

How to Protect Elections in Arkansas

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There is a cancer in our political culture: more and more Americans now publicly question whether we have fair elections. Both Donald Trump and Joe Biden have raised doubts about the legitimacy of American elections during their presidencies, and a significant number of Americans appear sympathetic to such views.¹ This is a dangerous state of affairs, and policymakers should take action to avoid the devastating consequences this doubt could create: it is crucial for our electoral institutions both to appear incorruptible and to be incorruptible.

Similarly, Arkansas government suffers from a lack of trust. The most recent Arkansas Poll revealed that many Arkansas residents are dissatisfied with the professionalism and integrity of their state government. Only 51% say that state elected officials are doing an excellent or good job;² only 58% say that local elected officials are doing an excellent or good job.³ That means nearly half of Arkansans believe that substantial parts of their own government are doing a mediocre job – or worse. Addressing the distrust and cynicism with which many Arkansans view their elected officials is imperative.

The backbone of American democracy – the way we choose our own representatives – is now viewed with unprecedented skepticism. Voters – including many who rarely, if ever, thought about the realities of election administration in previous years – are now regularly confronted with news stories that cast doubt on how elections are conducted and votes are counted. Public attention is now more focused on the administration of elections than it has been in many years. Now is the time for Arkansas policymakers to act on reforms to ensure that Arkansans can trust their own electoral system.

A widespread conviction that our political system does not accurately reflect the choices of voters will undermine representative government. A recent wave of convictions of state-level government officials suggests systemic corruption and self-dealing.⁴ Partisan gerrymandering, a wasteful and counterproductive primary voting system, and threats to the exercise of the franchise are all aspects of Arkansas's electoral system that should be remedied.

Arkansas's General Assembly should therefore:

- **implement primary election reform through instant runoff voting;**
- **reform state-level redistricting;**
- **preserve access to mail-in voting**
- **ensure that every Arkansan's vote is protected; and**
- **resist pressure to subvert the Electoral College through adoption of the National Popular Vote compact.**

This paper describes how to implement these reforms. Legislators who advance such policies will remedy significant problems with the state's current political process. Such remedies will also reduce Arkansans' cynicism about Arkansas state government.

¹ See, e.g., "Trump Says Biden's Push For Voting Rights Means 2020 Election Was Rigged, *New York Daily News*, January 20, 2022, <https://www.nydailynews.com/news/politics/us-elections-government/ny-trump-biden-voting-rights-election-2020-20220120-5ad7e6zg2jeajnytif4lmjyvy-story.html>; "Biden Questions If U.S. Midterm Elections Will Be 'Legit,' BBC News, January 20, 2022, <https://www.bbc.com/news/world-us-canada-60063594>

² Parry, Janine, "The Arkansas Poll 2020: Summary Result," University of Arkansas, Fayetteville, p. 3. <https://fulbright.uark.edu/departments/political-science/partners/arkpoll/2020summaryreport.pdf>

³ *Ibid.*

⁴ In the last decade, at least ten state-level Arkansas constitutional officials have been convicted of bribery, fraud, or embezzlement: Sen. Paul Bookout, Rep. Eddie Cooper, Sen. Jake Files, Rep. Hudson Hallum, Sen. Jeremy Hutchinson, Rep. Steven Jones, Rep. Micah Neal, State Treasurer Martha Shoffner, Rep. Hank Wilkins, and Sen. Jon Woods. If we use this figure as a measure of wrongdoing among public officials, it is atypically high when compared to other decades.

Instant Runoff Voting for Primaries

The first political reform this paper describes is instant runoff voting. Arkansas policymakers should establish instant runoff voting in primaries for several reasons:

- It reflects the will of voters more accurately;
- It encourages positive, issue-oriented campaigns;
- It is already in successful operation for Arkansans in the military;
- It saves taxpayers money; and
- It provides for faster and easier election administration.

Speaking generally, candidates for public office in Arkansas acquire party nominations through primary elections; the candidate who acquires a majority of the primary vote captures the nomination. If no candidate receives a majority of the votes in a primary race, Arkansas law pits the top two vote-getters against each other in a runoff that takes place three weeks after the primary election. Only nine other states require primary runoff elections.⁵

Notably, not all Arkansas voters must show up at the ballot box for their runoff choices to be counted. Arkansas voters who are members of the military and who are overseas are allowed to cast their primary and runoff votes at the same time – they use instant runoff voting, also known as ranked-choice voting.⁶

How instant runoff voting works. Under instant runoff voting, voters use ballots that allow them to express their choices in more detail than customary primary and runoff ballots do. When a primary election contains more than two candidates running for a seat, voters will rank the candidates on their ballots: that is, the primary election voter will mark the most-favored candidate with a “1”, the second-most-favored candidate with a “2”, and so forth.

Allowing voters to express this additional information on their ballot makes runoff elections unnecessary: that is, voters only have to cast one ballot in order to choose party nominees. In effect, the use of such ballots allows primary and runoff elections to be conducted simultaneously. In the circumstances when one candidate receives an absolute majority of “1” votes, that candidate will win the party nomination. However, if no candidate receives an absolute majority of “1” votes, this entails a more complex procedure. The ballots are then recounted immediately, but the votes for the candidate who received the lowest number of “1” votes are ignored: in other words, each ballot with a “1” vote for the candidate who was eliminated will be understood as containing a vote for the second-most-favored candidate (that is, the candidate who received a “2” on the ballot) during that recount. This recount procedure will necessarily produce a majority vote for one candidate in a three-candidate race. In the event of a race with more than three candidates, this procedure may have to be repeated: that is, one or more additional recounts will then be conducted – after striking the new lowest scorer off the ballot – so as to determine the highest vote-getter. To repeat, this procedure will eventually and necessarily produce a majority of votes for one candidate.⁷



⁵ Those nine other states are Alabama, Georgia, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, and Vermont. In Vermont, however, a runoff is conducted only in the event of a tie in the primary – an extremely rare event.

⁶ See generally Arkansas Code § 7-5-406, and in particular § (c)(1)(a).

⁷ An alternate method – one that captures less information from ballots than this paper proposes – would be to mirror Arkansas's current runoff system: that is, in the event that no candidate receives an absolute majority, all ballots would be recounted immediately, but only votes for the top two vote-getters would be counted.

The many benefits of instant runoff voting. Instant runoff voting more accurately expresses the will of a majority of voters. When more than two candidates run for a position under the current system, it can lead to one of those candidates winning the race with less than a majority of the vote. While runoff elections can help mitigate this problem, they are a flawed way of doing so. In a runoff, candidates who run third and below are eliminated. However, under instant runoff voting, voters can express their preferences in a more comprehensive way by choosing among the entire slate of candidates. Instead of being forced to choose from the top two in a runoff election, voters can indicate their level of support for the entire field of candidates by how they are ranked. Instead of an “either-or” choice, instant runoff voting provides a more accurate reflection of what voters prefer.

In his account of instant runoff voting in Massachusetts, Jonathan Tisch of Tufts University describes how it better expresses the true views of voters:

...the current system sometimes discourages voters from supporting their real favorites. If your preferred candidate has low polling numbers, you may feel pressure to back another candidate with a better chance of prevailing. But under ranked choice you can vote your true preference, confident that if your first choice proves unpopular, your vote will get transferred to a more viable candidate in your rankings.⁸

As described above, this procedure is already in use for military voters – primarily for reasons of practicality. Mail sent to overseas locations may be slow or unreliable. It is unrealistic to expect perfect compliance when an election clerk’s office is required both to print and to mail runoff election ballots to overseas voters in the three weeks between a primary election and a runoff vote. The fact that instant runoff voting is already a part of Arkansas elections suggests that there are no real barriers to its wider use.

Expanding the use of instant runoff voting to all Arkansas voters would be a faster, cheaper method of choosing primary nominees than our current system of runoff elections. One important advantage of instant runoff voting is that it would save the money that holding a runoff election costs. These elections cost taxpayers roughly \$1.5 million each election year.⁹ Instant runoff voting achieves the same result without that expenditure of taxpayer money: it also reveals the winners of each primary election much faster than the current system.

That clarity provides an additional reason to adopt instant runoff voting. Under the current system, political candidates have a window of three weeks between the primary election and the runoff election. Sometimes it’s unclear who the election winner is (or who the election winners are) on election night: occasionally, it takes several days to determine the victors of a primary election, which reduces the amount of time they have to campaign before the runoff election occurs. Such delays are more or less inevitable if a candidate demands a recount or pursues legal action. These problems do not just affect candidates and the voters who must cast a ballot at the runoff election; they also hinder elections officials who are charged with designing and printing ballots.

⁸ Tisch, Jonathan, “A Guide to Massachusetts Question 2: Ranked Choice Voting,” The Center for State Policy Analysis, Tufts University, p. 2. https://tischcollege.tufts.edu/sites/default/files/cSPA_ranked_choice_voting.pdf?utm_source=Center+for+State+Policy+Analysis&utm_campaign=3c5cd2e171-EMAIL_CAMPAIGN_2020_02_03_03_25_COPY_01&utm_medium=email&utm_term=0_54d4c454ba-3c5cd2e171-183659213

⁹ *Ibid.*

Besides the budget savings and the increase in the clarity of election results, instant runoff voting can also improve the tone of elections. It is commonplace to see more negative campaigning in runoff elections than in primary elections: the head-to-head nature of runoff elections tends to produce attacks that are intended to dampen the political support that the opposing candidate receives. In contrast, the nature of instant runoff voting discourages negative campaigning. Candidates who run down their rivals will risk alienating that candidate's supporters. Under instant runoff voting, a candidate may need the votes from another candidate's supporters in the second round of balloting. Instant runoff voting encourages candidates to appeal to a broader set of voters beyond his or her base – or at least to illustrate why such voters should rank him or her higher than another choice. Candidates cannot afford to alienate the supporters of their opponents, since these candidates can benefit by being the second-ranked choice of their opponents' supporters. While candidates can point out policy differences, they will have no incentive to engage in the type of negative campaigning that may raise the ire of their opponents' supporters.

The main argument against instant runoff voting is that many are unfamiliar with it. Although instant runoff voting is certainly a departure from the traditional binary form of voting, it is far from untried. Two states have adopted this style of voting,¹¹ and numerous local governments have used it – some for decades. There has been no evidence that instant runoff voting has led to increases in fraud or corruption in the voting process. (Critics of the administration of the recent New York City mayoral election may dispute this judgment, but the extraordinary bureaucratic inefficiency and delay seen in that election was almost certainly a function of the famously inept and corrupt New York Board of Elections.¹²) As mentioned above, it has been used in Arkansas since 2006 to ensure that military voters receive the full benefits of the franchise. Arkansas's experience in the past 16 years has demonstrated the viability of instant runoff voting.



¹⁰ See generally Arkansas Code § 7-5-106.

¹¹ Alaska and Maine. See this website for details on the states and localities using instant runoff voting: https://www.fairvote.org/rcv#where_is_ranked_choice_voting_used.

¹² See generally Brian M. Rosenthal and Michael Rothfeld, "Inside Decades of Nepotism and Bungling at the N.Y.C. Elections Board," *New York Times*, October 6, 2020.

There are obvious technical issues with implementing instant runoff voting for wider use in Arkansas: election workers will have to be retrained, and voting machines will have to be reprogrammed. These are hardly insurmountable barriers: the experience of other jurisdictions can provide guidance. Adam Kissel, a senior fellow at the Cardinal Institute, has outlined some of the transparency standards and safeguards that would ideally accompany instant runoff voting implementation:

First, the source code for the algorithm that counts votes must be well annotated and open to the public. Furthermore, election officials should publish the code from the computer that actually runs counting software both immediately before and immediately after counting the votes. As a result, the public can check the software and feel confident in the integrity of the calculations.

Second, each precinct using a computer to record votes should publish the relevant code both immediately before voting begins, again on the morning of election day, and again immediately after the polls close.

Third, no computers should be connected to the Internet so as to dramatically reduce the opportunity for hacking...

Finally, all ballots (minus information that identifies a voter) should be open to the public and published immediately after the winner is certified. This level of transparency permits any interested and sufficiently talented person to reproduce the exact results.¹³

As a practical matter, however, the first two standards above would be difficult to implement. Voting machine vendors are highly unlikely to make their source code public. Given that fact, in practice it is probable that the best safeguards that a reformer could hope for in the first two respects would be a requirement that courts have in camera (non-public) access to the relevant code or programming – as well as all guidance documents – in the event of an election challenge.

Other states have already begun using instant runoff voting, so there are examples for Arkansas to follow – such as cities and counties across the country, as well as Alaska, Maine, and the recent Virginia gubernatorial contest that nominated Glenn Youngkin. If policymakers were to establish instant runoff voting, then Arkansas could look to these other jurisdictions to see what type of software is needed, what procedures are followed to tabulate the results, and what pitfalls should be avoided during implementation and operation.¹⁴

¹³ One of Kissel's recommendations – disclose party affiliations of each candidate on the ballot – is not pertinent in the context of partisan primaries; it has therefore been redacted. Kissel's paper is available at <https://www.cardinalinstitute.com/app/uploads/2021/12/Can-Ranked-Choice-Voting-Work-A-Conservative-Approach.pdf>

¹⁴ Notably, a constitutional amendment that creates a procedure for instant runoff voting would need either to be consistent with or to redraft Amendment 81, which purports to protect the secrecy of the ballot. In the author's opinion, the scope of Amendment 81 is notably unclear even after attempted resolution by the Supreme Court of Arkansas; see *Willis v. Crumbly*, 371 Ark. 517 (2007).

The Nuts and Bolts of Instant Runoff Voting

Each voter is given a ballot to choose a favorite candidate, second favorite candidate, third favorite candidate, etc. The voter is instructed to label his or her favorite candidate “1”, the second favorite candidate “2,” etc. So in a three-candidate race, a typical voter would label his or her ballot so it ends up looking something like this:

- Candidate Alpha, 1
- Candidate Beta, 2
- Candidate Gamma, 3

The fundamental rule of instant-runoff voting is that only one vote from each voter – the vote for the favorite candidate – is counted in each race.

The Primary: Every ‘1’ vote is counted. Every ‘2’ and ‘3’ vote is ignored (because only one vote from each voter – the vote for the favorite candidate – is counted). If any candidate gets a majority of the ‘1’ votes, then that candidate has won the primary. If, however, no candidate gets a majority, then there is an instant runoff.

The Runoff: The same ballots are counted again immediately, but the candidate who received the lowest number of votes is eliminated from consideration. For the runoff, the candidate who receives the *highest ranking* on each ballot receives that ballot’s vote (because, again, only the vote for the favorite candidate is counted). Suppose Candidate Alpha receives the lowest number of votes in the three-candidate primary: that means Beta and Gamma become the runoff candidates. So the example ballot above – that is counted for the second time, during the runoff, might look something like this:

- Candidate Alpha, ——— 1
- Candidate Beta, 2
- Candidate Gamma, 3

In other words, because Candidate Alpha got the lowest vote of the three, any vote for Candidate Alpha in the runoff would be treated as invisible or nonexistent – and therefore would not be counted. The highest ranking on that ballot – ‘2’ for Beta – would create a vote for Beta in the runoff, because for that ballot ‘2’ is the highest ranking has been chosen for any of the surviving runoff candidates. Notably, the votes of the people who had assigned a ‘1’ to Beta or a ‘1’ to Gamma would be recognized and tallied in just the same way they were in the primary.

The Second Runoff: In the event of a race with more than 3 primary candidates, the instant runoff procedure can be repeated. In each succeeding runoff, the person who receives the lowest number of votes would be stricken from the ballot. For instance, a primary election with 4 candidates would occur, then a runoff election with 3 candidates would occur, then an additional runoff with 2 candidates would occur. For each runoff, the candidate with the smallest number of votes in the previous election would be struck from the ballot. Of course, there is no need to have subsequent runoffs after a candidate gets a majority of the vote.

Reapportionment Reform

The second political reform that this paper describes is reapportionment reform.

Cynicism about politics is corrosive: one source of cynicism about politics is the belief that public officials are rigging the rules of elections to benefit themselves or their friends. Such cynicism is not entirely unfounded; sometimes public officials do occasionally try to establish election rules to help themselves. One notorious instance of such conduct typically recurs once a decade, when public officials design the contours of legislative districts. Redistricting, like any other task of government, needs regulations and safeguards that are designed to resist corruption: although it is impossible to find pure and sinless people to administer the redistricting process, in contrast the establishment of reasonably fair and impartial procedures that govern redistricting's processes and results is an achievable goal.

After the decennial census is completed, states then must update the lines they draw for congressional and legislative districts. This line-drawing is necessary in order to ensure that each district has approximately the same number of people.¹⁵ Redistricting has become a hot-button issue due to the dangers of gerrymandering: gerrymandering occurs when districts are drawn in order to favor a political party or a personal interest.¹⁶ States have taken steps to reduce the prevalence of gerrymandering and have seen varying levels of success.

How it works now. In Arkansas, the Board of Apportionment draws legislative districts and the General Assembly draws congressional districts. The Board of Apportionment consists of the governor, the attorney general, and the secretary of state. While there are certain legal requirements for redistricting (districts must be of roughly equal population, districts cannot be drawn in a discriminatory manner, etc.),¹⁷ there are no formal rules to prohibit the board or General Assembly from drawing districts to benefit one political party or aid in the election of certain politicians.¹⁸

When politicians draw district lines that affect them, they might sometimes feel impelled to draw those lines to benefit themselves. Former state legislator Jeremy Hutchinson – one of many state legislators who successfully lobbied Board of Apportionment staff to include or exclude various precincts from various districts – was known for joking about a knob-like “jeremymander” that protruded from one side of the district he represented, so that it incorporated a piece of land containing a home he owned.



¹⁵ In 1964, the Supreme Court of the United States decided in *Reynolds v. Sims* (377 U.S. 533) that the Constitution's Equal Protection Clause requires legislators to represent legislative districts with substantially equal population. These districts must be based on population, not geography. See <https://supreme.justia.com/cases/federal/us/377/533/>

¹⁶ Gerrymandering gets its name from Elbridge Gerry, who as Massachusetts governor signed into law a legislative map that created a district that was strangely shaped, due to it being drawn for partisan purposes. The *Boston Gazette* said the district resembled a salamander, dubbing it a “Gerrymander.”

¹⁷ “Redistricting Standards and Requirements,” Arkansas Board of Apportionment. <https://arkansasredistricting.org/about-the-process/redistricting-criteria-2/>

¹⁸ Indeed, the state’s “Redistricting Standards and Requirements,” *ibid.*, expressly include “avoiding pairing incumbents” in its list of “commonly accepted legal principles.” It is unclear whether this “principle” has any legal foundation at all; in some cases, its operation appears to protect incumbents.

Arkansas's redistricting process has seen problems, as the last two rounds of redistricting illustrate. After the 2021 redistricting process, the NAACP filed suit against the state, arguing that the map it ultimately adopted violated federal law by discriminating against black Arkansans. The NAACP alleged that the new legislative lines did not give black voters proportional representation.¹⁹ Critics lodged similar complaints after the 2011 process.²⁰ In previous years, critics argued that Democrats gerrymandered districts so as to produce disproportionate advantages; now that Republicans are the majority party, the criticism is typically that the new maps are gerrymandered to maximize Republican representation.

A proposal for reform. The best way of minimizing the influence of politics over redistricting is to reduce and remove the ability of legislators to draw the district lines. Several members of the Arkansas legislature have introduced a constitutional amendment that would have accomplished these goals.²¹ Under this proposed amendment, the current Board of Apportionment (the governor, the secretary of state, and the attorney general) would appoint a nine-member commission to draw the districts. Of those nine members, one must be educated in mathematics, another must be a licensed attorney, and a third must be educated in the field of technology-assisted cartography. Lobbyists, elected officials, and party officials – as well as those who held such positions in the recent past – would be barred from commission membership. After serving, every member would be prohibited both from running for office and from contributing to political campaigns for two years.

The nine-member commission would be responsible for drawing legislative districts using these criteria in this order:

- Population
- Relevant federal civil rights laws
- Contiguity
- Avoiding the division of cities and counties
- Avoiding dividing areas marked by physical characteristics such as mountains or rivers
- Compactness
- Ensuring that house districts are fully within senate districts

The commission may not take political factors, such as how the new lines would affect incumbents or any partisan data, into consideration unless otherwise stated by law.

The commission will submit the new districts to a board consisting of the governor, secretary of state, and the attorney general. If the board rejects the districts, the commission will redraw them. The board can only reject the districts three times, however. The Arkansas Supreme Court will redraw the districts upon further rejections.

This amendment offers many improvements over the current system. Perhaps most importantly, it removes the appearance (or the reality) of corruption. When legislators no longer draw districts, it lessens political influence in the redistricting process. The limitations on the political activities of commission members will also reduce the role that political or partisan considerations play. Another benefit from ending legislators' involvement in redistricting is that it frees up legislators' time so they can concentrate on other matters of more importance.

¹⁹ <https://www.democracymonitor.com/wp-content/uploads/2021/12/01-2021-12-29-complaint.pdf>

²⁰ "Redistricting in Arkansas after the 2010 Census," Ballotpedia. https://ballotpedia.org/Redistricting_in_Arkansas_after_the_2010_census

²¹ See, e.g., H.J.R. 1005 of 2009.

Establishing clear rules for drawing new districts is one of the most important reforms that the state can enact. As Walter Olson, an expert in redistricting for the Cato Institute, notes, “States that have enacted clear, objective rules to guide mapmakers on topics like compactness and congruence tend to have far less of a gerrymandering problem than those that have not.”²² Prohibiting political considerations is also vital, since it is easier than ever to use software to discern partisan voting patterns in geographic areas and then to draw districts to benefit one party.

The perfect time to enact redistricting reform is now, when the next round of redistricting is roughly a decade away. How redistricting after the 2030 census will affect the political or partisan nature of Arkansas politics cannot be predicted with any accuracy in 2022. No politician or political party could reasonably be expected to strategically design redistricting reforms that are self-benefiting so far in the future. Enacting this reform now would ensure that the state has a fair, transparent process free from political maneuvering after the 2030 census.

If enacted, this method of redistricting would be similar to the redistricting process used in Iowa. Since 1980, nonpartisan Iowa legislative staff members have drawn districts to be approved by the state legislature. This process uses many of the same criteria outlined in the Arkansas amendment, including prohibiting partisan considerations and trying to ensure that every house district fits within a senatorial district. If legislators do not adopt the new legislative districts by September 1 in a redistricting year, the Iowa Supreme Court then takes over the process. In the decades following, Iowa legislators have adopted these redistricting plans and the state’s highest court has not been involved.²³

An inferior alternative. This proposed constitutional amendment stands in stark contrast to another proposed measure that would also change how redistricting is done in Arkansas.²⁴ Under the proposal from “People Not Politicians,” redistricting would be done by a 9-member commission of citizens selected by a complicated process of narrowing down an initial pool of 90 applicants. New legislative and congressional maps would need to be approved by 6 of the 9 commissioners.



²² <https://www.cato.org/commentary/why-redistricting-reform-goes-rails#>

²³ <https://www.ncsl.org/research/redistricting/the-iowa-model-for-redistricting.aspx>

²⁴ “Arkansas Issue 4: Redistricting Commission Amendment (2020),” Ballotpedia. [https://ballotpedia.org/Arkansas_Issue_4_Redistricting_Commission_Amendment_\(2020\)](https://ballotpedia.org/Arkansas_Issue_4_Redistricting_Commission_Amendment_(2020))

The “People Not Politicians” proposal, which was unsuccessfully proposed for the 2022 ballot, is flawed in at least three respects. Its most significant flaw is that its rules – and, in particular, its two-thirds supermajority requirements for passage – seem almost designed to fail. Supermajority requirements notoriously create a high hurdle for passage, and there is a real prospect that a nine-member board might be unable to produce a six-member consensus. A second flaw is the proposal’s essentially unenforceable requirement that a third of the commissioners will be “affiliated” with neither Republicans nor Democrats: this is a recipe for partisan forces to stack the application process with young, fresh-faced applicants who hold unexpressed political preferences. Connoisseurs of political theatre will enjoy the spectacle of the appointments process that this measure will create: it will be filled with retired judges who profess to have no political sympathies, and those judges will be charged to appoint commissioners who profess to have no political sympathies. With respect to political affiliation, it is realistic to predict that a significant number of these judges, and a significant number of the board applicants that the judges must select from, will be less than forthcoming when describing their own political sympathies. Finally, the portion of the commission’s decisional process described above is far from the only aspect of the proposal’s procedures

that is inordinately and pointlessly complex. The bottom line for this proposal is that its design failures are likely to lead to its substantive failures: just because the text of the proposal requires six of nine board members to produce a redistricting plan, it certainly does not follow that – in the real world – the board will produce a satisfactory map.

An additional failure of design can be seen in the text of the proposal, which not only prohibits district maps from “unduly favor[ing] or disfavor[ing] any political party ... on a statewide basis,” but also lays out a set of principles that are ranked by priority: contiguity, no racial or language discrimination, no division of cities or counties, compactness, and partisan competition. Notably, however, it is unclear how the prohibition of favoring/disfavoring parties works, whether that prohibition is supposed to take priority over the five principles that the proposal lists, and whether that prohibition is the same as or different from the principle of partisan competition. Furthermore, the proposal’s requirement of partisan competition appears to be in significant tension with other redistricting goals; it appears likely to motivate designers to push for 50/50 Democratic/Republican districts, even if such districts would make it more difficult to satisfy the proposal’s more neutral rules that command contiguity, compactness, and respect for established political divisions.



Two lessons from Virginia. Predicting the outcome of redistricting commissions that are hampered by structural or institutional problems is not a demanding task: historically, such commissions have failed to meet their objective. Consider the 2021 results of Virginia's bipartisan redistricting commission, which was carefully designed to include an equal number of Republicans and Democrats. This design contained the seeds of its own failure: the commission split almost immediately into two mirror-image partisan factions, each of which drew its own partisan map, relied on its own partisan lawyer, and cast its set of partisan votes for its preferred partisan outcome. Ultimately, the commission was never able to produce a plan that drew majority support: even if a majority-supported plan had emerged, that plan likely would have failed to meet the supermajority requirements that the commission's rules required.²⁵ One observer, Stephen Farnsworth (a professor of political science at the University of Mary Washington), noted that the commission had "failed in every respect to do what the majority of Virginians thought would be the best way forward."²⁶ The first lesson of Virginia redistricting is that a committee's inherent failure of institutional design can swamp even the most thoughtful and best-intentioned appointees who serve on it.

Ultimately, Virginia's redistricting commission ended in a humiliating collapse. Virginia's redistricting process dictated that – because the commission failed to accomplish its mission – legislative districts would be drawn by the state Supreme Court. That court eventually appointed two special masters – Bernard Grofman and Sean Trende – who were tasked to propose district maps for Virginia's state and federal legislators. Although Grofman and Trende were each selected by one of the two state's rival political parties, it is reasonable to conclude that they followed the Supreme Court of Virginia's command to work in "an apolitical and nonpartisan manner."²⁷ Instead of attending to incumbents and local political interests, the two special masters drew district lines based on fair and neutral values, including population equality, the avoidance of city and county splits, and compactness. No redistricting outcome will ever achieve universal acclaim, but it is reasonable to conclude that the work of Grofman and Trende produced broad acceptance and minimal grumbling. The second lesson of Virginia's redistricting is that a fair process that is purposefully blind to entrenched political interests can produce consensus.

²⁵ The commission's exacting supermajority requirements are described at <https://www.virginiaredistricting.org/PageReader.aspx?page=FAQs>

²⁶ Meagan Flynn, "Virginia's Redistricting Commission's Failure to Transcend Partisanship Has Lessons for Other States, Critics Say," *Washington Post*, October 25, 2021.

²⁷ See their memo to the Court of December 7, 2021, available at https://www.vacourts.gov/courts/scv/districting/memorandum_re_va_redistricting_2021.pdf

Preserving the Franchise

In Arkansas's 2020 general election, 66.92% of eligible voters turned out to vote, compared to 64.65% in 2018.²⁸ Arkansans cast over 1.2 million ballots in 2020,²⁹ and there were no serious allegations of vote fraud or voter irregularities in the state. It is imperative that state-level policymakers embrace policies that continue to give voters reason to trust our electoral system. That trust will be the foundation for Arkansas voters' high turnout; ultimately, that trust will encourage even more Arkansans to cast ballots.

As a general rule, it should be easy to vote and difficult to cheat. Our state's vote-by-mail system preserves these goals, because it maximizes access to the ballot while minimizing fraud. In-person voting is the default method of voting in the state – and it is a method that should be preserved – but for some, voting by mail is a vital substitute. Of course, the establishment of common-sense safeguards as part of voting by mail has allowed Arkansans who are unable to vote in person to exercise the franchise.



Although there have been no recent cases of absentee vote fraud in Arkansas, the General Assembly enacted several new reforms in 2021 in response to concerns about the security of the ballot. Some of these new laws are aimed at curbing abuses of the mail-in voting systems. Act 736 restricts “ballot harvesting,” in which activists and paid political operatives gather multiple absentee ballots and bring them to polling locations. (This practice was at the heart of a massive voter fraud operation in a North Carolina congressional election in 2018.³⁰) Under Arkansas's new law, anyone with more than 5 absentee ballots in his or her possession would be presumed to intend to commit vote fraud. Act 736 also prohibits the state from mailing out absentee ballots to voters who have not requested them. The law also requires that anyone requesting such a ballot must use his or her residential address.

Arkansas has seen instances of absentee voter fraud in the past. For instance, state representative Hudson Hallum and his father were convicted of voter fraud by means of absentee ballots in 2013.³¹ Arkansas's changes to the absentee voting system since then, especially the reforms enacted in 2021, will help ensure that this type of crime does not occur in the future. Absentee ballots are widely used in Arkansas elections: nearly 10% of Arkansas general election voters relied on them in 2020.³²

²⁸ Arkansas Secretary of State, <https://results.enr.clarityelections.com/AR/106124/web.274956/#/turnout>

²⁹ *Ibid.*

³⁰ Graff, Michael and Nick Ochsner, “‘This Smacks of Something Gone Awry’: A True Tale of Absentee Voter Fraud,” *Politico*, November 29, 2021. <https://www.politico.com/news/magazine/2021/11/29/true-tale-absentee-voter-fraud-north-carolina-523238>

³¹ “Former State Representative Hudson Hallum and Father Sentenced For Conspiracy To Commit Election Fraud,” U.S. Department of Justice, June 21, 2013. <https://www.justice.gov/usao-edar/pr/former-state-representative-hudson-hallum-and-father-sentenced-conspiracy-commit>

³² In Arkansas's 2020 general election, 1,223,777 votes were cast. Roughly 10% of them were *absentee* votes, and roughly two-thirds of them were *early* votes.

Rejecting the National Popular Vote

Those who want to protect Arkansas voters' exercise of their franchise should be on guard against one particularly pernicious proposal: the National Popular Vote Interstate Compact.³³ This is an interstate agreement that, if passed, would award Arkansas's electoral votes to the winner of the national popular vote. This agreement would serve as an end run around the Electoral College as it currently exists. While reforming or eliminating the Electoral College would require changing the Constitution, the adoption of the National Popular Vote compact would circumvent the electoral college through legislative means.

Fifteen states and the District of Columbia have already passed legislation to adopt this compact:³⁴ it would disregard the traditional mechanism of the Electoral College and instead award candidates' electoral votes to whomever wins the popular vote nationally. This plan would go into effect once the electoral votes of the states enacting it total 280 or more. Currently the states who have enacted it control 195 electoral votes.³⁵

Arkansas has not joined this compact, but the House of Representatives has passed legislation to do so in two previous legislative sessions (2007 and 2009). The Senate failed to act on this proposal either of these years. It appears that legislative sympathy for the National Popular Vote has dwindled over time: legislators who wish to underscore the practical necessity and the moral legitimacy of the Electoral College should consider passing a resolution highlighting its centrality to presidential elections.³⁶

It is reasonable to predict that the adoption of the National Popular Vote compact would change Arkansas politics for the worse. More precisely, it would likely change the behavior of presidential candidates. Presidential candidates respond to incentives just like anyone else; the incentives of the National Popular Vote would encourage candidates to campaign in and focus on densely populated states, where they could run up their vote totals. States with low population density, like Arkansas, would likely suffer from inattention and neglect by presidential candidates.

If Arkansas legislators adopted this compact, it would cancel the votes cast by Arkansans in some future presidential elections. Currently, the majority of Arkansas voters in effect direct electors to cast their votes in the Electoral College for Arkansas's favorite candidate; in contrast, the National Popular Vote compact would undercut local voters' franchise by shifting Arkansas's votes to whoever received a national majority. The choices of Arkansas voters would no longer determine who received Arkansas's electoral votes. Anyone who wants Arkansans' votes to count should realize that the National Popular Vote would (metaphorically) toss Arkansas votes into a wastebasket and (practically) make those votes irrelevant.



³³ "Agreement Among the States to Elect the President by National Popular Vote," National Popular Vote. <https://www.nationalpopularvote.com/written-explanation>

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ In the author's view, a strong argument in favor of preservation of the Electoral College is that it eliminates an incentive for partisans to cheat in presidential elections. Those who want their candidate to win the electoral votes of their state don't care how big the winning margin is under the present system; under the National Popular Vote rules, however, partisans have an incentive to discover more and more votes, even after the identity of the candidate who has garnered the most votes has been identified. This dynamic leads to stolen elections: it appears likely that corrupt cascades of serially discovered fake votes changed the outcome of a notorious U.S. Senate election in Texas in 1948. Those who enjoy reading dramatic historical accounts of elections will find Robert Caro's *The Years of Lyndon Johnson: Means of Ascent* (1990) to be of interest in this context.

Conclusion

Arkansas policymakers should demonstrate leadership by taking proactive measures: they should write reforms on instant runoff voting, reapportionment, and protecting the franchise into law. Legislative inaction on such issues in the past has encouraged activists to make end runs around the legislative process by getting voters to approve significant political reforms without legislative input. Policymakers should play to their strengths by enacting carefully crafted, well-designed reforms that will restore their constituents' faith in representative democracy.



The Advance Arkansas Institute is a nonprofit research and educational organization committed to advancing public policy based on free markets, individual liberty, and limited, transparent government.

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