is the one taken instead by David F. Epstein, who, in his seminal work on *The Federalist Papers* and *Federalist No. 10*, argues that any group qualifies, as long as it possesses the necessary shared impulse that is adverse to the rights of other citizens or the common good.¹⁸⁰ Epstein’s theory is the one that most aligns with Madison’s language. One cannot limit the definition to political parties, for Madison himself cites economic interests and property ownership as causes and types of faction.¹⁸¹ Nor should any understanding exclude political parties, institutions that very clearly meet faction’s definition, especially given Madison’s frequent interchangeable use of the words “faction” and “party.” Certainly in *Federalist No. 10* itself there is no one universal faction archetype. Madison describes a wide variety of motivators that cause the formation of factions, including competing opinions concerning religion, methods of governance, political leaders, and other public figures who inspire “human passions.”¹⁸² This Note will thus proceed by understanding faction to encompass interest groups, political associations, and parties. There is no need to draw a line.

178. DIETZE, *supra* note 177, at 141–75 (“‘Faction’ is for Hamilton identical to ‘party.’ He speaks of the ‘tempestuous waves of sedition and party rage’ (9, 47) and says that ‘the spirit of party, in different degrees, must be expected to infect all political bodies’ (26, 163). With respect to political offenses, he says that ‘the prosecution of them . . . will . . . agitate the passions of the . . . community and . . . divide it into parties . . . [and] in many cases will connect itself with the pre-existing factions’ (65, 424).”).

179. THE FEDERALIST No. 10, *supra* note 25, at 44 (James Madison) (“ . . . the most numerous party, or, in other words, the most powerful faction must be expected to prevail. . . .”); see also Frank P. Belloni & Dennis C. Beller, *The Study of Party Factions as Competitive Political Organizations*, 29 W. POL. QUARTERLY 531, 532 (1976) (explaining how the Founding Fathers, including Madison, used “party” and “faction” interchangeably); AUSTIN RANNEY, *CURING THE MISCHIEFS OF FACTION: PARTY REFORM IN AMERICA* 23 (1975) (explaining that Madison used “party” and “faction” to denote the same concept).

180. See EPSTEIN, *supra* note 128, at 65.

181. THE FEDERALIST No. 10, *supra* note 25, at 44 (“But the most common and durable source of factions has been the various and unequal distribution of property.”); see also, Alan Gibson, *The Commercial Republic & the Pluralist Critique of Marxism: An Analysis of Martin Diamond’s Interpretation of “Federalist” 10*, 25 POLITY 497, 501 (1993) (“ . . . Madison is principally concerned with the ‘domestic convulsion’ caused by economic factions. . .”).

182. THE FEDERALIST No. 10, *supra* note 25, at 44 (“A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions. . .”).

2. *The Dangers Posed by the Existence of Factions*

Madison dedicates his first *Federalist* essay to factions because he believes them an inevitable¹⁸³—and dangerous—facet of any popular government. To Madison, there are a number of negative effects caused by faction that should alarm “friend[s] of popular government” and “our most considerate and virtuous citizens” alike.¹⁸⁴ For one, the division sewn by factions introduces “instability, injustice, and confusion” into government, hurting the reputation of liberty and democracy. Madison writes that the negative effects of faction provide fodder to the “adversaries of liberty” who wish to overturn the entire system.¹⁸⁵ These problems stem, in part, from another consequence of faction: rivalries that may arise among factions and overcome governments, causing them to sacrifice attention to the public good in favor of tempering or rewarding the interests of factions.¹⁸⁶

Madison next makes clear that while all factions generate these detrimental effects, the largest threat to popular governance lies specifically with factions comprising a political majority, rather than those making up a minority. Minority factions are subject to the structure of democratic governance—to the possibility of a majority outvoting them—whereas majority factions may take advantage of their political power to trample the rights of minority groups.¹⁸⁷ A faction

183. He expressed this view repeatedly even after the publication of *Federalist 10*. For example, in *Federalist 51*, Madison’s resigns himself to the fact that “society itself will be broken into many parts, interests, and classes of citizens.” THE FEDERALIST No. 51 (James Madison). And in 1792, Madison penned an essay on parties for the *National Gazette*, opening with the line, “In every political society, parties are unavoidable.” James Madison, For the *National Gazette* (Jan. 23, 1792), in 14 PAPERS OF JAMES MADISON 197 (Robert A. Rutland & Thomas A. Mason eds., 1983). Still, Madison argued, “In all political societies, different interests and parties arise out of the nature of things, and the great art of politicians lies in making them checks and balances to each other.” *Id.*

184. THE FEDERALIST No. 10, *supra* note 25, at 42; *see also* EPSTEIN, *supra* note 128, at 61.

185. *Id.* (“The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations.”).

186. *Id.* (“Complaints are every where heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties. . .”).

187. *See* EPSTEIN, *supra* note 128, at 89; ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 9 (1956) (“Neither at the Constitutional Convention nor in the “Federalist Papers” is much anxiety displayed over the dangers arising from minority tyranny; by comparison, the danger of majority tyranny appears to be a source of acute fear.”). It is worth noting that Madison saw a similar power to oppress in individuals with power, such as a despot or an executive. This is discussed in *Federalist*

in the majority may deprive minority groups of rights and liberty through its unchecked power to pursue goals that are adverse to those groups, thus behaving in an unjust and “overbearing” manner.¹⁸⁸ Minority factions, on the other hand, pose fewer risks. While they may have power to “clog the administration” or “convulse the society,” a majority can still defeat their agenda through regular voting.¹⁸⁹ Without the same checks on power, a faction comprising a political majority may take advantage of the existing structure of popular governance, using it to achieve the group’s own ends.

Finally, Madison saw political polarization as an additional negative effect of unrestrained factionalism. Political divisiveness, or what he calls “factious spirit” in *Federalist No. 10*,¹⁹⁰ particularly concerned Madison. In some Madisonian writings, he points, as a warning, to real-world examples of opposing factions preventing proper governance. In *Federalist 50*, for example, Madison laments that the Pennsylvania Council of Censors¹⁹¹ had “split into two fixed and violent parties,” causing a breakdown in “reason” and preventing the Council from conducting satisfactory business.¹⁹² Historian Mark G. Spencer argues that “[w]hen Madison came to write of the consequences of extreme factions, it was the dangers of polarization that he stressed.”¹⁹³ Even prior to authoring *Federalist No. 10*, Madison argued for the need to control the divisiveness of factions, including in a speech he gave in June 1787 to the Constitutional Convention and in a letter to Thomas Jefferson from October of that year.¹⁹⁴

48, and is different from his message in *Federalist 10*. See THE FEDERALIST NO. 48 (James Madison) (“In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire.”); DIETZE, *supra* note 178.

188. THE FEDERALIST NO. 10, *supra* note 25, at 43.

189. *Id.* (“If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution.”).

190. *Id.*

191. A body created by the 1776 Pennsylvania Constitution to review and revise laws and constitutional provisions and issue impeachments and public censures. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776 – 1787 339 (1998 ed.).

192. THE FEDERALIST NO. 50 (James Madison).

193. SPENCER, *supra* note 151, at 174.

194. James Madison, Address at the Federal Convention (July 4, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 132 (Max Farrand ed., 1911); Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 12 PAPERS OF THOMAS JEFFERSON 270 (Julian P. Boyd ed., 1995).

Madison thus sees factions as an inevitable, but dangerous, aspect of popular government. Factions possess the ability to render governments unstable, pursue unjust treatment of minority groups, and cause deep, political polarization. The remainder of *Federalist No. 10* outlines Madison's vision for counteracting these negative effects.

3. *Ranked Choice Voting as an Anti-Faction Election System*

The overlap between *Federalist No. 10* and ranked choice voting begins with factions. Both Madison and vote reform advocates identify factionalism as the primary ill their political vision will remedy. Ranked choice voting bakes anti-faction calls to unity into its general theory. As this section will illuminate, the voting system aims to alleviate discord caused by a variety of groups that meet the broad, Madisonian definition of faction, including political parties; ideologically united interest groups; racially cohesive voting blocs; and incumbent politicians. Additionally, advocates see implementation of the system as preventing many of the same negative influences of faction observed by Madison, such as improving government fairness and stability, and supporting the rights of smaller political groups as against an overbearing majority.¹⁹⁵

To start, ranked choice supporters strive to fix the intense divide between two modern factions: the Democratic and Republican parties, both of which are, in Madisonian terms, united by a common impulse of passion adverse to the other.¹⁹⁶ As discussed above, Madison saw extreme polarization as one of faction's negative consequences. Ranked choice voting supporters similarly cite to the untenable polari-

195. See *Details About Ranked Choice Voting: Where is Ranked Choice Voting Used?*, FAIRVOTE, *supra* note 5 (“Ranked choice voting (RCV) makes democracy more fair and functional.”); *Third Party and Independent Representation*, FAIRVOTE, *supra* note 68 (“Third parties supporters are thus free to elect their favorite candidate with minimal chance that that support will spoil the election outcome.”); Marsha Mercer, *How Ranked-Choice Voting Could Make Voters More Open to Third-Party Candidates*, PBS (Sept. 2, 2016), <https://www.pbs.org/newshour/politics/instant-runoffs-better-way-vote>.

196. See, e.g., Anne-Marie Slaughter, Francis Fukuyama & Larry Diamond, *Ranked-Choice Voting*, POLITICO, <https://www.politico.com/interactives/2019/how-to-fix-politics-in-america/polarization/ranked-choice-voting> (last visited May 26, 2021) (“Political polarization is one of the greatest threats to our system today, and replacing our current plurality voting with RCV will facilitate the emergence of third parties. . . .”); Mike Condray & Jeremy Mayer, Opinion, *Alaska Is a New Model for Ending Toxic Political Partisanship in America*, USA TODAY (Jan. 18, 2021), <https://www.usatoday.com/story/opinion/2021/01/18/alaskas-ranked-choice-voting-model-reducing-toxic-polarization-column/4172422001>; Deb Otis, *While Democracy Held, Polarization Remains. Ranked Elections Would Change That*, FULCRUM (Dec. 15, 2020), <https://thefulcrum.us/voting/what-is-ranked-choice-voting>.

zation of the modern U.S. political system, which, at the federal level, prevents Congress from passing legislation and leaves voters with little power to fix the problem.¹⁹⁷ Supporters urge adoption of ranked choice voting as a method of reducing disunity and encouraging voters and candidates to cross party lines. They warn of the dangers of political factions, lament the disappearance of “crossover” legislators who work with both parties, and blame the existence of powerful, opposing parties on the “winner-take-all” system of voting.¹⁹⁸ Ranked choice voting, in contrast to the winner-take-all system, discourages faction by disincentivizing negative campaigning and encouraging candidates to conduct outreach to a large number of voters, including those who have historically supported a different party.¹⁹⁹ Highly partisan candidates cannot attract or conduct successful outreach to a broad enough base of voters and are therefore less successful under a ranked choice system.²⁰⁰ The Ninth Circuit has even acknowledged the voting system’s ability to disrupt partisan factions and create broad voter coalitions; in *Dudum v. Arntz*, the court wrote that the voting system “will result in the election of a candidate with more widespread support than would simple plurality voting.”²⁰¹ By encouraging cross-party campaigning, ranked choice minimizes the likelihood political parties behave like factions.

Supporters also present ranked choice voting as a solution to factionalism *within* parties, as the system aims to unify different wings across ideological lines. As opposed to winner-take-all elections, which necessitate aligning solely with one party or one candidate, ranked choice allows for the existence of coalitions of voters who agree only partially.²⁰² Because voters may rank multiple candidates, those who do not agree on a first-choice candidate may agree after subsequent rounds of counting, becoming part of the same majority

197. Ed Kilgore, *Partisan Polarization Reaching Record Levels*, N.Y. MAG. (Jan. 23, 2020), <https://nymag.com/intelligencer/2020/01/partisan-polarization-reaching-record-levels.html> (“Eighty-two percentage points separated Republicans’ (89%) and Democrats’ (7%) average job approval ratings of President Donald Trump during his third year in office. This is the largest degree of political polarization in any presidential year measured by Gallup. . .”).

198. *Benefits of RCV*, FAIRVOTE, <https://www.fairvote.org/rcvbenefits> (last visited May 22, 2021).

199. *See id.* (arguing ranked choice voting encourages candidates to “reach out positively to as many voters as possible”); Kambhampaty, *supra* note 80 (explaining that ranked choice voting “motivate[s] partisan candidates to avoid taking extremes” and “give[s] third-party, centrist candidates more incentive to run”).

200. Kambhampaty, *supra* note 80.

201. *Dudum v. Arntz*, 640 F.3d 1098, 1104 (9th Cir. 2011).

202. Fromuth, *supra* note 89 (“Ranked choice voting replaces the fear-based logic of winner-take-all.”).

that elects their second or third choice candidate.²⁰³ The 2018 Democratic gubernatorial primary in Maine provides an example of this in practice. Because the election used a ranked choice system, voters faced less pressure to divide into factions based on candidate support. Two of the more progressive candidates actually endorsed one another, encouraging voters to rank both of them.²⁰⁴ Nor did the progressive and centrist wings of the party need to formally divide. Voters elected Janet Mills, a centrist candidate who received only 33% of the vote in the first round of ballot counting.²⁰⁵ After four IRV rounds, she eventually obtained a majority of the vote, including votes from ballots that initially preferred the two progressive candidates.²⁰⁶ After the race, one opinion columnist noted the election's success in reducing division: "ranked choice was a magnet to the center, inducing . . . candidates to adopt each other's popular issues."²⁰⁷

Ranked choice voting may also counteract negative effects caused by other types of factions, such as racially-cohesive voting blocs. Recognizing the voting system's ability to secure broader and more diverse voter coalitions, courts in both Michigan and California have considered employing ranked choice voting as a remedy for vote dilution.²⁰⁸ Vote dilution refers to the use of redistricting plans to neuter the voting power of racial and other minority groups in a jurisdiction. This occurs usually when a jurisdiction exhibits racially polarized voting, a type of factionalism at the polls in which both

203. See Bruce E. Cain & Cody Gray, *Parties by Design: Pluralist Party Reform in a Polarized Era*, 93 N.Y.U. L. REV. 621, 640 (2018) (arguing that ranked choice voting "encourages like-minded voters to forge coalitions").

204. Mark Eves & Betsy Sweet, *In Maine, Ranked-Choice Voting Changed Everything*, CAPE COD TIMES (Oct. 21, 2020), <https://www.capecodtimes.com/story/special/special-sections/2020/10/22/opinionmy-view-in-maine-ranked-choice-voting-changed-everything/42868213/> ("[Ranked choice voting] also allows for wonderful alliances. For example, we were both strong progressive candidates in a field of seven candidates. We co-endorsed each other, asking voters to rank us number one and two in either order.").

205. MAINE DEP'T SEC. OF STATE, TABULATIONS FOR ELECTIONS HELD IN 2018 - JUNE 12, 2018 - PRIMARY ELECTION - RANKED-CHOICE OFFICES - GOVERNOR - DEMOCRAT; Michael Shepherd, *What to Expect from Janet Mills' First Two-Year Budget Proposal*, BANGOR DAILY NEWS (Feb. 7, 2019), <https://bangordailynews.com/2019/02/07/politics/maines-governor-has-offered-few-hints-about-what-to-expect-in-her-first-budget/> (describing Mills as a "wonkish, centrist Democrat").

206. MAINE DEP'T SEC. OF STATE, *supra* note 203.

207. Fromuth, *supra* note 89.

208. *United States v. City of Eastpointe*, No. 4:17-CV-10079, 2019 U.S. Dist. LEXIS 110885, at *4 (E.D. Mich. 2019) (enumerating the provisions of a consent decree developed by the City and plaintiffs after plaintiffs sued under Section 2 of the Voting Rights Act); *Pico Neighborhood Ass'n v. City of Santa Monica*, No. BC616804, 2019 Cal. Super. LEXIS 2015, at *3-4 (Cal. Sup. Ct. 2019) (suggesting ranked choice voting as a cure for vote dilution).

white voters and nonwhite voters consistently and overwhelmingly vote along racial lines.²⁰⁹ The majority faction in the legislature—usually lawmakers selected by white voters—may take advantage of this split voting behavior to implement voting practices, such as redistricting plans and at-large electoral districts, that prevent the other racial voting bloc from achieving legislative success.²¹⁰ Legislatures often achieve this either by fragmenting and dispersing the minority group’s voter population across a large number of districts (referred to as “cracking”) or by stacking that same population in only a few districts (“packing”).²¹¹ These reapportionment schemes often work to produce a disproportionate number of majority-white districts. In these cases, the electoral policies of a successful majority faction prevent minority votes from carrying equal weight.²¹²

In response to these types of claims, advocates and courts in both Michigan and California have presented ranked choice voting as a method of tempering the majority’s power. The Eastern District of Michigan recently supported a consent decree developed between the city and the plaintiffs to resolve vote dilution in part by implementing ranked choice voting.²¹³ In a state court suit in California, the plaintiffs and the trial court both suggested ranked choice voting might “enhance” Latino voting power as opposed to the current vote diluted scheme.²¹⁴ Although the appeals court dismissed the trial court’s ranked choice analysis as perfunctory, it remains notable that supporters of the system believed it might temper the negative effects of racial voting bloc factionalism. It once again shows ranked choice voting to be an anti-faction political proposal at its roots.

209. See *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986) (“Thus, the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim . . . And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white ‘crossover’ votes rises to the level of legally significant white bloc voting.”).

210. See Heather K. Gerken, *Understand the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666 (2001).

211. ACLU VOTING RIGHTS PROJECT, EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT REDISTRICTING BUT WERE AFRAID TO ASK! 6 (2010).

212. See Gerken, *supra* note 210, at 1666. (“A state could take advantage of this type of voting pattern by drawing district lines that give whites a majority in a disproportionate share of districts, thus ensuring that minority voters are unable to elect a candidate of their choice.”); see also *Thornburg*, 478 U.S. at 36–37.

213. *City of Eastpointe*, No. 4:17-CV-10079, 2019 U.S. Dist. LEXIS 110885, at *4.

214. *Pico Neighborhood Ass’n v. City of Santa Monica*, No. BC616804, 2019 Cal. Super. LEXIS 2015, at *3–4 (Cal. Sup. Ct. 2019).

Finally, like the philosophy espoused in *Federalist No. 10*, the theory behind ranked choice voting expresses concern not only about factions themselves, but also specifically about the power of *majority* factions. For ranked choice voting, this includes powerful incumbent candidates and parties that act as majority factions in legislatures against outsiders, third parties, and new candidates. In the system's earliest form, ranked choice forefather John Stuart Mill promoted it as a method of fracturing majority rule and giving voice to minority groups in elected legislatures.²¹⁵ In the modern U.S., supporters propose to weaken a different kind of majority: the “ideologically homogeneous duopoly” of the Republican and Democratic parties.²¹⁶ While the two parties may differ on many policies, they are too often unified in opposition on the question of whether to open the political system to other viewpoints and groups. Both parties often strive to prevent competitor parties from organizing effectively and aim to block independent candidates and viewpoints from entering the political arena.²¹⁷

Judicial support aids the two parties in these endeavors; a series of judicial opinions have created a strong First Amendment party associational right that trumps the rights of independent voters, outside candidates, and third parties.²¹⁸ For example, the Supreme Court in 1973 upheld a bipartisan Connecticut apportionment scheme that entrenched the Democratic and Republican parties and diluted the voting strength of independent voters and the political viability of third parties in the state.²¹⁹ Moreover, under the First Amendment, states cannot force political parties to open their primaries to independent voters in an effort to create broader vote coalitions.²²⁰ Parties exercise a total right to run their elections as they choose, often to the detriment of non-incumbents and outsiders. In the same vein, constitutional doctrine allows parties to exclude any person they wish from appearing on a ballot in the party's name.²²¹ Ranked choice voting, in contrast, fa-

215. See Endersby & Michael, *supra* note 34.

216. Persily & Cain, *supra* note 104, at 780–81.

217. *Id.* at 782.

218. See, e.g., *Gaffney v. Cummings*, 412 U.S. 735 (1973) (upholding an apportionment scheme that entrenched the two-party system and excluded third parties); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (holding that parties may exclude non-members from their nominating process); *Republican Party of Texas v. Dietz*, 940 S.W.2d 86 (Tex. 1997) (holding parties can exclude whoever they choose from party conventions); *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn. 1976) (holding closed primaries constitutional because of party associational rights).

219. *Gaffney v. Cummings*, 412 U.S. 735 (1973).

220. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 591 (2000).

221. *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996).

ilitates the rise of third parties and non-incumbents by removing the problems of “wasted votes” and “strategic voting.”²²² Thus ranked choice voting, in its call to break down partisan factions, subvert majority control by the two-party duopoly, and avoid extreme polarization, shares the same central concerns that *Federalist No. 10* articulates.

4. *Majority Rule Without Tyranny of the Majority*

Critics of ranked choice voting may turn to one foreseeable—but unpersuasive—argument against the above comparison: *Federalist No. 10* decries tyranny of the majority, but ranked choice voting loudly identifies as a majoritarian political system.²²³ This argument does not hold water. Madison opposed tyranny of the majority, but not majoritarian democracy.²²⁴ To Madison, tyranny of the majority arises due to majority faction, not as a result of majorities in general. He calls, in *Federalist No. 10*, for a balance between majority rule and checks on majority power. For example, while repudiating the ills caused by majority faction, he simultaneously praises when citizens “co-operate for their common good.”²²⁵ Political theorist Robert W. T. Martin argues Madison is “best understood as a ‘liberal republican’ who wanted both individual rights and majority rule without majority tyranny.”²²⁶ Both ranked choice voting and Madisonian theory therefore strive for majorities, but majorities comprised of coalitions rather than cohesive groups acting against the rights of others.

222. Anne-Marie Slaughter, Francis Fukuyama & Larry Diamond, *Ranked-Choice Voting*, POLITICO, <https://www.politico.com/interactives/2019/how-to-fix-politics-in-america/polarization/ranked-choice-voting> (last visited May 26, 2021).

223. See, e.g., Matthew R. Massie, *Upending Minority Rule: The Case for Ranked-Choice Voting in West Virginia*, 122 W. VA. L. REV. 323 (2019) (“The key reform embodied in RCV speaks not simply to democracy but to one of its central propositions: majority rule.”); *Voter Preferences, Spoilers and Majority Winners*, FAIRVOTE, https://www.fairvote.org/research_rcvsocialchoice [https://web.archive.org/web/20161203223340/https://www.fairvote.org/research_rcvsocialchoice] (“The use of single-winner RCV should increase the proportion of candidates winning with a majority of votes cast. . .”); Don Fraser & George Latimer, *Ranked-Choice Voting Upholds Majority-Rule Principle, Broadens Choice and Opens Up Political Process*, MINNPOST, (Sept. 16, 2013), <https://www.minnpost.com/community-voices/2013/09/ranked-choice-voting-upholds-majority-rule-principle-broadens-choice-and-op/> (“That’s why we’re longtime proponents of ranked-choice voting (RCV), which upholds the principle of majority rule. . .”).

224. See Robert W. T. Martin, *James Madison and Popular Government: The Neglected Case of the “Memorial,”* 42 POLITY 185, 189 (2010).

225. THE FEDERALIST NO. 10, *supra* note 25, at 44 (James Madison).

226. Martin, *supra* note 224, at 189.

First, ranked choice voting inarguably, on its face, promotes majority rule. The system's primary function is to select political candidates who receive a majority, rather than a mere plurality, of votes. Certainly, this is the reason many ranked choice supporters favor the system. In February 2020, for example, the *New York Times* Editorial Board published an article advocating use of ranked choice voting in political primaries in large part *because* the system would better achieve majority support for a candidate than first-past-the-post elections.²²⁷ FairVote similarly loudly celebrates majoritarianism, publishing articles with titles like, "*Majority Rule: More Than Just a Principle for Successful Elections.*"²²⁸ This is more than just lip-service; in single-winner elections, ranked choice voting builds in majority rule. IRV requires a candidate to achieve a majority of the votes to win, even if it takes multiple rounds of vote transfer.²²⁹

A shallow understanding of Madison's argument in *Federalist No. 10* might lead one to believe that ranked choice voting's explicit majoritarianism directly conflicts with *Federalist No. 10*'s disavowal of majority faction. This is not so. Madison's argument takes issue not with majority rule, but with majority *faction*, and the majorities promoted by ranked choice voting do not constitute factions. To the contrary, ranked choice voting majorities align squarely with Madison's vision of democracy. When Madison describes majorities in *Federalist No. 10*, he refers specifically to "overbearing,"²³⁰ "unjust and interested,"²³¹ factious majorities. Turning again to Madison's definition of faction,²³² the term does not apply to all groups of people. It instead refers solely to groups that share a "common impulse of passion" that is "adverse" to the rights of other groups or to aggregate community interests.²³³ For a majority to pose a problem, it must possess these factious qualities.

227. *The Primaries Are Just Dumb*, *supra* note 91 ("Single-winner elections do a poor job of winnowing a large field of candidates down to one who reflects majority agreement. . .").

228. Nancy Lavin, *Majority Rule: More than Just a Principle for Successful Elections*, FAIRVOTE (Feb. 22, 2019), https://www.fairvote.org/majority_rule_more_than_just_a_principle_for_successful_elections.

229. *Infra* p. 111.

230. THE FEDERALIST NO.10, *supra* note 25, at 42 (James Madison).

231. *Id.* at 48.

232. "By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.* at 43.

233. *Id.*

Majority *coalitions*, on the other hand, do not constitute factions and consequently do not concern Madison. Political scientist Edward J. Erler argues that *Federalist No. 10* advances a view of society in which, “[t]he majorities that do form will be essentially composed of coalitions of minorities that come together for limited, self-interested purposes.”²³⁴ Because they remain separate interest groups, they are “largely unaffected by the fact that they have become a part of the majority.”²³⁵ Political Scientist Jennifer Hochschild, upon conducting a close reading of Madison’s work, similarly concludes that modern political coalitions fit within his theory.²³⁶

This type of majority reflects a different aspect of Madisonian theory: the hope that citizens will “co-operate for their common good.”²³⁷ *Federalist No. 10* repeatedly supports non-factional majorities that act on behalf of the best interests of the community. Madison’s definition of faction implies as much. If factions act against “the permanent and aggregate interests of the community,” then there must necessarily exist an interest that is aggregate and community-wide.²³⁸ Rakove explains that Madison hoped not to prevent majorities from ever forming, but to forestall the formation of majorities until, through combining varying interests, “a compelling conception of public good could somehow emerge.”²³⁹ Madison’s writing in *Federalist 51* similarly expresses optimism about nationwide majorities, arguing that a majority “coalition” of the “great variety of interests, parties, and sects” in the United States must, due to its diverse membership, bend toward “justice and the general good.”²⁴⁰

Ranked choice voting strives for the type of diverse, coalition-based majority Madison favors, and not the factious majorities he fears. Ranked voting achieves majorities precisely because it encompasses voters who do not agree with each other about the first—or

234. Edward Erler, *The Problem of the Public Good in THE FEDERALIST*, 13 *POLITY* 649, 660 (1981).

235. *Id.*

236. Hochschild, *supra* note 130, at 26 (“The structure of American politics (perhaps of all politics) gives a powerful incentive to develop coalitions with some opponents in order to win a fraction of what a group wants. Thus coalitional politics are not new; what might be new is a growing number and influence of coalitions in which the factions are organized around ascriptive identities rather than around individualistic opinions, passions, and interests. Such factions would be astonishing to Madison, but not as fearful as a more pure identity politics.”).

237. *THE FEDERALIST NO. 10*, *supra* note 25, at 44 (James Madison).

238. *Id.* at 43.

239. Rakove, *supra* note 19, at 485.

240. *THE FEDERALIST NO. 51*, *supra* note 183 (James Madison).

perhaps even second or third—best candidate. For example,²⁴¹ Janet Mills, the winner of Maine’s 2018 Gubernatorial race, eventually received a majority of the votes, but only after the completion of four rounds of IRV. Her tallies included voters who had initially supported more ideologically progressive candidates.²⁴² One could hardly label such a majority as factious; it included voters who supported a variety of different candidates and different positions.

Thus, in the Madisonian universe, ranked choice majority rule looks far more similar to cooperation on behalf of the common good than it does tyranny of the majority. Rather than undermine the system’s overlap with *Federalist No. 10*, majoritarian success only strengthens the connection.

C: *Pluralism as Remedy*

Madison proposes a structural solution to cure the ills of faction, one that multiplies the number of groups participating in government and—significantly for our purposes—aligns with the goals of modern ranked choice voting. The second half of *Federalist No. 10* devotes itself to considering possible remedies to the problems posed by faction, including, most significantly, what Madison terms “extend[ing] the sphere.”²⁴³ This section will first describe what extending the sphere entails, outlining Madison’s view that increasing the number and diversity of factions cures the problems posed by majority faction. He proposes achieving greater diversity through an expansion of the polity, either through territorial growth or growth in the number of people participating in the political process. This section will then explain how ranked choice voting aims to accomplish the same goal by permitting a larger number of political parties, candidates, and voters to meaningfully participate in democracy. Finally, this section will demonstrate that, despite *Federalist No. 10* explicitly referencing territorial expansion in its discussion of extending the sphere,²⁴⁴ geographic growth is not necessary to the concept. Madison’s proposal applies equally to the type of political expansion suggested by ranked choice voting.

241. *Infra* p. 140–41.

242. Fromuth, *supra* note 89.

243. *Infra* pp. 149–50.

244. THE FEDERALIST NO. 10, *supra* note 25, at 47 (James Madison) (referring to “the greater . . . extent of territory” in his discussion of extending the sphere).

I. Madison on Pluralism

Critical to our analysis of ranked choice voting is the type of solution Madison proposes. He roots his remedy to faction's problems not in appeals to morality or religion, but instead in the structure of democracy and the political process. After listing the many negative effects of factions—and specifically majority factions—Madison then proposes mitigating these effects by “extend[ing] the sphere,” or expanding the polity to take in a greater number of people and groups.²⁴⁵ He believes increasing the number and diversity of factions will “control” their negative effects and prevent factious majorities from arising.²⁴⁶

Madison argues that the structure of democracy should create conditions that allow for the flourishing of a variety and multitude of different factions, something he saw as essential to combatting the threat of tyranny by majority faction. The fewer the distinct parties, individuals, and interests in a society, the more likely a factious majority will arise that unites because of its passion for a common cause. Conversely, he writes,

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.²⁴⁷

By extending the sphere and growing the polity, one permits the existence of a diversity of factions, lessening the likelihood a domineering majority finds itself in power. Diversity presents “greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority.”²⁴⁸ One group's impulse toward oppression is hindered by the existence of a great many other groups to convince, or by a great distance to cross to spread the message. As Madison puts it, while someone may “kindle a flame,” an

245. *Id.* at 48. As was mentioned in Section A, Madison also proposed a system of representative democracy, as opposed to direct democracy, a point not relevant to the substance of this note and consequently not considered at length. *See supra* Section III.A.

246. *Id.* at 43. While he does not completely dismiss religious or moral motives as potential restraints on tyrannical behavior, he does not see them as reliable constraints should impulse and opportunity for oppressive majoritarian control arise. *Id.* at 45. (“If the impulse and the opportunity be suffered to coincide, we well know, that neither moral nor religious motives can be relied on as an adequate control.”).

247. *Id.* at 48.

248. *Id.*

extended sphere prevents “general conflagration.”²⁴⁹ Under the formulation provided in *Federalist No. 10*, extending the sphere applies to geographic expansion, growth of the number of citizens in a polity, and widening of the political process. This will be explored in more detail below.

2. *Ranked Choice Voting on Pluralism*

In addressing issues of faction, ranked choice voting proposes a strikingly Madisonian solution: “extend the sphere” politically and philosophically and take in a greater diversity of viewpoints and political parties. The system opens elections to candidates of different ideologies and backgrounds and encourages the formation of new constituencies.²⁵⁰ Because ranked choice voting allows voters to vote for both a major party candidate *and* third party candidates, voters do not face the risk of “wasting” their vote if they most prefer a party other than the Democratic or Republican. Voters need not choose between who they want to win and who they think is likely to defeat their least favorite candidate.²⁵¹ Voters’ willingness to rank third-party candidates on their ballots, in turn, encourages more third party candidates to run for office, loosening the two-party grip,²⁵² and conforming to Madison’s belief that there is “greater security afforded by a greater variety of parties.”²⁵³ Moreover, ranked choice voting encourages participation by non-incumbents, opens elections to under-represented constituencies, and encourages cross-party campaigning, allowing new coalitions of constituencies to form.²⁵⁴ Each of these grow the polity through expansion of the electorate and widening of democratic options.

Madison’s extension of the sphere includes the type of political process expansion observed in ranked choice voting, despite explicit references in *Federalist No. 10* to geographic, territorial expansion.²⁵⁵

249. *Id.*

250. Lynsi Burton, *Ranked Choice Voting Gains Traction For 2020*, YES! MAG. (Jan. 10, 2020), <https://www.yesmagazine.org/democracy/2020/01/10/election-vote-fair-campaign/> (explaining that the system opens elections to “different ideologies, constituencies, backgrounds, and income levels”).

251. Lee Drutman, *Laboratories of Democracy: San Francisco Voters Rank Their Candidates. It’s Made Politics a Little Less Nasty.*, Vox (July 31, 2019), <https://www.vox.com/the-highlight/2019/7/24/20700007/maine-san-francisco-ranked-choice-voting>.

252. Kambhampaty, *supra* note 80.

253. THE FEDERALIST NO. 10, *supra* note 25, at 48 (James Madison).

254. *See* Section B.

255. *See* Erler, *supra* note 234, at 655 (describing Madison’s desire to defeat anti-Federalist arguments about the virtues of a small republic).

Certainly, one might incorrectly argue that when Madison discusses “extending the sphere” in *Federalist No. 10*, he means so exclusively territorially,²⁵⁶ especially as the essay functions, in part, as a defense of a large, republican state over a smaller, compact democracy.²⁵⁷ But to limit Madison’s pluralist theory of factions merely to geographic expansion is too narrow a reading.

Instead, “extending the sphere” properly includes any structural change that allows a greater number of groups to participate in the levers of democracy. This entails, among other things, widening of the political process and expansion of the number of parties and constituencies that participate in a democracy—all central aspects of ranked choice voting.²⁵⁸ For example, he writes of the “greater security afforded by a greater variety of parties,” and argues that this variety itself makes it “less probable that a majority of the whole will have a common motive to invade the rights of other citizens.”²⁵⁹ The security he describes in no way depends on geography, but relies instead on the existence of a great variety of parties.

Madison articulates the same view in a letter to Thomas Jefferson composed shortly before the publication of *Federalist No. 10*. In the letter, Madison outlines many of the same arguments he makes in *Federalist No. 10* and again expresses his belief that growth in the number of factions will control the most negative effects of factions.²⁶⁰ He goes on to compare faction multiplication to the proliferation of religious sects in a community, arguing that, much like other groups, growth in the number of religious sects provides “security”:

256. See, e.g., Marc M. Arkin, *The Intractable Principle: David Hume, James Madison, Religion, and the Tenth Federalist*, 39 AM. J. LEGAL HIST. 148, 152–53 (1995) (describing both Madison and philosopher David Hume’s support for “large territory” republics, as opposed to Montesquieu’s “small-republic theory”); Mark Rush, *The Current State of Election Law in the United States*, 23 WASH. & LEE J. CIV. RTS. & SOC. JUST. 383, 417 (“The large republic that the country would be in the late 18th century would proliferate interest groups (Madison’s ‘factions’) and therefore make it extraordinarily difficult for a majority to form.”); Lawrence Hunter, *Why James Madison Was Wrong About a Large Republic*, FORBES (Oct. 30, 2011, 6:09 PM), <https://www.forbes.com/sites/lawrencehunter/2011/10/30/why-james-madison-was-wrong-about-a-large-republic/#5c9800772449> (“Madison’s vaccination against faction: Extend the republic’s size to encompass both many people and much territory. . .”).

257. Erler, *supra* note 234, at 660.

258. *Infra* Part III.B.3.

259. THE FEDERALIST NO. 10, *supra* note 25, at 48 (James Madison).

260. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 12 PAPERS OF THOMAS JEFFERSON 270 (Julian P. Boyd ed., 1995), <https://founders.archives.gov/documents/Jefferson/01-12-02-0274> (“In a large Society, the people are broken into so many interests and parties, that a common sentiment is less likely to be felt, and the requisite concert less likely to be formed, by a majority of the whole.”).

the greater the number of religions, the less likely a majority sect is to arise and oppress the others.²⁶¹ Here, once again, Madison's explanation is rooted not in geography, but in pluralism; the *number* of religious sects provides security.²⁶²

Finally, Madison's theory on separation of powers, as espoused in *Federalist 47–51* further evinces Madison's belief in the inherent power-checking function of an increased variety of groups. Here, once again, geographic distance plays no role. Madison's advocacy for the Constitution's checks and balances rests on the pluralist idea that a government composed of multiple groups that wield different powers and functions will stabilize by allowing 'ambition . . . to counteract ambition.'²⁶³ Across his writings, Madison consistently advocates for this "plural constitutional structure,"²⁶⁴ demonstrating that growing the number of groups in society lies at the heart of Madisonian political philosophy, and accordingly, his views on extending the sphere.

For these reasons, the multiplication of different viewpoints and political parties under ranked choice voting situates the system plainly within the ambit of Madisonian theory. The voting system need not induce geographic expansion to reflect *Federalist No. 10*'s call to defeat tyranny of the majority through pluralist expansion. By opening elections to "different ideologies, constituencies, backgrounds, and income levels,"²⁶⁵ ranked choice voting strives to subvert the power of the polarized, two-party system and achieve something Madison might call liberty.

CONCLUSION

Federalist No. 10 is not the only Madisonian text, the only *Federalist Paper*, nor the only work of political theory to apply to ranked

261. *Id.* ("The same security seems requisite for the civil as for the religious rights of individuals. If the same sects form a majority and have the power, other sects will be sure to be depressed.").

262. This aligns with historian Richard Hofstadter's analysis that "Madison's insight into the strength and viability of a pluralistic society seems at least to have been heightened, if it did not derive from, the model, already before him, of various religious groups coexisting in comparative peace and harmony." Hofstadter, *supra* note 176, at 358.

263. Rakove, *supra* note 19, at 476–77 (" . . . a divided legislature elected by different constituencies for different terms, reinforced by an executive wielding a veto and also enjoying a special relation with the Senate, would best preserve the constitutional allocation of power by encouraging 'ambition . . . to counteract ambition'").

264. Hofstadter, *supra* note 176, at 354 ("The great achievement of Madison was to provide for his contemporaries a statement . . . of government in which a pluralistic view of society itself was linked to the plural constitutional structure.").

265. Burton, *supra* note 250.

choice voting. But the overlap between the theory of ranked choice and the ideology espoused in *Federalist No. 10* is striking. Because it is a seminal founding text, its philosophical support of ranked choice voting adds value to vote reform discourse as more jurisdictions adopt the voting system.

For advocates of ranked choice voting, it also provides an important tool of persuasion. It is surprising advocates have not already seized the opportunity more explicitly. Both Madisonian theory and *The Federalist Papers* remain persuasive in the modern era, possessing value today as texts central to the American conception of democracy and, for some, evidence of the original meaning and theory of the Constitution.²⁶⁶ In fact, *Federalist No. 10* has already aided ranked choice voting in Maine, where Judge Walker, in dismissing an Article I claim, cited *Federalist No. 10* it for the proposition that ranked choice voting is not “inherently inconsistent with our Nation’s republican values.”²⁶⁷ *Federalist No. 10*’s repeated use in Supreme Court election law cases further supports its modern voting rights relevance.²⁶⁸

Moreover, opposition to ranked choice voting has come largely from Republican lawmakers and conservative thinkers.²⁶⁹ At the same time, conservative jurists and thinkers, who ground legal theory in originalism, celebrate *Federalist No. 10*.²⁷⁰ Demonstrating that Madis-

266. See Rakove, *supra* note 19, at 502 (“[I]n at least one crucial aspect . . . Madison’s political thinking remain[s] relevant to the constitutional discourse of a political culture—our own—which is still enjoined to defer to the original meanings, intentions, or understandings of the Constitution.”).

267. *Baber v. Dunlap*, 376 F. Supp. 3d 125, 137 (D. Me. 2018) (“In the final analysis, RCV is not invalidated by Article I because there is no textual support for such a result and because it is not inherently inconsistent with our Nation’s republican values. In fact, the opposite is true . . . In discussing the dangers of political factions to a ‘wellconstructed Union,’ James Madison made some observations that are worth considering when evaluating the bona fides of ranked-choice voting.”).

268. *Infra* p. 125.

269. For example, Maine’s Republican former Governor Paul LePage called it “horrific.” See Zach Blanchard & M. Kmack, *Governor Denounces ‘Horrific’ Ranked-Choice Voting, Says He May Not Certify Election Results*, NEWS CTR. MAINE (June 12, 2018, 7:18 PM), <https://www.newscentermaine.com/article/news/politics/elections/governor-denounces-horrific-ranked-choice-voting-says-he-may-not-certify-election-results/97-563683283>. Representatives from conservative groups like The Heritage Center and The Independent Women’s Law Center have also voiced opposition. See Braceras, *supra* note 16; Spakovsky & Adams, *supra* note 16; see also Thistle, *supra* note 94 (describing Maine Republicans’ effort to repeal ranked choice voting for presidential elections).

270. See Whittington, *supra* note 140, at 29 (“Originalism as an approach to constitutional theory and constitutional interpretation is often associated with conservative politics.”).

onian theory bolsters ranked choice voting may inform a policy or value-based argument that appeals to a judge or lawmaker otherwise disinclined to support the voting system.

Finally, *Federalist No. 10* presents a useful tool for crafting a policy narrative and challenging the ideas of outspoken critics of preferential voting. The Heritage Foundation, for example, has written that ranked choice advocates, “want to change the rules to manipulate elections outcomes in order to force the public into their distorted vision of a supposedly utopian society.”²⁷¹ An op-ed in the *New York Daily News* argued that, a “small percentage of New Yorkers [supporting ranked choice voting]. . . could impose their will on those who prefer our traditional democratic method.”²⁷² In Maine, opponents argued that “advocates want to replace real democracy” and that the system is “unAmerican.”²⁷³ One powerful way to counter arguments that ranked choice voting offers an unamerican or distorted vision of democracy is to demonstrate its fundamental Madisonian nature. With an understanding of *Federalist No. 10* in hand, advocates can show that ranked choice voting may bring democracy *more* in line with the vision held by the “Father of the Constitution.”

To conclude, ranked choice voting logically fits within the American democratic tradition. It finds its roots in theories that undergirded the founding and reflects arguments made in the “proof-texts” of the Constitution.²⁷⁴ As more states move towards ranked choice voting, it will become necessary for advocates to understand this relationship to our constitutional ethos. For skeptical citizens, courts, and elected officials, arguments reflective of Founding-era political philosophy may very well persuade. With *Federalist No. 10* as their manual, advocates can definitively argue that ranked choice voting is, indeed, fundamentally American.

271. Spakovsky & Adams, *supra* note 16.

272. Herb W. Stupp, *What’s Wrong with Ranked-Choice Voting: Let Us Count the Problems*, N.Y. DAILY NEWS (Nov. 1, 2019, 10:14 AM), <https://www.nydailynews.com/opinion/ny-oped-whats-wrong-with-ranked-choice-voting-20191101-k7o2s57h5bfrxoorisjw4zrp2i-story.html>.

273. Gordon L. Weil, *We Don’t Need Ranked-Choice Voting*, CENT. MAINE (Dec. 17, 2015), <https://www.centralmaine.com/2015/12/17/we-dont-need-ranked-choice-voting/>; *see also* Thistle, *supra* note 94 (quoting State Republican Party Chairwoman Demi Kouzounas as saying, “One person, one vote is a bedrock American principle. Ranked-choice voting is a direct violation of that principle . . .”).

274. Rakove, *supra* note 19 at 474.

