

As I See It

The Potential for Electoral Reform in Wisconsin:

A Legal Analysis





The authors provide an overview and critique of our current voting systems, summarize various available reforms, and make the case for one particular election system, Final Five Elections.

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This is the way we've always done it" is a common refrain we hear all too often. We hear it when proposing changes to our election system because many

Americans assume the systems in the U.S. are dictated by federal law. In reality, the U.S. Constitution delegates this authority to the states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."¹

States have been setting, and changing, election laws for centuries. All states permit election laws to be changed by passing legislation. But in 26 states, election laws may also be changed through citizen-initiated ballot measures.

In recent years, state efforts to reform election systems have been gaining traction, often focused on two major challenges:

1) Party primaries: voting processes by which voters can indicate their preference for their party's candidate, or a candidate in general, in an upcoming general election, local election, or by-election²; and

2) Plurality voting: voting system by which a party, candidate, or proposition wins an election by receiving more votes than any other but does not necessarily receive a majority of the votes cast.³

In this article, we provide an overview and critique of current voting systems, summarize various available reforms, and make the case for one election system, "Final Five Elections." In Final Five Elections, a single non-partisan primary sends the top five finishers to the general election. In the general election, voters choose up to five candidates in order of preference, and winners are determined using an "instant runoff" procedure.

Wisconsin was once seen as a leader in electoral innovation, and we believe it can be again.

Primary Elections

The way U.S. citizens vote may seem standard, but it has changed over time and varies from state to state. Wisconsin's rich history of election reform is a good place to start because it outlines the complexity of caucuses, nominating conventions, and direct primary elections.

In the 19th century, Wisconsin political parties nominated their candidates through a caucus-convention system. First, localities would meet at nominating conventions to choose delegates. Delegates then gathered at party conventions to nominate candidates and formulate the party platform.⁴ Party leaders (or "bosses") used a variety of methods to manipulate this process: offering patronage or bribes, adjusting the time or location of the caucus, engaging in intimidation, fraud, or corruption, providing alcohol, and so on.⁵ Party bosses could personally pick candidates who would remain faithful to them in office.⁶

Around the turn of the 20th century, reformers in Wisconsin, led by then Governor Robert M. La Follette, aimed to disrupt these "corrupt political machines" through adoption of a direct primary. The state legislature passed the direct primary in 1903, and voters ratified the law in a November 1904 referendum (with 62% of support). The direct primary went into effect in Wisconsin in 1906.⁷ In the following years, this shift to a direct primary spread across the country.

Direct primaries are elections used to narrow the field of candidates for a given elective office or to determine the nominees for political parties in

advance of a general election. Primary elections can take several different forms. The terms of participation can vary by jurisdiction, political party, and the office or offices up for election. The variations and innovations in the struc-

In Idaho, Oklahoma, South Dakota, and Utah, the Democratic Party has amended its rules to allow independent voters to participate.

Open Partisan Primaries with Partisan Registration. Unaffiliated

This system, which Wisconsin uses, is similar to open partisan primaries with partisan registration, except that all voters (regardless of party affiliation) can choose a ballot line to vote in the primary but still cannot cross over from one party ballot to another in the same election.

ture of primaries are much more diverse than many people appreciate. Current forms of congressional and state primaries include the following⁸:

Closed Partisan Primaries. Only voters registered with a particular party may vote in that party's primary election. The candidate with the most votes for each party moves on to the general election. Unaffiliated and independent voters cannot vote in closed primary elections.

States with closed primaries are Connecticut, Delaware, Florida, Idaho, Kentucky, Maryland, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, South Dakota, and Utah.

and independent voters may choose a major party ballot line in the primary, either Republican or Democrat, but may not "cross over" from one party ballot to another party ballot in different races in the same election (that is, if an individual chooses the Democratic primary ballot, the person can only vote in Democratic primary contests in that election). Voters who are already affiliated with a political party – Republican, Democrat, or minor party – can vote only in that party's primary.

States with a partisan primary and partisan voter registration are Arizona, Colorado, Iowa, Kansas, Maine, Massachusetts, New Hampshire, Rhode Island, West Virginia, and Wyoming.

Open Partisan Primaries with

Nonpartisan Registration. This system, which Wisconsin uses, is similar to open partisan primaries with partisan registration, except that *all* voters (regardless of party affiliation) can choose a ballot line to vote in the primary but still cannot cross over from one party ballot to another in the same election.

States with a partisan open primary and nonpartisan voter registration are Alabama, Arkansas, Georgia, Hawaii, Illinois, Indiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota (no voter registration), Ohio, South Carolina, Tennessee, Texas, Vermont, Virginia, and Wisconsin.

Top-Two (or Top-Four) Open Primary: In this type of election, there



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***Disclaimer:** The views and opinions expressed in this article are those of the authors and do not necessarily reflect the views of their respective firms or any entities they represent. While the authors do not speak for the State Bar of Wisconsin, nor Wisconsin Lawyer magazine, the authors encourage readers to take a real look at Final Five Elections and the impact they could have both on our state and the nation. We welcome the exchange of ideas on electoral reform and welcome discussion on this topic, be it in support of or opposition to Final Five Elections. Access the digital article at www.wisbar.org/wl.*

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is no Republican primary or Democratic primary. There is one primary, run by the state, with all candidates and all parties (or no party) listed. Every voter can participate and vote for any candidate, regardless of party. The top-two (or top-four) winners move on to the general election.

States with a top-two open primary are California, Washington, and Nebraska (state legislative races only). One state has a top-four open primary: Alaska.

Because most states and districts are considered “noncompetitive” (that is, they heavily lean Democrat or Republican), the primary election in most states decides the outcome of the general election. When combined with low voter turnout in primaries (compared to general elections), studies show that about 8% of Americans determined the outcomes in 83% of U.S. House races.⁹ Systemically advantaging primary voters (who tend to be more partisan), as opposed to general election voters, leads to a staggering misalignment of electoral accountability and incentivizes partisan governing behavior that is at the root of so much of Americans’ frustration with politics and the gridlock in Washington, D.C.¹⁰

Plurality Voting

As citizens, we tend not to think much about the fact that most election systems in the United States use plurality voting (in primary and general elections). As discussed above, plurality voting is a system in which the candidate with the most votes wins the election, even if the winning candidate has fewer than 50% of the votes cast. For example, in a general election with three or more candidates from multiple parties, the winning candidate might have fewer than 40% of the votes.

Critics of the plurality system say it inherently stifles competition because when there are more than two candidates in a race any additional candidates are painted as “spoilers” and a wasted vote (think Ross Perot in 1992 or Ralph

Nader in 2000). Plurality voting often results in voters feeling like they must vote for “the lesser of two evils” as opposed to having meaningful choices and voting for the candidate they truly support.

Changing Election Laws

While many countries organize voting at a national level, the American federalist system deems election processes to be a state matter. The individual states’ power to elect their congressional delegations as they see fit is dictated by Article 1, Section 4, Clause 1 of the U.S. Constitution: the manner of electing Senators and Representatives “shall be prescribed in each State by the Legislature thereof.”

The process for changing election laws varies among the states. Some states can change the format of their elections via statewide ballot referendum. In Wisconsin, however, changing elections requires that legislation be passed in

both the State Assembly and the State Senate and signed by the governor.

Recent State Election System Reforms

States across the country are realizing the limitations of party primaries and plurality voting and are starting to implement systems that better align politicians with their constituents.

For example, to address the “spoiler problem” mentioned above, some states require an elected candidate to obtain at least 50% of the vote in elections, often requiring one or more runoff elections.¹¹ It is believed that this system of running elections better aligns elected officials with their constituents. In runoff elections, the lowest-vote candidate in the first round of voting is eliminated, and the voters must return to the polls to vote again in a second round (voters who voted for the eliminated candidate in the first round may vote

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for a different candidate in the second round). This process continues (often requiring multiple rounds of runoffs) until a candidate achieves 50% of the vote. People probably are most familiar with the prominently covered Georgia Senate runoffs in recent years, when the election season stretched well into the end-of-year holidays.

A ranked ballot has gained prominence as a mechanism to implement runoff elections without requiring voters to return for subsequent rounds of voting. In a ranked ballot election, voters go to the polls only once and rank the candidates in order – first choice, second choice, and so on. In the first round of voting, all first choices are counted. If no candidate receives 50% of the vote, then the lowest-vote candidate is eliminated and the votes of any voters who voted for the eliminated candidate as their first choice would be transferred to their second-choice candidate. By allowing voters to cast all their preferences at once (that is, by ranking the candidates on their ballot), the election can be tabulated through an “instant runoff” (as opposed to temporally spaced runoff elections).

Some southern states that require majority-winner elections started using

ranked ballots for military and overseas voters years ago to account for the quick timeline between subsequent runoff elections. Local municipalities and other jurisdictions have been using ranked ballots and instant runoffs at the local level for decades. More recently, in 2016 and 2018, Maine voters affirmed a ballot initiative to shift to ranked ballots for state primary and general elections and federal general elections.

Using a ranked ballot and instant runoffs addresses the problems inherent in plurality voting. However, the prominent criticism of these approaches, particularly in local elections, has been that a ranked ballot with many candidates is too confusing for voters. In some local races, there have been up to 35 candidates on the ballot for voters to rank. A more recent innovation addresses this challenge as well as the party primary problem.

In 2020, Alaska voters passed a ballot initiative to adopt what they call Final Four Elections (the combination of a top-four open primary and a ranked-ballot, instant-runoff general election). They used the new system for the first time in 2022. That same year, Nevada voters passed a constitutional amendment to move to Final Five Elections (top-five open

primary with a ranked-ballot, instant-runoff general) and will need to reaffirm that vote in 2024 for it to take effect.

During the 2023-24 legislative session, the Wisconsin Legislature considered a bipartisan bill that would implement Final Five Elections for U.S. House and Senate elections in Wisconsin (S.B. 528¹² and A.B. 563¹³). The bill had hearings in both the Senate and Assembly Elections Committees, with overwhelming testimony from Wisconsinites in favor and some opposed. An opposing constitutional amendment to ban all forms of ranked-choice elections and open primaries was introduced by some Republicans and also had hearings in the Elections Committees of both chambers. Full videos of all hearings can be found on WisEye,¹⁴ and a 14-minute highlight video from the Assembly Elections Committee, including testimony in support of Final Five Elections from Cathy Giessel (R-Alaska), a member of the Alaska Senate, and Reid Ribble (R-Wisconsin), a former member of the U.S. House of Representatives, is linked in the endnotes.¹⁵

Legality of Recent Reforms

Both open primaries and instant-runoff general elections have been found constitutional in every state that has passed them in recent years.

Alaska’s Final Four Elections system was upheld by the Alaska Supreme Court in October 2022 in *Kohlhaas v. State*. The court stated: “Because Initiative 2 takes the State out of the party nominating process entirely, it places no burden on political parties’ right to choose a standard bearer or on their right to determine who can participate in making that choice.”¹⁶

California’s top-two primary was similarly ruled constitutional by the First District Court of Appeal, and the U.S. Supreme Court declined to hear the case.¹⁷ Similarly, Washington state’s top-two primary system was affirmed by the U.S. Supreme Court in 2008 in a 7-2 opinion authored by Justice Clarence Thomas in *Washington State Grange v.*

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Washington State Republican Party.¹⁸ Justice Thomas rejected the argument that this kind of primary system violated political parties' associational rights by making the victorious primary candidates "the de facto nominees of the parties they prefer." Instead, Justice

in a cross-partisan way) and achievable (that is, can be implemented and effective in years, not decades).

Final Four Elections and Final Five Elections aim to generate more healthy competition and produce better incentives for the actors in the U.S. political

In Wisconsin, however, changing elections requires that legislation be passed in both the State Assembly and the State Senate and signed by the governor.

Thomas explained, "[t]he essence of nomination – the choice of a party representative – does not occur under [the law]."¹⁹

Why Final Five?

Based on the data and experience in other states, the authors feel strongly that Final Five Elections are the best next innovation for Wisconsin elections. Katherine Gehl, former president and CEO of Wisconsin-based Gehl Foods, and Michael Porter, a professor at Harvard Business School, made a strong case for Final Five Elections in their book, *The Politics Industry: How Political Innovation Can Break Partisan Gridlock and Save Our Democracy*, including a framework for prioritizing reform that is both powerful (that is, allows Congress to successfully address complex problems

system. By ensuring that no election is decided until all voters have had their voices heard in the November general election, creating real competition in November elections, and guaranteeing the winner receives a majority of the vote, Final Five Elections can hold elected officials accountable to at least a majority of voters.

Conclusion

There might not be a perfect election system. As such, the founding fathers knew the system would need to innovate to maintain representativeness and accountability over time. The federalist system makes states the laboratories of democracy with the responsibility for change.

Wisconsin is often referred to as a battleground state and, at the top of the ticket, statewide elections are

competitive. However, we already had the only 2024 election that matters for more than 85% of Wisconsin voters when it comes to who represents them in Congress and the state legislature. It happened on a Tuesday in mid-August, during the party primary. By the time November arrives, only one U.S. House seat will be truly competitive and only 11% of seats for State Assembly or Senate will be competitive.²⁰ If Wisconsin voters and elected officials do not address this "primary problem" with Final Five Elections, we are not addressing the underlying systemic misalignment between electoral incentives and governing for Wisconsin voters and elected officials.

An election system that generates more healthy competition and incentivizes innovation and collaboration is to everyone's benefit, especially legal professionals. We have witnessed firsthand the crippling effects of the current system – gridlock, grandstanding, and pandering to the most partisan minority of the political parties. We believe reform is needed, and for Wisconsin Congressional elections, we believe instituting Final Five Elections would be a step in the right direction. **WL**

ENDNOTES

¹U.S. Constitution, art. 1, § 4, cl. 1.

²Ballotpedia, *Primary Election*, https://ballotpedia.org/Primary_election (last visited Sept. 8, 2024).

³Britannica, *Plurality System*, www.britannica.com/topic/plurality-system (last visited Sept. 8, 2024).

⁴Shigeo Hirano & James M. Snyder Jr., *Primary Elections in the United States* (Cambridge: Cambridge University Press 2019).

⁵Ernst C. Meyer, *Nominating Systems: Direct Primaries Versus Conventions in the United States* (Madison, WI: Meyer 1902).

⁶Seth E. Masket, "Wisconsin's Adoption of the Direct Primary," in *The Inevitable Party: Why Attempts to Kill the Party System Fail and How they Weaken Democracy* (Oxford: Oxford University Press 2016).

⁷*Id.*

⁸Open Primaries, *Rules in Your State*, <https://openprimaries.org/rules-in-your-state/> (last visited Sept. 5, 2024).

⁹Unite Am. Inst., *The Primary Problem* (March 2021), <https://docsend.com/view/futywxm23w7i5sa7>.

¹⁰Jeremy Gruber, Michael Hardy & Harry Kresky, *Let All Voters Vote: Independents and the Expansion of Voting Rights in the United States*, 35 Touro L. Rev. no. 2, 2019.

¹¹Ballotpedia, *Runoff Election*, https://ballotpedia.org/Runoff_election (last visited Sept. 10, 2024).

¹²<https://docs.legis.wisconsin.gov/document/session/2023/REG/SB528>.

¹³<https://docs.legis.wisconsin.gov/2023/proposals/ab563>.

¹⁴<https://wiseye.org/category/committees/>.

¹⁵Democracy Found Action, Highlights from Assembly Committee on Campaigns and Elections Hearing on Assembly Bill 563, www.youtube.com/watch?v=_EbotKLegdQ&feature=youtu.be.

¹⁶*Kohlhaas v. Alaska*, 518 P.3d 1095 (Alaska 2022).

¹⁷*Rubin v. Padilla*, 233 Cal. App. 4th 1128 (2015).

¹⁸*Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008).

¹⁹*Id.* at 452-53.

²⁰Cook Pol. Rep., *2024 CPR House Race Ratings*, www.cookpolitical.com/ratings/house-race-ratings (defining competitive as "toss up" and "lean") (last visited Sept. 8, 2024); WisPolitics, *2024 Wisconsin Assembly Races*, www.wispolitics.com/2024/2024-assembly-races/ (March 11, 2024) (defining competitive as 46-54% seats). **WL**