# THE GREAT UNSKEWING: REMEDYING STRUCTURAL BIAS IN U.S. ELECTIONS

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### I. INTRODUCTION

When Starbucks CEO Howard Schultz announced he was exploring a run for President as an independent in the 2020 election, a chorus of concern arose among the left and center-left commentariat. Their (entirely legitimate) concern was that a well-funded third-party candidacy could split the anti-Trump vote and ensure a Trump reelection.[1] By splitting the vote, Schultz could play the role of a "spoiler."

Similar spoiler, vote-splitting concerns have arisen regarding the overabundance of Democratic presidential candidates.[2] Commentators refer to various "lanes" in these primary elections: the progressive lane, the moderate lane, etc.[3] Progressives are concerned that too many progressive candidates will split the progressive vote, allowing a moderate to gain the nomination.[4] Moderates fear the reverse.[5]

The answer to all these vote-splitting concerns is Ranked Choice Voting (RCV), where voters are allowed to indicate a first, second, and third

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[1] *See, e.g.*, Eugene Robinson, *Howard Schultz Is Fully Capable of Winning the 2020 Election . . . for Trump*, REALCLEAR POL. (Jan. 29, 2019), https://www.realclearpolitics.com/articles/2019/01/29/howard_schultz_is_fully_capable_of_winning_the_2020_election__for_trump_139303.html; Edward-Isaac Dovere, *Ex-Starbucks CEO Could Get Trump Reelected*, ATLANTIC (Jan. 26, 2019,) https://www.theatlantic.com/politics/archive/2019/01/howard-schultzs-independent-run-could-help-trump/581374/. *But see* Kyle Swenson, *Would a Howard Schultz Presidential Bid Help Reelect Trump? Experts Disagree*, WASH. POST (Jan. 28, 2019), https://www.washingtonpost.com/nation/2019/01/28/would-howard-schultz-presidential-bid-help-reelect-trump-experts-disagree/?utm_term=.995008b6015e.

[2] Lisa Lehrer & Reid J. Epstein, *As 2020 Candidates Struggle to Be Heard, Their Grumbling Gets Louder*, N.Y. TIMES (June 11, 2019), https://www.nytimes.com/2019/06/11/us/politics/2020-democratic-candidates.html.

[3] Ed Kilgore, *What 'Lanes' Will the Democratic Candidates Run In?*, N.Y. MAG. (Jan. 13, 2019), http://nymag.com/intelligencer/2019/01/what-lanes-will-the-2020-democratic-candidates-run-in.html.

[4] Dylan Scott & Tara Golshan, *Why so Many Democrats are Running for President*, VOX (May 16, 2019), https://www.vox.com/policy-and-politics/2019/5/16/18623083/democratic-presidential-candidates-2020-election-bill-de-blasio.

[5] *Id.*

preference (and sometimes more). If a voter's first-choice candidate fails to garner enough votes to stay in the running, that candidate is eliminated. Rather than "wasting" that voter's vote, the vote is reassigned to another remaining candidate based on the second-choice indicated by that voter.[6] With RCV, there are no spoilers and no vote-splitting. Drivers on the presidential primary highway need not worry about overcrowded lanes.

Indeed, commentators have called for RCV in presidential elections for precisely this reason, both in the general election in response to the Schultz candidacy,[7] and in the Democratic primaries in response to candidate overpopulation.[8] At least four states (Alaska, Hawaii, Kansas, & Wyoming) have adopted it for presidential primaries this year.[9]

But presidential vote-splitting is not the only electoral problem which can be remedied through RCV. Indeed, RCV plays a crucial role in a far more fundamental electoral reform, concerning the inherent electoral bias injected into our system through the use of "winner-take-all" elections. Winner-take-all elections allow 50.1% of the vote to control 100% of the power. Combined with single-member districting in legislative elections, it causes a "skew" between the percentage of the vote a political party receives and the percentage of seats it gains. In the context of partisan elections, this skew is sometimes called "partisan bias."[10]

This skew has profound negative effects on our political system. In addition to yielding an inaccurate reflection of popular will, it can even award majority control of a legislature to the party receiving a minority of jurisdiction-wide votes.[11] This is especially true when coupled with

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[6] STEVEN MULROY, RETHINKING U.S. ELECTION LAW: UNSKEWING THE SYSTEM 9–11, 119–21 (2018).

[7] See, e.g., Edward B. Foley, Want to Fix Presidential Elections? Here's the Quickest Way, POLITICO (May 4, 2019), https://www.politico.com/magazine/story/2019/05/04/electoral-college-reform-2020-226792; Michelle Goldberg, Howard Schultz, Please Don't Run for President, N.Y. TIMES, (Jan. 28, 2019), https://www.nytimes.com/2019/01/28/opinion/howard-schultz-president.html; Howard Schultz is Why We Need Ranked Choice Voting, DAILY KOS (Jan. 30, 2019), https://www.daily kos.com/stories/2019/1/29/1830786/-Howard-Schultz-is-Why-We-Need-Ranked-Choice-Voting.

[8] See, e.g., Adam Eichen, We Need Ranked-Choice Voting in the Presidential Primaries, THE HILL (Mar. 5, 2019), https://thehill.com/blogs/congress-blog/politics/432644-we-need-ranked-choice-voting-in-the-presidential-primaries; Jamie Raskin, Rob Richie & Adam Eichen, A Crowded 2020 Presidential Primary Field Calls for Ranked Choice Voting, THE HILL (Jan. 25, 2019), https://thehill.com/blogs/congress-blog/politics/426982-a-crowded-2020-presidential-primary-field-calls-for-ranked.

[9] Jacey Fortin, Why Ranked Choice Voting is Having a Moment, N.Y. TIMES (Feb. 10, 2020), ttps://www.nytimes.com/2020/02/10/us/politics/ranked-choice-voting.html.

[10] See, e.g., MATTHEW S. SHUGART & REIN TAAGEPERA, VOTES FROM SEATS: LOGICAL MODELS OF ELECTORAL SYSTEMS (2017).

[11] See Douglas J. Amy, What Is Proportional Representation and Why Do We Need This Reform?, FAIRVOTE, https://www.fairvote.org/what_is_proportional_representation_and_why_do_we_need_this_reform (last visited Sept. 16, 2019).

aggressive gerrymandering. But the unacknowledged truth is that when winner-take-all is combined with single-member districts (SMDs), a certain level of gerrymandering is inevitable because of the uneven geographic distribution of voters in the U.S. These gerrymandered districts, both purposeful and accidental, lead to noncompetitive elections with diminished turnout; an incentive for incumbents to move to extremes of the left or right, to avoid being "primaried"; and a disincentive for moderation and compromise. The skew that results from winner-take-all and SMDs is thus a recipe for non-representative gridlock.

The skew can be remedied through Proportional Representation (PR), a system in which the percentage of the vote obtained by a party (or racial/ethnic minority, or any politically cohesive group) closely matches the percentage of the seats won.[12] There are many ways to implement PR, but the most promising is through the use of RCV.

This Article explains these fundamental problems in our electoral system and the structural reforms needed to address them. Part II shows how winner-take-all and single-district systems can cause counter-majoritarian results and other skews. Part III explains how these two electoral features combine with "demographic clustering" to cause "natural gerrymanders" which even the best current reforms—judicial review, nonpartisan redistricting commissions—will ultimately fail to completely cure. Part IV explains how PR, implemented through RCV, can address these issues and fundamentally reform our electoral system.

## II. THE SKEW

### A. The Basic Problem

Most of us are familiar with the fact that Hillary Clinton received about 3 million more votes than Donald Trump in 2016 and yet lost the presidential election.[13] The culprit in this anomalous electoral result is, of course, the Electoral College.[14]

But there are other "counter-majoritarian" results from recent U.S. elections. In 2012, 1.4 million more Americans voted for Democratic U.S. House candidates than Republican candidates, yet the GOP maintained a 30-

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[12]  *Id.*

[13]  FED. ELECTION COMM'N, FEDERAL ELECTIONS 2016: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 5 (2017), https://transition.fec.gov/pubrec/fe2016/federalelections2016.pdf.

[14]  *Id.* at 5–6.

seat-plus majority.[15] Two years later, 3 million more Americans voted for Democratic U.S. Senate candidates than Republican, yet the Democrats lost a net nine seats and ceded control of the Senate to the GOP.[16] In that election, Democratic candidates together garnered 51.4% of the nationwide votes while winning only 36.4% of the thirty-three Senate seats up for election that year.[17]

And these counter-majoritarian results do not exclusively help Republicans. For example, in New Jersey, Republican State Assembly candidates yielded 51% of the 2013 statewide vote, but Democrats ended up controlling 60% of the seats.[18]

These upside-down election results, where the winning party or candidate has fewer votes than the losing party or candidate, are the most dramatic example of the skew in our electoral system. They are not the norm, but neither are they freakishly rare. Even when counter-majoritarian results do not occur, it is still common for there to be a significant deviation between the percentage of the votes obtained and the percentage of the seats awarded. Even when the majority vote-gathering party wins majority legislative control, it may still be robbed of its proportional share of the seats, or be given a windfall of extra seats. It's a well-recognized phenomenon, measured by political scientists.[19] It can happen with political parties, with racial or ethnic groups, or any other group of voters who are 'politically cohesive'— i.e., people who tend to vote alike.[20]

Whether it's the Electoral College, the Senate, the House, or a state or local legislative body, the underlying cause of this skew is the same. Whenever you carve up the voting jurisdiction into arbitrary subunits, and hold a winner-take-all election within each subunit, there is the mathematical possibility (if not likelihood) of such a votes-seats skew. Those subunits can be States, in the case of the Electoral College or the U.S. Senate; or they can be single-member districts (SMDs), as in the case of the U.S. House, the New

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[15] *See generally* FED. ELECTION COMM'N, OFFICIAL ELECTION RESULTS FOR UNITED STATES HOUSE OF REPRESENTATIVES: 2012 U.S. HOUSE CAMPAIGNS 79–177 (2012), https://transition.fec. gov/pubrec/fe2012/2012congresults.pdf; Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES (Feb. 2, 2013), https://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html.

[16] *See* FED. ELECTION COMM'N, OFFICIAL ELECTION RESULTS FOR U.S. SENATE: 2014 SENATE CAMPAIGNS 19–31 (2014), https://transition.fec.gov/pubrec/fe2014/2014senate.pdf.

[17] *Id.*

[18] Kevin Werner, *The Winner-Take-All Problem in Fort Lee, New Jersey*, FAIRVOTE (Jan. 21, 2014), https://www.fairvote.org/the-winner-take-all-problem-in-fort-lee-new-jersey; *see also* N.J. DEP'T OF STATE, GENERAL ELECTION RESULTS (2013), https://www.state.nj.us/state/elections/assets/pdf/election-results/2013/2013-official-general-election-results-general-assembly.pdf.

[19] *See, e.g.*, SHUGART & TAAGEPERA, *supra* note 10, at 2–3.

[20] Amy, *supra* note 11.

Jersey State Assembly, or many other examples. It is an inherent bug common to all winner-take-all systems.

## B. *"Packing" and "Cracking"*

Winner-take-all systems cause "wasted votes." This can happen in two main ways: "cracking" and "packing." "Cracking" involves setting things up so that a politically cohesive group does not have enough votes to elect a candidate of choice.[21] "Packing" involves setting things up so that such a group has way too many votes, so many more than necessary to elect a candidate of choice that it robs them of being able to elect a second candidate.[22] Either way, there are many votes wasted.

While the terms "cracking" and "packing" are often used to describe a deliberate attempt by the drawer of a gerrymandered districting plan to dilute a rival's voting strength,[23] packing and cracking can occur more "naturally" as a byproduct of the electoral system used.[24]

The Electoral College presents a good example of packing. Under the Electoral College, each State gets a number of electoral votes equal to the number of U.S. House Representatives it has (based on population), and the number of Senators it has (two for each State).[25] Almost all States allocate their electoral votes on a winner-take-all basis; whichever candidate carries the state, even if only narrowly, gets all the electoral votes.[26]

In 2016, Hillary Clinton ran up huge supermajorities in populous blue states like California and New York.[27] Every vote over 50.01% in those states was wasted: they contributed nothing to the Electoral College scoreboard. In contrast, Donald Trump edged out some bare majorities in a few key states, taking all their electoral votes.[28] Clinton's votes were "packed" into superfluous over-victories, while Trump's were more efficiently distributed.

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[21] *See* Gill v. Whitford, 138 S. Ct. 1916, 1923–24 (2018).

[22] *See id.* at 1924.

[23] *See id.*

[24] *Id.* at 1933.

[25] *See* U.S. Const. art. II, § 1, cl. 2 (detailing the Electoral College makeup); art. I, §2, cl. 2 (outlining the rules for House representation); art. I, §3, cl. 1 (providing the number for Senate representation).

[26] The only exceptions are Maine and Nebraska, which allocate their electoral votes by congressional district, with the statewide winner receiving the two electoral votes corresponding to the state's two Senators. ME. STAT. tit. 21-A, § 805 (1989); NEB. REV. STAT. § 32-713 (2015); *see also Maine and Nebraska*, FAIRVOTE, https://www.fairvote.org/maine_nebraska (last visited Oct. 6, 2019).

[27] *See Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 9, 2017), https://www.nytimes.com/elections/2016/results/president.

[28] *Id.*

The situation in the Senate is similar, with Democratic candidates "self-packing" by running up supermajorities in populous blue states.[29] But the skew is exacerbated by the fact that all States get the same number of Senators (two), regardless of population. Numerically, a Wyoming voter's Senate vote counts sixty times more than that of a Californian's.[30] This skew has only been growing worse in recent years.[31] This skew favors less densely populated, rural states, which tend to lean Republican.[32]

Because each State also gets two electoral votes based on its Senate representation, this pro-small-state skew warps presidential elections also, but it is ameliorated by the presence of so many electoral votes corresponding to House seats, which are based on population. In the College, a Wyomingan's vote counts only 3.6 times as much as a Californian's.[33] Just as votes can be "packed" in a State, they can also be packed in an SMD. This partly explains the skew in U.S. House elections. But SMDs, whose lines are periodically redrawn,[34] also provide an opportunity for "cracking," as when newly drawn lines divide geographic concentrations of similar-minded voters so that they cannot constitute a majority of district voters on either side of the district line.[35]

## C. The Gerrymandering Scourge

There is certainly no shortage of packing and cracking in current and recent U.S. House redistricting plans, and gerrymandering dates back to the beginning of the Republic. The term's namesake, Massachusetts Governor (and Founding Father) Elbridge Gerry, signed an 1812 state senate districting plan featuring a snakelike district designed to favor his party, the Democratic-Republicans, over the rival Federalists.[36] Critics said it looked like a salamander, and the mocking term "gerrymander" was born.[37] Notably, the

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[29] See Senate Election Results: G.O.P. Keeps Control, N.Y. TIMES (Aug. 1, 2017), https://www.nytimes.com/elections/2016/results/senate.

[30] Adam Liptak, Smaller States Find Outside Clout Growing in the Senate, N.Y. TIMES (Mar. 11, 2013), http://www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html##smallstate.

[31] Id.

[32] Id.

[33] See Dale R. Durran, Whose Votes Count the Least in the Electoral College?, CONVERSATION (Mar. 13, 2017), https://theconversation.com/whose-votes-count-the-least-in-the-electoral-college-74280.

[34] See, e.g., Lawyer v. Dep't of Justice, 521 U.S. 567, 577 n.4 (1997) (describing the need to redraw district lines after the decennial census). The author litigated this case at the district court level for the U.S. Department of Justice.

[35] MULROY, supra note 6, at 70.

[36] Erick Trickey, Where Did the Term Gerrymander Come from?, SMITHSONIAN MAG. (July 20, 2017), https://www.smithsonianmag.com/history/where-did-term-gerrymander-come1809064118/.

[37] Id.

districting plan allowed Gerry's party to control the state senate even though the Federalists won a statewide vote majority.[38] Thus, even counter-majoritarian outcomes have been with us since the beginning.

Gerrymandering not only continued throughout later years, but has actually been getting worse in recent decades, as technical advances in computer mapdrawing allow ever more fine-tuned gerrymanders.[39] At the same time, voters are becoming more predictable in their voting patterns along party lines, which makes properly drawn partisan gerrymanders more reliably effective.[40] Over the past few decades, the number of House seats gained through gerrymandering has increased from fewer than five in the 1970s, 1980s, and 1990s to almost twenty today.[41]

Even when a gerrymander does not switch control of a particular district from one party to another, it does tend to protect incumbents, making elections less competitive. Indeed, as gerrymandering has gotten worse, the number of truly competitive districts have declined.[42] This is true whether you measure "competitive districts" by looking at the ratio of Republican to Democratic voters, and counting those more lopsided than 60–40 (a common political science definition of a landslide), or by looking at the number of incumbents who drew serious opposition in the election.[43] Another indication is incumbent reelection rates, which are disturbingly high. In the 1940s, about 80% of incumbents got reelected.[44] Starting in the mid-60s, that rate rose to 85%.[45] By the 1990s, the rate was well over 90% in all but one House election, and it was common that decade to see reelection rates as high as 96%.[46] The same is true for the current decade.[47] Even the 2018 election, noted for its high number of competitive districts and first-time candidates

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[38]  *Id.*

[39]  *See* Micah Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting,* 5 DUKE J. CONST. L. & PUB. POL'Y 69, 73–75 (2010); Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race,* ATLANTIC (Oct. 28, 2017), https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/5438888/.

[40]  *See* Drew Desilver, *Split-Ticket Districts, Once Common, Are Now Rare,* PEW (Aug. 6, 2016), http://www.pewresearch.org/fact-tank/2016/08/08/split-ticket-districts-once-common-are-now-rare/.

[41]  MULROY, *supra* note 6, at 79–80.

[42]  Matt Tabibi, *Far Too Many House Seats Have Been Uncontested for Too Long,* ROLLING STONE (Nov. 6, 2018), https://www.rollingstone.com/politics/politics-features/uncontested-house-seats-history-752658/ (citing data from Ballotpedia.org).

[43]  MULROY, *supra* note 6, at 79–80.

[44]  Tabibi, *supra* note 42.

[45]  Center For Responsive Politics, *Reelection Rates Over the Years,* OPENSECRETS.ORG, https://www.opensecrets.org/overview/reelect.php (last visited Oct. 9, 2019).

[46]  *Id.*

[47]  *Id.*

challenging incumbents,[48] had a reelection rate of 91%,[49] and about 10% of incumbents went uncontested by a major party candidate.[50]

The concern over lack of competition is not just about some generalized sense of fair play, or a political junkie's desire to see more interesting horse races. When districts are drawn overwhelmingly in favor of one party or another, the incumbents have more room to stray from the preferences of their constituents, secure in the knowledge that only a dramatic departure on one of a few high-profile issues would cause any serious risk of electoral loss.[51] While occasional deviations from popular sentiment on certain issues of principle may be lauded as political courage, a generalized unmooring of representative action from constituent desires is not healthy for democracy. Under these conditions, the general election then becomes a foregone conclusion, with the lack of competition increasing voter alienation and depressing turnout. If you are a Democrat in an overwhelmingly Republican district, you have no real incentive to turn out—you know there is no hope. If you are a Republican in that same district, you also lack a real incentive to turn out—you know there is no need.

Indeed, we have seen a long-term voter turnout decline over the decades as gerrymandering has gotten worse. Turnout in federal elections dropped from about 55% of voting age population in midterm elections and 69% in presidential elections in the mid-1960s to 45% midterm and 57% presidential in 1990.[52] While there have been ups and downs since 1990, the overall trend has been one of decline, with midterm turnout percentage rates in the thirties or low forties, and presidential rates mostly below 57%.[53]

Worse, in partisan elections, the only real competition then occurs in the primaries. This incentivizes incumbents to become ever more extreme—Democrats on the left, Republicans on the right—to forestall or defeat a primary challenge, with much less countervailing general election pressure to moderate one's positions.

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[48]  Tabibi, *supra* note 42.

[49]  Center For Responsive Politics, *supra* note 46.

[50]  Tabibi, *supra* note 42.

[51]  Lane Baldwin, *Gerrymandering and its Effect on Fair Represenatation*, FAIRVOTE (Feb. 22, 2017), https://www.fairvote.org/gerrymandering_and_its_effect_on_fair_representation .

[52]  *Statistical Brief: The Decline in American Voter Turnout*, U.S. BUREAU OF THE CENSUS (1991), https://www.census.gov/population/socdemo/voting/SB91-23.pdf.

[53]  *See* Larry J. Sabato, *Who Votes? The Key Questions for the 2006 Midterms*, U. VA. CTR. FOR POL. (Apr. 28, 2006), http://crystalball.centerforpolitics.org/crystalball/articles/ljs2006042801/ (citing data from 1990–2004); Michael P. McDonald, *Voter Turnout: National Turnout Rates, 1787–2016*, U.S. ELECTION PROJECT, http://www.electproject.org/home/voter-turnout/voter-turnout-data (last visited Sept. 28, 2019).

Political polarization has increased in recent decades, whether one measures it by voters' self-identified ideological uniformity or fear and suspicion of the opposition.[54] And the most ideologically polarized are more active in politics, reinforcing the effect.[55] That voter polarization is reflected in increasing ideological polarization of elected officials since the 1970s, with a resulting increase in gridlock.[56] It is not certain that the structural electoral features criticized above are the cause for the polarization; it might be, for example, that the two have been mutually reinforcing over the decades. But either way, the rise in polarization and gridlock increase the need to examine those features of our electoral system which may tend to exacerbate them.

For these reasons, commentators and reformers have searched for ways to address the gerrymandering problem. The most popular ways, however, will fall short of full redress.

## III. THE LIMITS OF CONVENTIONAL GERRYMANDERING REFORM

### A. Judicial Review

#### 1. Judicial Reluctance

The redistricting reform proposal with the longest pedigree is that of judicial review of gerrymanders. The Supreme Court got involved in policing *racial* gerrymanders in 1960, striking down the state legislature's obviously racially gerrymandered city boundaries of Tuskegee, Alabama.[57] Overruling lower court determinations that the federal courts had no business to intervene in such matters, the Court held that the race-based line-drawing violated the Fifteenth Amendment's guarantee of the right to vote.[58] However, the Court ruled that plaintiffs could make out a constitutional claim

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[54] *See, e.g., Political Polarization in the American Public*, PEW RES. CTR. (June 12, 2014), https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public//; Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690 (2014).

[55] *See, e.g.*, sources cited *supra* note 54.

[56] *See* Laura Paisley, *Political Polarization at Its Worst Since the Civil War*, USC NEWS (Nov. 8, 2016), https://news.usc.edu/110124/political-polarization-at-its-worst-since-the-civil-war-2/ (recounting research by USC scholar James Lo); *see also* Royce Carroll et al., *Measuring Bias and Uncertainty in DW-NOMINATE Ideal Point Estimates via the Parametric Bootstrap*, 17 POL. ANALYSIS 261, 272–74 (2009).

[57] Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960). The state redrew the boundaries from a relatively compact shape to an irregular twenty-eight-sided figure which excluded over of the city's black population without eliminating any white voters. *Id.* at 341.

[58] *Id.* at 346–47.

only if they proved intentional discrimination,[59] which is often difficult to do. Congress thus amended section 2 of the Voting Rights Act in 1982 to make clear that a racially discriminatory *effect* would suffice.[60] Plaintiffs could make out a prima facie case for minority vote dilution by proving that voting in the jurisdiction was racially polarized, and that the minority group in question could form a majority in a compact SMD.[61] Civil rights advocates aggressively brought, and often won, suits challenging racial gerrymanders under this Act.[62]

But the judicial landscape is quite different regarding *partisan* gerrymanders. There, courts have been reluctant to intervene in what they see as an inherently political process—or to "enter this political thicket," in the oft-quoted words of Justice Frankfurter.[63] Although the Supreme Court ruled in 1986 that courts could invalidate partisan gerrymanders under the Constitution,[64] it set a standard for liability so high that no legal challenge ever succeeded.[65] In 2004, the Court reversed course, ruling in a plurality opinion in *Vieth v. Jubilerer* that partisan gerrymandering was a "nonjusticiable political question" under the "political question" doctrine.[66]

This referred to a little-used court doctrine that allowed a court to abstain from taking the rare politically sensitive case that was peculiarly appropriate for resolution by the legislative and executive branches, and peculiarly unamenable to resolution by judges.[67] In modern times, courts have used it

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[59]   Mobile v. Bolden, 446 U.S. 55, 66 (1979).

[60]   52 U.S.C. § 10301 (2012).

[61]   Thornburg v. Gingles, 478 U.S. 30, 55 (1986). This requirement became problematic in later decades, as geographic dispersal of racial and ethnic minority populations made it more difficult to draw compact majority-minority single-member districts. *See* MULROY, *supra* note 6.

[62]   *See generally* CHANDLER DAVIDSON & BERNARD GROFMAN, QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990 (1994). *See also* Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1688–90, nn. 227–33 (1993).

[63]   Colegrove v. Green, 328 U.S. 549, 556 (1946). *Cf.* Baker v. Carr, 369 U.S. 186, 266 (Frankfurter, J., dissenting). *Colegrove* and *Baker* dealt with the related but distinct question of whether the Court should rule on apportionment cases when the population of different districts varied widely, mathematically diluting the votes of those in the larger-population districts. *Colegrove*, 328 U.S. at 551; *Baker*, 369 U.S. at 192–93. But courts and commentators have invoked the phrase since to discuss the general reluctance of judges to police redistricting disputes as well. *See, e.g.*, Evenwel v. Abbott, 136 S. Ct. 1120, 1123 (2016); George F. Will, *Is the Supreme Court About to Plunge into a Political Thicket?*, WASH. POST (Sept. 29, 2017), https://www.washingtonpost.com/opinions/will-the-supreme-court-plunge-into-a-political-thicket/2017/09/29/337dedae-a475-11e7-b14f-f41773cd5a14_story.html.

[64]   Davis v. Bandemer, 487 U.S. 109, 113 (1986).

[65]   Vieth v. Jubelirer, 541 U.S. 267, 283–84 (2004) (noting lack of success of challengers using the *Bandemer* standard).

[66]   *Id.* at 292.

[67]   *See* Luther v. Borden, 48 U.S. 1, 42 (1849) (ruling that whether a state's government was a "republican form of government" under Article IV was a nonjusticiable political question).

mostly for cases involving foreign policy and military matters.[68] *Vieth*'s use of it for partisan gerrymandering was unusual.

The opinion complained of a lack of "judicially manageable standards" to evaluate partisan gerrymandering.[69] At least five Justices agreed that partisan considerations can properly play *some* role in drawing district lines.[70] It might make sense to put like-minded voters in the same district, for example, or use partisan considerations to ensure partisan fairness. But the Justices could not agree on a clear, objective, quantifiable measure of *how much* use of partisanship was too much.[71] Therefore, the reasoning went, judges should stay out of it, and let the political process work these disputes out.[72]

However, that opinion commanded only four votes. Justice Kennedy supplied the crucial fifth vote in a concurring opinion. Justice Kennedy professed to be sympathetic for the desire to have courts curb gerrymandering excess, and regretted his inability to find a judicially manageable standard.[73] But he did not rule out that one could be found later, at which time partisan gerrymandering could be again subject to judicial review.[74]

For years after, experts and activists sought an objective standard that would satisfy the Court and allow for robust judicial policing of political gerrymandering. Commentators debated different candidate standards.[75]

The Supreme Court just closed the door to any such approach. In *Rucho v. Common Cause*, the Supreme Court ruled that partisan gerrymandering claims were nonjusticiable political questions.[76]

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[68]   *See, e.g.*, Smith v. Obama, 217 F. Supp. 3d 283, 303–04 (D.D.C. 2016) (holding that whether military campaign in Iraq and Syria was illegal was a nonjusticiable political question); United States v. Prince, 398 F.2d 686, 688 (2d Cir. 1968) (holding that the legality of Vietnam War draft procedures fell under "*de facto* political authority"); United States v. Hogans, 369 F.2d 359, 360 (2d Cir. 1966) ("The courts will not examine the purposes for which the executive employs the armed forces in foreign military operations.").

[69]   *Vieth*, 541 U.S. at 280.

[70]   *Id.* at 299 (plurality agreeing with Justice Breyer's dissent in stating "political considerations will likely play an important, and proper, role in the drawing of district boundaries"). *See also id.* at 344 (Souter, J., dissenting) (acknowledging that "some intent to gain political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent").

[71]   *See id.* at 280–98.

[72]   *See id.* at 304–06.

[73]   *Id.* at 306–10 (Kennedy, J., concurring).

[74]   *See id.* at 311–12.

[75]   *See, e.g.*, Michael S. Kang, *When Courts Won't Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1105–06 (2007); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 834 (2015); Benjamin Plener Cover, *Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal*, 70 STAN. L. REV. 1131, 1135–41 (2018).

[76]   Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).

*Rucho* actually involved two different cases.[77] In one, Republicans alleged that the Democratic-controlled Maryland state legislature gerrymandered a previously Republican-majority congressional so as to favor Democrats.[78] The legal theory was that defendants retaliated against them for their Republican preferences in violation of the First Amendment.[79] In the other, Democrats alleged that the Republican-controlled North Carolina legislature gerrymandered the statewide congressional districting map.[80] The plaintiffs alleged claims under both the Fourteenth Amendment Equal Protection Clause as well as the First Amendment.[81] The lower court had previously struck the Republicans' first attempt at a North Carolina congressional districting plan as an intentional racial gerrymander.[82] The legislature redrew the plan, and the lower court struck down the current plan as a partisan gerrymander twice—once prior to the Supreme Court's decision in *Gill*, and a second time in light of *Gill*.[83] In these cases, the votes-seats skew and other indicators created a strong indication of intentional partisan gerrymandering.

Nonetheless, the Court ruled that federal courts could not intervene in such cases.[84] The Court again decried the lack of judicially manageable standards, rejecting each of the various tests proposed by the parties or used by the lower courts.[85] It specifically stated that the remedy lay in legislative action, including action by state legislatures and by Congress.[86]

## 2. The Judges' Limited Reach

*Rucho* makes clear that the federal courts will not save us when it comes to gerrymandering. But even if in future years the Court changes its mind, perhaps with a change in the composition of the Court, that would not fully solve the problem of gerrymandering. Given the Court's natural reluctance to get too deep into the "political thicket," lest it be seen as too political,[87] a

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[77] *Id.* at 2491–93.
[78] Benisek v. Lamone, 348 F. Supp. 3d 493 (D. Md. 2018).
[79] *Id.* at 497.
[80] Common Cause v. Rucho, 318 F. Supp. 3d 777, 810–11 (M.D.N.C. 2018).
[81] *Id.* at 799.
[82] *Id.* at 805.
[83] *Id.* at 799.
[84] Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).
[85] *Id.* at 2502.
[86] *Id.* at 2508.
[87] *See* Amy Howe, *Argument Analysis: Justices Divided and Hard to Read on Partisan Gerrymandering*, SCOTUSBLOG (Mar. 26, 2019), https://www.scotusblog.com/2019/03/argument-analysis-justices-divided-and-hard-to-read-on-partisan-gerrymandering/ (describing these concerns raised during oral argument of the two cases).

jurisprudence of partisan gerrymandering will only reach the most extreme, obvious cases of political gerrymandering.

Indeed, Justices searching for a justiciable standard have said as much. During oral argument in *Gill*, Justice Breyer, who is sympathetic to judicial intervention here, tried to formulate a proposed standard which required that a gerrymander plan be both "persistent" and "extreme" for there to be liability.[88] During oral argument in *Rucho*, he mused aloud about a standard which would detect "real outliers."[89] As an example, he cited a test that would require evidence that a party won a majority of the statewide vote but less than one-third of the seats[90]—a very extreme measure which would leave the vast majority of gerrymanders intact. At the argument in *Lamone v. Benisek*, Justice Kagan—also relatively sympathetic to judicial intervention— suggested that after the Court set a new standard, only redistricting plans with "dramatic effects," the "worst of the worst," would be struck down.[91] And these are the *friends* of judicial policing of gerrymanders.

A more practical reason why judicial policing is not the best solution for gerrymandering is that it is reactive and not proactive.[92] Litigation just takes too long. Even relatively speedy court challenges take years, often over the course of several election cycles. The 2010 round of redistricting in Texas lead to an infamous map which courts found to include both intentional racial and political gerrymanders.[93] But the cases have been up on appeal and back down on remand multiple times,[94] and still no replacement plan has been put into effect. The district court in Texas has now ordered that the state implement a remedial plan for the 2020 election after the state legislature failed to pass a remedial plan of its own before a court-imposed deadline.[95] The remedial plan will thus be used in one election before the 2020 census

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[88] Transcript of Oral Argument at 11–12, Gill v. Whitford, 138 S. Ct. 52 (2017) (No. 16-1161). *See also* Vieth v. Jubelirer, 541 U.S. 267, 365 (2004) (Breyer, J., dissenting).

[89] Transcript of Oral Argument at 19–20, *Rucho*, 139 S. Ct. 782 (No. 18-422). This echoes various commentators who, proposing their own standards, also speak in terms of an "extreme outlier." Bruce E. Cain et al., *A Reasonable Bias Approach to Gerrymandering: Using Automated Plan Generation to Evaluate Redistricting Proposals*, 59 WM. & MARY L. REV. 1521, 1556 (2018); Erica Klarreich, *Gerrymandering Is Illegal, But Only Mathematicians Can Prove It*, WIRED (Apr. 16, 2017), https://www.wired.com/2017/04/gerrymandering-illegal-mathermaticians-can-prove/.

[90] Transcript of Oral Argument at 20, *Rucho*, 139 S. Ct. 782 (No. 18-422).

[91] Transcript of Oral Argument at 54, 59, Lamone v. Benisek, 139 S. Ct. 783 (2019) (No. 18-726).

[92] *See, e.g.*, Romo v. Detzner, No. 2012-CA-412, 2014 WL 3797315, at *1 (Fla. Cir. Ct. July 10, 2014) ("This case is before me following a lengthy bench trial.").

[93] Perez v. Abbott, 274 F. Supp. 3d 624, 680 (W.D. Tex. 2017); Texas v. United States, 887 F. Supp. 2d 133, 166 (D.D.C. 2012).

[94] *See* Abbott v. Perez, 138 S. Ct. 2305, 2313 (2018); Texas v. United States, 570 U.S. 928, 928 (2013); Perry v. Perez, 565 U.S. 388, 399 (2012) (per curiam).

[95] Perez v. Texas, No. SA-11-CV-360-OLG-JES-XR (W.D. Tex. May 28, 2019).

triggers a new round of redistricting. Texas is not unique. As of this writing, nine years into the 2010 decade, and one year before the next census, electoral maps in seven states (GA, MD, NC, PA, MI, TX, & WI) are still tied up in redistricting litigation.[96] By the time these cases are resolved, we will almost be ready for the next redistricting map—and yet more rounds of litigation.

### 3. Demographic Clustering

But perhaps the most important reason why judicial intervention will not be a complete solution is that any standard the Court comes up with will likely involve some showing of *intent* on the part of the map-drawers. That was true of the standard suggested by the *Bandemer* plurality, which would require "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group";[97] and of Justice Powell's concurrence in *Bandemer*, which also proposed a test involving intent and effect.[98] It was true of the standard urged by the plaintiffs in *Vieth*, who proposed requiring a showing of "predominant intent,"[99] as well as the standards proposed by the various dissenters in *Vieth*.[100] It is implicit in the latest, most promising theory discussed during argument in *Rucho* and *Benisek*, that of "retaliation" against plaintiffs because of their party affiliation in violation of the First Amendment.[101]

There are several problems with these intent-based standards. One, intent is notoriously difficult to prove. Once word gets out that courts are entertaining intentional partisan gerrymandering claims, gerrymanderers will be more careful to conceal their intentions, both by self-censoring any comments about their intent to avoid providing direct evidence, and also by more carefully drawing the district lines to achieve the partisan aims less obviously.[102] More important, not all gerrymanders with significant

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[96] For an up-to-date summary of the various cases with links to the pleadings, see Michael Li, Thomas Wolf & Annie Lo, *The State of Redistricting Litigation*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/print/17671 (last visited Sept. 2019).

[97] Davis v. Bandemer, 478 U.S 109, 127 (1986).

[98] *Id.* at 161.

[99] Vieth v. Jubelirer, 514 U.S. 267, 284 (2004).

[100] *See id.* at 335–36, 339 (Stevens, J., dissenting) (requiring a "naked desire to increase partisan strength"); *id.* at 350 (Souter, J., dissenting) (requiring a showing that "defendants acted intentionally to manipulate the shape of the district"); *id.* at 366–67 (Breyer, J., dissenting) (requiring a showing of harm to "democratic principles").

[101] *See* Transcript of Oral Argument at 20, Rucho v. Common Cause, 139 S. Ct. 782 (2019) (No. 18-422); Transcript of Oral Argument at 54, 59, Lamone v. Benisek, 139 S. Ct. 783 (2019) (No. 18-726).

[102] *See* Transcript of Oral Argument at 52–53, *Lamone*, 139 S. Ct. 783 (No. 18-726) (Kagan, J.) (noting that once the Court has made clear that partisan gerrymandering is unconstitutional, state officials

representational skews are intentional gerrymanders. Some gerrymanders are naturally occurring.[103]

The fundamental source of gerrymandered districts is not moustache-twirling villainy by self-interested politicians—though there is no shortage of that[104]—but in our natural tendency to settle in areas with demographically similar people who happen to be like-minded voters, which complicates the drawing of politically balanced districting plans using SMDs. The 2008 book *The Big Sort* popularized this thesis, which we can call "demographic clustering."[105] Since World War II, America has seen a slow-motion internal migration, with Democrats moving more and more into densely populated urban areas, and Republicans concentrating in suburbs and rural areas.[106] This makes for natural "packing" of Democrats into districts with large Democratic supermajorities, wasting Democratic votes to that party's electoral disadvantage.

This demographic clustering is a real phenomenon. For example, in the 1976 presidential election, about 25% of Americans resided in "landslide" counties where the margin of victory was over 20%.[107] By 2004, that percentage rose to 50%.[108] In 2016, the median county margin was over forty percentage points.[109] Since county boundaries do not undergo decennial redistricting, gerrymandering cannot explain this rise. Demographic clustering can. Some critics have argued that non-presidential election results

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would stop "bragging" about how they had successfully gerrymandered, which would "really raise the bar" for plaintiffs). This reasoning by Justice Kagan, relatively friendly to judicial intervention, is likely designed to allay the fears of more conservative Justices of a slippery slope. But it is a telling indication of where we are today that the relative ease of avoiding meaningful judicial scrutiny by gerrymanderers can be seen as a selling point.

[103] *See* Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q. J. POL. SCI. 239 (2013).

[104] *See, e.g.*, League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 437 (Fla. 2015) (finding that Florida Republican political operatives "conspire[d] to manipulate and influence the redistricting process"); David Daley, *Emails Are the Tools of the Devil*, SLATE (July 29, 2018), https://slate.com/news-and-politics/2018/07/michigan-partisan-gerrymandering-newly-released-emails-reveal-the-intent-behind-republicans-redistricting-plan.html (reviewing emails of Michigan Republican redistricting staffers referring to voters in Democratic counties as "Dem garbage" and reveling in "giving the finger" to a Democratic congressional incumbent); Hulme v. Madison Cty., 188 F. Supp. 2d 1041, 1051 (S.D. Ill. 2001) (reciting evidence that a Democratic county legislator told Republican opponents, "We are going to shove it [the map] up your f__ ass and you are going to like it, and I'll f__ any Republican I can").

[105] *See generally* BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART (2008).

[106] *Id.*

[107] *Id.* at 10.

[108] *Id.*

[109] *Id.*

undercut this thesis,[110] but there are supportive studies looking at non-presidential races as well.

For example, a Stanford and University of Michigan study reached similar results, showing how Democratic over-concentration in urban areas can lead to counter-majoritarian results.[111] That is, Democrats will win less than 50% of the statewide seats in many states despite constituting more than 50% of the votes.[112] This phenomenon thus leads to "natural" or "unintentional" gerrymanders.[113] In 2018, the quantitative political analysts at the FiveThirtyEight website drew multiple illustrative nationwide House districting plans and concluded that demographic clustering created a "natural" bias of seven seats for the Republicans.[114]

That is not to say that intentional gerrymandering does not represent a real problem. One nonpartisan statistical analysis estimated that for Democrats to control the House in the current political environment, they would have to not merely win a bare majority of the nationwide vote, but instead win that vote by about eight points, thus demonstrating a skew against them.[115] But the same analysis estimated that demographic clustering alone accounted for only two percentage points of that skew.[116] Additionally, partisan bias is worse in states where the same party controls the governorship and both chambers of the state legislature, and thus the redistricting process, strongly suggesting that intentional partisan actions have a substantial effect.[117]

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[110] *See, e.g.,* Samuel J. Abrams & Morris P. Fiorina, *The Myth of the "Big Sort"*, HOOVER INST. (Aug. 13, 2012), https://www.hoover.org/research/myth-big-sort.

[111] *See* Chen & Rodden, *supra* note 103.

[112] *Id.* at 265.

[113] *Id.* Ironically, among the demographic groups for which clustering has become less the norm are racial and ethnic minorities. Many African-Americans have moved from the cities to the suburbs, scattering in the process. *See* Dale Ho, *Two Fs for Formalism: Interpreting Section 2 of the Voting Rights Act in Light of Changing Demographic and Electoral Patterns*, 50 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 403, 407–09 (2015). And Hispanics, while rising in numbers and percentage of the U.S. population, have long been less geographically dispersed. Steven J. Mulroy, *Coloring Outside the Lines: Erasing 'One-Person, One-Vote' & Voting Rights Act Line-Drawing Dilemmas by Erasing District Lines*, 85 MISS. L.J. 1271, 1303 (2017). This is ironic because, in order to obtain relief under the Voting Rights Act, minority plaintiffs must show they can constitute a majority of a compact single-member district. *See id.* Thus, any advances in ending racial and ethnic housing segregation will only make voting rights relief harder—as long as we are wedded to a single-member district construct.

[114] *See The Gerrymandering Project*, FIVETHIRTYEIGHT (Jan. 25, 2018), https://fivethirtyeight .com/tag/the-gerrymandering-project/.

[115] Sam Wang & Brian Remlinger, *Slaying the Partisan Gerrymander*, AM. PROSPECT (Sept. 25, 2017), https://prospect.org/article/slaying-partisan-gerrymander.

[116] *Id. See also* Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1291 (2016).

[117] *See* Laura Royden & Michael Li, *Extreme Maps*, BRENNAN CTR. FOR JUST. (May 9, 2017), https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16_0.pdf.

Ultimately, the modern gerrymandering problem is a combination of both deliberate self-dealing by politicians in charge of line-drawing, and naturally occurring gerrymanders caused by underlying demographic clustering. The contribution of the latter is why the other popular gerrymandering reform, nonpartisan redistricting commissions, will also not completely fix the problem.

## B. Redistricting Commissions

### 1. A Welcome Evolution

The United States is the only Western democracy that still allows incumbent politicians to draw their own district lines.[118] All other Western democracies have abandoned this practice and established independent redistricting commissions.[119] The best version of these commissions are truly independent of the legislators' control, composed primarily of nonpartisan judges, academics, or other experts appointed to the position and who oversee the drawing of district lines.[120] Some countries allow partisan elected officials (normally equal numbers from each of the major parties) to participate, but many do not.[121] The former model are best referred to as "nonpartisan" redistricting commissions, and the latter as "bipartisan" redistricting commissions. Nonpartisan commissions naturally tend to be more independent of incumbent legislator influence.[122]

Another measure of such independence is whether the legislature gets approval or veto power over the commission's proposed districting plans. Some countries, like Australia, India, and New Zealand, allow the legislature no such say-so over the commission's proposals. Even in countries requiring legislative approval, like Canada, the U.K., and France, legislative objections are rare.[123] Courts in these countries are very deferential to plans drawn by such commissions, and court challenges rarely succeed.[124] For these reasons, while structurally the systems which afford the legislature no formal role would tend to be more independent of legislative influence, all such systems can legitimately be referred to as "independent redistricting commissions."

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[118] *See* Justin Levitt, *All About Redistricting*, LOY. L. SCH., http://redistricting.lls.edu/who-fed10.php.
[119] Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 773–83 (2013).
[120] *Id.* at 783–84.
[121] *Id.* at 783 n.63.
[122] *Id.* at 784–85.
[123] Christopher S. Elmendorf, *Representation Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1388 (2005).
[124] Stephanopoulos, *supra* note 119, at 785–86.

In recent years, U.S. states have been adopting similar models. The most independent are systems in five states (AZ, CA, ID, MT, & WA) which have no legislators or other public officials as members, just citizens balanced by party who cannot take advantage of the plans they draw by running in them.[125] Others allow elected officials, balanced by major party, to serve, either to draw just state legislative district lines (AK, CO, MO, & PA) or for both state legislative and congressional plans (CO, HI, MO, & NJ).[126]

The plans vary according to legislative approval as well. Five states (IA, ME, NY, RI, & VT) have advisory commissions.[127] At the other end of the spectrum, seven states (CT, IL, MD, MS, OK, OR, & TX) have backup commissions which take over if the state legislature fails to pass a plan by the relevant deadline.[128]

Currently, about one in four states have some sort of redistricting commission.[129] The trend seems to be in their favor: in 2018, four states (CO, MO, MI, & UT) adopted them by referendum,[130] and similar movements are in progress in Pennsylvania and Virginia, among other places.[131]

Indeed, the For the People Act of 2019 would require them.[132] The Bill requires that all redistricting plans for U.S. House districts be the enacted plan of an independent redistricting commission or be approved by a three-judge court.[133] The Bill establishes standards for the selection and makeup of the independent redistricting commissions and the plans they produce.[134] The bill also mandates that states receiving federal grants for compliant paper ballots and voting machine security updates ensure that the state's equipment can allow for RCV to the greatest extent practicable.[135]

## 2. The Commissions' Limited Reach

Redistricting commissions are certainly a salutary reform. Incumbent politicians should not be able to draw their own district lines. It is a clear conflict of interest, as evidenced by the many examples of egregious gerrymanders we have seen over the history of the U.S. An oft-cited

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[125]  MULROY, *supra* note 6, at 102.
[126]  *Id.* at 103.
[127]  *Id.*
[128]  *Id.*
[129]  *See id.* at 102–03.
[130]  *Id.* at 179.
[131]  *Id.* at 103.
[132]  H.R. 1, 116th Cong. (2019).
[133]  *Id.* § 2401.
[134]  *Id.* §§ 2411–2413.
[135]  *Id.* § 298(e).

complaint about our systems is that only the naïve think that the voters choose their representatives, when, in fact, it is the reverse. Ridding the U.S. of this archaic practice, and joining the rest of the Western democracies, is certainly worth doing, and would likely curb the worst of the gerrymandering excesses.

And redistricting commissions have scored some successes. Studies of decades of redistricting plans used before and after the adoption of such commissions in Canada and Australia showed that the commissions reduced the extent of partisan bias by more than fifty percent,[136] and that partisan bias of Australian plans was about one-third lower than American plans.[137] But they do not eliminate partisan bias entirely. It is not uncommon to see votes-seats skews of six percentage points.[138] Even counter-majoritarian skews are unavoidable. The Australian Electoral Commission is widely respected for its apolitical professionalism as it draws national maps for Australian House elections. But in 1990, the Liberal Party won a majority of the nationwide two-party vote but a minority of House seats. In 1998, the Labor Party did the same.[139]

In the U.S., the reviews for redistricting commissions are also mixed, perhaps more so. Commissions frequently cannot shake the perception that they are not truly apolitical.[140] After a study of redistricting commission drawn plans in the 1992–2012 electoral cycles, University of Chicago Law School Professor Nicholas Stephanopoulos found no overall significant improvement in partisan bias in state legislative or congressional elections.[141] Using a different measure, the "efficiency gap" measure he helped develop, in a 2015 study, Professor Stephanopoulos found a median efficiency gap of 12% for legislator-drawn plans, compared to 6% for commission-drawn plans.[142] A significant improvement indeed, but it still leaves a nontrivial

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[136] *See* Alan Siaroff, *Electoral Bias In Quebec Since 1936*, 4 CAN. POL. SCI. REV. 62, 66–67 (2010) (examining redistricting in Quebec); Simon Jackman, *Measuring Electoral Bias: Australia, 1949-93*, 23 BRIT. J. POL. SCI. 319, 345 (1994) (examining South Australia and Queensland).

[137] Nicholas O. Stephanopoulos, *The Consequences of Consequentialist Criteria*, 3 U.C. IRVINE L. REV. 669, 704 (2013).

[138] MULROY, *supra* note 6, at 102.

[139] *Id.* In countries like Australia where third parties get a nontrivial percentage of the vote, a more helpful measure of the "majority rule" criterion is to examine percentage of the vote of the two major parties. *Id.* at 102 n.8.

[140] *See, e.g.*, Josh Goodman, *Why Redistricting Commissions Aren't Immune From Politics*, PEW (Jan. 27, 2012), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/01/27/why-redistricting-commissions-arent-immune-from-politics; Harris v. Ariz. Indep. Redistricting Comm'n, 993 F. Supp. 2d 1042, 1046 (D. Ariz. 2014) (finding that pro-Democratic partisanship played a role in the creation of at least one congressional district in redistricting commission-drawn plan).

[141] Stephanopoulos, *supra* note 137, at 704.

[142] Nicholas O. Stephanopoulos, *Arizona and Anti-Reform*, 2015 U. CHI. LEGAL F. 477, 482 (2016).

skew even after the best of redistricting reform efforts. In fact, that 12%-to-6% comparison only applied when presidential election results were used to indicate partisan preference among voters. Using congressional election results, the gap evaporated, suggesting that the commission-drawn plans were not significantly better than those in other states.[143]

And just as in Australia, redistricting commissions in U.S. states can violate the majoritarian criterion. In Arizona, Democrats constitute about 47% of the two-party vote, and Republicans 52%.[144] But its commission-drawn 2012 congressional districting plan resulted in Democrats controlling a majority of U.S. House seats. New Jersey's 2013 plan not only violated the majoritarian criterion, but also featured fewer competitive districts and lower turnout.[145]

These results of only partial success should not be surprising once we consider the effects of demographic clustering. Under federal law, commissions drawing U.S. House maps must use SMDs[146] of very equal population.[147] Most states require (or expect as a norm) that the districts be relatively compact in shape.[148] If you overlay any such configuration of districts on a jurisdiction with demographic clustering, you are bound to yield a skew of some kind or another. This was the experience in Florida, which in 2010 adopted by referendum a redistricting reform imposing party-neutral redistricting criteria like compactness, contiguity, and respect for political subdivision boundaries.[149] The reformers' intent was to curb what they

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The "efficiency gap" is a measure of "wasted votes" in a plan—either votes cast for a losing candidate or votes for a winning candidate over and above the minimum needed to win. The former might be the product of cracking, and the latter the product of packing. The "efficiency gap" method compares the percentage of wasted votes cast for Democratic versus Republican candidates. An unbalanced ratio between the two suggests a highly gerrymandered plan. *See id.* at 491–92, 496–97; *see also* Wang & Remlinger, *supra* note 115, at 1268–69 n.17.

[143] Stephanopoulos, *supra* note 142, at 481–82.

[144] Voter registration in Arizona, however, is divided as follows: 35% Republican, 30% Democratic, and 34% Independent. MULROY, *supra* note 6, at 106.

[145] *See* Mark J. Magyar, *Redistricting Reform in New Jersey*, NJLM EDUC. FOUND. (Dec. 2011/Jan. 2012), https://nj-njslom.civicplus.com/DocumentCenter/View/6540/Redistricting-Reform-in-New-Jersey?bidId=.

[146] *See* 2 U.S.C. § 2c (2012) (requiring single-member districts for U.S. House elections).

[147] Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (holding that congressional districts must be drawn "as nearly as practicable" of equal population, so that "one man's vote in a congressional election is worth as much as another's").

[148] MULROY, *supra* note 6, at 7.

[149] FLA. CONST. art. III, §§ 20–21. Indeed, states very often by law or custom require plan-drawers to consider these criteria. *See* MULROY, *supra* note 6, at 72–74, 111–12. In addition, federal law requires them to ensure that they do not dilute the voting strength of racial or ethnic minorities. *See* Voting Rights Act § 2, 52 U.S.C. § 10301 (2012); Thornburg v. Gingles, 478 U.S. 30, 42–51 (1986) (explaining

perceived as pro-Republican bias in recent redistricting plans drawn by the GOP-controlled state legislature.[150] The reform did not work out as hoped, due at least in part to the intersection of the compactness requirement with Democratic clustering in Florida cities.[151]

Indeed, this is an inherent flaw in winner-take-all elections within SMDs—there is always the mathematical possibility of a skew, which becomes a likelihood once you introduce demographic clustering.

The winner-take-all/SMD construct also frustrates reformers laudable desire for competitive districts and elections. To be sure, there is some evidence suggesting that commission-drawn plans do tend to create somewhat more competitive districts than plans drawn by incumbent legislators, whether one views competition by number of uncontested races or number of races decided by "landslide" twenty-point margins.[152] But that still has not managed to reduce the incumbent reelection rate much below its staggeringly high levels well above 90%.[153] The number of truly competitive elections remains disturbingly low.

Indeed, the SMD, winner-take-all paradigm creates an inherent tension between competition and partisan fairness. The more you try to draw a plan which has a number of Democratic-majority and Republican-majority districts which fairly reflects the statewide proportion of Democratic and Republican voters, the more "safe" Democratic and Republican districts you must draw, and thus the fewer competitive districts. The more "toss-up" districts you draw in a nod to competition, the harder it is to create a proportional ratio of Republican versus Democratic districts, leading to a higher votes-seats skew.

This is not only intuitively obvious. We also know this because many people have tried. In 2018, for example, experts at the polling and political analysis website FiveThirtyEight drew seven nationwide redistricting maps for U.S. House elections, using a different set of redistricting criteria for each

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"minority vote dilution" liability under section 2 of the Voting Rights Act). All of these many redistricting criteria can begin to conflict with one another, and with the separate goals of partisan fairness and competitive districts.

[150] Andrew Prokop, *Florida's Supreme Court Has Struck Another Blow Against Gerrymandering,* VOX (Dec. 5, 2015), https://www.vox.com/2015/12/5/9851152/florida-gerrymandering-ruling; Michael Li, *Another Win for Florida Redistricting Reforms,* BRENNAN CTR. FOR JUST. (July 30, 2015), https://www.brennancenter.org/blog/another-win-florida-redistricting-reforms.

[151] *See* Chen & Rodden, *supra* note 103, at 240.

[152] *See* Jamie L. Carson & Michael H. Crespin, *The Effect of State Redistricting Methods on Electoral Competition in United States House of Representatives Races,* 4 ST. POL. & POL'Y Q. 455, 461–62 (2004). *But see* Seth E. Masket et al., *The Gerrymanders Are Coming! Legislative Redistricting Won't Affect Competition or Polarization Much, No Matter Who Does It,* 45 POL. SCI. & POL'Y 39, 41 (2012) (concluding the opposite).

[153] *See* discussion *supra* Part II.C and sources cited therein.

one.[154] The various maps illustrated clearly the tensions between partisan fairness and competitive districts. As the number of competitive districts increased, so did partisan bias, and vice versa.[155] Looking at past House races, they found an overall decline in the number of competitive districts in the last twenty years but concluded that only 17% of that decline was the result of redistricting decisions.[156] The rest was a natural byproduct of demographic clustering.[157]

So, not only are competition and partisan fairness at odds, but demographic clustering makes a decline in competition unavoidable under the current SMD, winner-take-all framework. And the decline in competition has particularly toxic effects on our democracy, as described above.[158] Justice Kagan summed up those effects well in her concurrence in *Gill*. Quoting the amicus curiae brief of a bipartisan group of federal politicians, she listed "indifference to swing voters['] . . . views; extreme political positioning designed to placate the party's base and fend off primary challenges; the devaluing of negotiation and compromise; and the impossibility of reaching pragmatic, bipartisan solutions to the nations' problems."[159]

And, even if one were to somehow capture lightning in a bottle and draw an ideal redistricting plan which somehow satisfactorily balanced all these competing concerns—equality of population, compliance with the Voting Rights Act, compactness, contiguity, respect for political subdivision boundaries, as well as the inherent tensions between partisan fairness and competition—we still would not be permanently out of the woods. This is because just a few years later, when the next decennial census arrives, it will become necessary to start the process all over again.

In sum, the only way to eliminate (or minimize) gerrymandering is to eliminate (or minimize) districting. Fortunately, there is a way to do that, through Proportional Representation.

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[154] *See The Gerrymandering Project, supra* note 114.

[155] *See id.*

[156] *See id.*

[157] *See id.*; MULROY, *supra* note 6, at 112.

[158] *See supra* Part I.

[159] *See* Gill v. Whitford, 138 S. Ct. 1916, 1940 (Kagan, J., concurring) (quoting Brief for Bipartisan Group of Current and Former Members of Congress as Amici Curiae, at 4, 10–23).

## IV. Proportional Representation

### A. *Generally*

A common form of electoral system around the world is Proportional Representation (PR). PR avoids a winner-take-all construct. Under winner-take-all, 50.1% of the vote yields 100% of the power. A minority party which consistently achieves, say, 38% of the vote comes away with nothing. This complete and repeated shutout of political power for a substantial minority can promote a sense of futility, discouraging turnout and other political engagement.

As far as is feasible, PR awards a pro rata share of seats to each party, based on the overall percentage of the vote each party receives. So, if a political party—or racial or ethnic group, or any other politically cohesive group[160] of voters—makes up about 38% of the jurisdiction-wide vote, they should garner roughly 38% of the seats, give or take.

It may not be exactly 38%; there are rarely 100 seats up for grabs in a single election, so some rounding up or rounding down may be necessary to get to the nearest fraction of available seats. If, for example, there are only five seats up at a time, and a particular group nets 25% of the vote, it may be necessary to round down to one seat out of five, or 20%. But they get a seat at the table. And, under PR, the party with the majority of the vote still controls a majority of the seats, avoiding the "winner loses" scenarios discussed above.[161]

Note the contrast with winner-take-all systems. Under PR, it's not winner-take-all; it's "majority take most, and minority take its fair share."[162] And PR systems do not require the use of single-member districts. To the extent they avoid SMDs, they also avoid the ills of gerrymandering discussed above.

PR systems of various types are used in democracies around the world. In fact, it is more common internationally than winner-take-all systems.[163] Every democracy in the developed world uses some form of PR at the

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[160] "Politically cohesive" here simply means that they tend to vote together. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 49–51 (1986) (discussing the need to show a "politically cohesive" racial or ethnic minority group to make out a case of minority vote dilution under section 2 of the Voting Rights Act).

[161] *See supra* Part II.A.

[162] *Id.*

[163] MULROY, *supra* note 6, at 130.

national level, either to elect its leader or at least one chamber of the national legislature.[164] The U.S. and Canada are the outliers.[165]

The exact mechanisms for achieving proportional representation vary. Most PR systems employ some form of a "party list" system, in which voters vote for parties instead of or in addition to candidates, and seats are awarded to parties based on nationwide shares of the vote.[166] The list of candidates available to fill seats (depending on the number of seats each party ends up winning in the election) is chosen by the party leadership or after an internal party caucus, not through an American-style primary election.[167] Such a list of candidates is ranked in order of priority. For example, the party may list fifteen candidates and end up winning only ten seats after the election. In this case, candidates one through ten are then seated.

Some PR variations may mix in some SMDs in the same legislative elections, filled separately from another group of seats simultaneously filled using a party list PR approach.[168] Or they may mix in some SMDs, but reserve some at-large seats elected with PR to supplement a party's SMD victories to ensure that each party has as close to possible to a proportionate share. For example, a party may win three SMD races outright, but get enough votes nationwide to entitle them to fill five seats, in which case the first two candidates on the party's list are elected as well.[169] Regardless of the variation, the goal is to have each party get approximately its proportionate share of seats.

None of these varieties of PR is suitable for use in the U.S. Americans are used to voting for candidates and not parties. They are used to choosing their party nominees through primary elections, not through insider caucusing among party leadership.

Further, the above systems tend to be parliamentary systems, in which the national leader is appointed by the legislature from the majority party (or majority coalition of parties, if no one party achieves a nationwide majority of seats).[170] This leader is almost always the head of the party receiving the most votes.[171] Although regularly scheduled elections may be initially set, the party can call for elections at any time, and party members can call at any

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[164] *See Comparative Data*, ACE PROJECT, http://aceproject.org/epic-en (last visited Feb. 12, 2020). Actually, most countries have only one house in their national legislature. *Id.*

[165] *Id.*

[166] *See id.*; MULROY, *supra* note 6, at 130–31.

[167] MULROY, *supra* note 6, at 130–31.

[168] *Id.* at 132–33.

[169] *Id.*

[170] *How Proportional Representation Elections Work*, FAIRVOTE, https://www.fairvote.org/how_ proportional_representation_elections_work (last visited Feb. 12, 2020).

[171] *Id.*

time for a vote of "no confidence," forcing the national leader to step down and be replaced.[172] The U.S. does not have a parliamentary system. We elect our chief executive directly, and for a set term.[173] The set terms lead to more stability than in a parliamentary system, where leader turnover can be fast and unpredictable.[174]

But there is a form of PR suitable for use in the U.S. In fact, it has been used in the U.S. for over half a century. That form uses RCV.

## B. Ranked Choice Voting[175]

### 1. Generally

Under RCV, the voter is allowed to rank their first, second, and third choices for candidates. Sometimes the voter is allowed to rank more than three choices, perhaps up to as many choices as there are candidates.[176]

The simplest form of RCV is the one used where there is only one electoral office to be filled. This would be the case with the election of a single mayor, county executive, governor, or national leader. It would also be the case if the election used SMDs. This form of RCV is variously referred to as "single-choice RCV," or "the alternative vote," or "Instant Runoff Voting (IRV)."[177]

Under IRV, election officials tally up the first-choice votes won by all candidates. If one candidate receives a majority of the overall vote, that candidate wins, just like in any other election. Otherwise, the candidate with the fewest first-place votes is eliminated. All the ballots for that eliminated candidate are then examined for their second-place votes, and the votes are reassigned among the remaining candidates accordingly. If there is now a candidate with an overall majority, she is declared the winner. Otherwise, the candidate with the fewest votes is again eliminated, and votes are again reassigned among remaining candidates, either based on the second choices on the ballots for that newly eliminated candidate, or, if the second choice

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[172] *See, e.g.*, Richard Kelly, *Confidence Motions*, COMMONS LIBR. BRIEFING (Mar. 14, 2019), https://researchbriefings.files.parliament.uk/documents/SN02873/SN02873.pdf.

[173] U.S. CONST. art. II; *id.* amend. XII.

[174] For example, Australia has had five prime ministers in the past five years. Since 2007, no prime minister has finished his nominal three-year term. Rick Noack, *Australia Has Had Five Prime Ministers in Five Years. No Wonder Merkel Needed a Cheat Sheet at the G-20*, WASH. POST (Dec. 3, 2018), https://www.washingtonpost.com/world/2018/12/03/australia-has-had-prime-ministers-years-no-wonder-merkel-needed-cheat-sheet-g-/?utm_term=.37f3523375a3.

[175] Much of the discussion of IRV in this section is taken from MULROY, *supra* note 6, at 119–29.

[176] MULROY, *supra* note 6, at 119–21.

[177] *Id.*

has already been eliminated, based on the third choice of that ballot. This process of eliminating candidates and redistributing votes continues until there is a majority winner.[178]

Ireland and India both use IRV to elect their presidents.[179] Australia has used it successfully for over a century in its SMD elections for its national House of Representatives.[180] In the U.S., IRV has been used successfully in over a dozen cities, including Minneapolis, Oakland, Portland, San Francisco, and St. Paul. Five states (AL, AR, LA, MS, & SC) use it for military and overseas voters, allowing them to participate in federal runoff elections without needing to mail a separate ballot.[181] The Oscars uses it to select winners,[182] and *Robert's Rules of Order* recommends it when voting must be done by mail rather than in person.[183] The Heisman Trophy uses a form of ranking in its voting procedures.[184]

And RCV is definitely a growing trend. Santa Fe used it for the first time in March 2018 for its municipal elections.[185] Maine used it in 2018 statewide for the first time in its congressional and Senate elections.[186] Utah passed a 2019 "local option" bill allowing local governments to adopt it, and two Utah cities have done so.[187] Later in 2019, the U.S. Department of Justice settled a Voting Rights Act lawsuit with the City of Eastpointe, Michigan, replacing its traditional winner-take-all at-large method of election with a form of RCV.[188]

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[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] Glenn Whipp, *How the Oscars Preferential Ballot Turns the Best Picture Race into A Celebration of the "Least Disliked"*, L.A. TIMES (Mar. 1, 2018), https://www.latimes.com/entertainment/movies/la-ca-mn-oscars-preferential-ballots-20180301-story.html.

[183] *See* ROBERT'S RULES OF ORDER § 45 (11th ed. 2011).

[184] *See* Chris Huston, *Heisman Balloting: How It Works*, HEISMAN TROPHY (Nov. 27, 2018), https://www.heisman.com/articles/heisman-balloting-how-it-works/. The Heisman Trophy organization uses the "sum of the digits" system, where voters rank their first, second, and third choice, with three points awarded to the first choice, two to the second choice, and one to the third choice. Candidates are then ranked based on total points. *Id.*

[185] Tripp Stelnicki, *Santa Fe Turns Out In City's First Ranked-Choice Election*, SANTA FE NEW MEXICAN (Mar. 5, 2018), https://www.santafenewmexican.com/news/local_news/santa-fe-turns-out-in-city-s-first-ranked-choice/article_b306198d-0542-50d2-9c77-157ff79e2780.html.

[186] Ella Nilsen, *Maine Voters Blew Up Their Voting System and Started From Scratch*, VOX (June 12, 2018), https://www.vox.com/2018/6/12/17448450/maine-ranked-choice-voting-paul-lepage-instant-runoff-2018-midterms.

[187] Taylor Stevens, *Two Utah Cities to Pilot a New Voting Method in a County That Has Faced Election-Related Problems in the Past*, SALT LAKE TRIB. (Apr. 15, 2019), https://www.sltrib.com/news/politics/2019/04/15/two-utah-cities-pilot-new/.

[188] Mark Hicks, *Eastpointe Agrees to Settle Black Voting Rights Case*, DET. NEWS (June 4, 2019),

## 2. Advantages Of RCV

IRV, like any form of RCV, has many advantages. First, RCV avoids the vote-splitting problem described at the beginning of this article.[189] The traditional way to solve this problem and ensure a majority winner is to hold a second, separate "runoff" election some weeks after the first election. But forcing people to go to the polls twice instead of once is inconvenient, and causes notoriously bad turnout, either in the first round or the second round.[190] The drop-off in turnout is normally worse among lower-income groups, racial and ethnic minorities, and the disabled, thus skewing the electoral result.[191] IRV thus avoids costly, inconvenient, low-turnout elections, while yielding more representative election results.

RCV also discourages negative campaigning.[192] Candidates in RCV elections want to be the first choice of their own base but also the second choice of their rivals' bases. Thus, they are less likely to resort to attack ads and scorched-earth campaign strategies, lest they alienate rivals' supporters who might throw some second- or third-choice votes their way. The smarter play under RCV is to say things like, "I'd sure like your first-choice vote, but I respect Ms. Smith; if she's your favorite, I'd sure appreciate your second-choice vote." The result is a cooperative, coalition approach to campaigning and the election of consensus candidates, with less bad blood among the candidates post-election, and an overall healthier campaign climate which avoids the voter alienation often reported by voters bombarded with campaign attack ads.[193]

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https://www.detroitnews.com/story/news/local/macomb-county/2019/06/04/eastpointe-considers-possible-settlement-voting-suit/1344074001/.

[189]  *See supra* Part I.

[190]  *See* Mulroy, *supra* note 6, at 116 n.17.

[191]  *See, e.g., id.* at 116–17 (noting 80% drop in turnout, from 28% to 5%, from first to second round in Memphis, Tennessee, municipal elections, with the 5% turnout in the final round being disproportionately white and affluent).

[192]  Wy Spano, *Ranked Choice Voting Would Help Rid Political Campaigns of Negative Ads*, MINN. POST (Sept. 23, 2010), https://www.minnpost.com/community-voices/2010/09/ranked-choice-voting-would-help-rid-political-campaigns-negative-ads/.

[193]  Surveys consistently show that voters dislike negative campaigning by large margins and consider it harmful to democracy. *See, e.g.,* Jared Barton, Marco Castillo & Ragan Petrie, *Negative Campaigning, Fundraising, and Voter Turnout: A Field Experiment*, 121 J. ECON. BEHAV. & ORG. 99, 99 (2013) (referencing such studies). There are some studies which suggest that this dislike translates into depressed turnout, especially if the negative campaigning is perceived as "mudslinging" as opposed to legitimate policy contrasts. *See* Kim Fridkin Kahn & Patrick J. Kenney, *Do Negative Campaigns Mobilize or Suppress Turnout? Clarifying the Relationship between Negativity and Participation*, 93 AM. POL. SCI. REV. 877, 877–78 (1999) (summarizing such studies and their own empirical findings of suppressed turnout). But other studies suggest that some types of negative campaigning can actually stimulate turnout.

This has been the campaign experience where RCV elections have been held.[194] Polls of voters in seven IRV jurisdictions report that campaigning has become more positive, compared to voters in fourteen non-IRV jurisdictions.[195]

Finally, RCV provides more opportunities for first-time, lesser-known, or lesser-funded candidates.[196] It is not unheard for voters to prefer such a candidate, but to fear that voting for her would be "throwing away my vote," given a perception that they are unlikely to win. A similar dynamic occurs in partisan general elections with third-party candidates. Even worse, under winner-take-all, a vote for such a non-mainstream candidate might actually be worse than useless: it might help the candidate one dislikes the most. In a swing state, a vote for third-party candidate Jill Stein was essentially a vote for Donald Trump. Under RCV, you can vote for your sincere preference, secure in the knowledge that if that candidate does not perform well, your vote will transfer to your second choice—perhaps a "safer," more established candidate.

This advantage has a snowball effect. Once voters realize that such less-established candidates can get first-choice RCV votes without risk, more voters will give them such votes.[197] Knowing that means that more donors will be willing to donate, and more media will be willing to cover them.[198] All of this creates more electoral viability, both real and perceived, with each feeding upon the other. Even if such candidates do not prevail their first time out, an enhanced showing may lead to a better estimate of their electability in a future election.

A similar dynamic occurs with third parties. Third parties which might previously have been non-players can now command significant fractions of the vote. Once they do so, the major parties will have incentive to court their endorsement, seeking the third party to recommend that its members give their second-choice vote to one of the major parties—in exchange for policy

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*See id.* (summarizing such studies); Barton, Castillo & Petrie, 121 J. ECON. BEHAV. & ORG. at 99–103 (summarizing such studies, and concluding in their own study that negative campaigning has a positive effect on turnout). Regardless of whether they "work," most voters would prefer to see less of them.

[194] *Why Jurisdictions Adopt Ranked Choice Voting*, RANKED CHOICE VOTING RESOURCE CTR., available at https://www.rankedchoicevoting.org/adopt.

[195] *Ranked Choice Voting and Civil Campaigning*, FAIRVOTE, http://www.fairvote.org/research_rcvcampaigncivility (last visited Feb. 12, 2020). This dynamic is not universal, however. It apparently did not much temper campaigning in Australia's 2017 election. *See* Michael Lewyn, *Two Cheers for Instant Runoff Voting*, 6 PHX. L. REV. 117, 128–29 (2012).

[196] *See* DOUGLAS J. AMY, REAL CHOICES, NEW VOICES 76–98 (1993) (citing multiple sources).

[197] MULROY, *supra* note 6, at 122.

[198] *See id.* ("IRV lowers barriers to entry for first-time, lesser-known, and/or lesser-funded candidates.").

concessions. The third parties thus can influence policy and governance even if they cannot win 51% of the vote. This has been the experience in Australia.[199]

### 3. Objections To RCV

Critics of IRV point to voter confusion, election administration complexity, and implementation cost as objections.[200] But in the U.S. we have a track record of over 200 IRV elections taking place in over a dozen different jurisdictions over the last twenty years.[201] These three pragmatic concerns simply do not arise.

The experience regarding voter confusion, for example, shows it is simply not a serious issue.[202] One 2016 study of RCV adoption in multiple cities showed that the "residual error rate"—the rate at which ballots were invalidated due to voter error—was no higher after the adoption of RCV than before.[203] Exit polling after Santa Fe's first use of IRV in 2018, when voter confusion would presumably be at its peak, showed over 84% of voters finding IRV "not at all confusing" or "not too confusing."[204]

As to cost, it is true that a robust voter education campaign would be necessary for the first use of RCV in a jurisdiction, to make sure voters understand the ranking system. Such a voter education program would cost money. But it would not cost more than the cost of running a separate runoff election.[205] So, at least in jurisdictions which use regular second-round runoff elections, IRV would actually *save* money. That has been the experience of the jurisdictions which adopted IRV to replace a traditional two-round runoff system.[206] Even where it would replace a simple plurality system which does

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[199]  *Id.* at 50.

[200]  *See* James P. Langan, *Instant Runoff Voting: A Cure That is Likely Worse Than the Disease*, 46 WM. & MARY L. REV. 1569, 1592–95 (2005).

[201]  MULROY, *supra* note 6, at 126.

[202]  *See* Lewyn, *supra* note 195, at 132–33 (collecting data sources).

[203]  Rich Robinson, *Exit Survey Analysis Finds Santa Fe Voters Strongly Support Ranked Choice Voting, Have High Confidence in City Elections*, FAIRVOTE (Mar. 15, 2018), https://www.fairvote.org /exit_survey_analysis_finds_santa_fe_strongly_support_ranked_choice_voting_have_high_confidence_i n_city_elections.

[204]  *Voters Liked Ranked Choice Voting in Santa Fe*, FAIRVOTE, https://www.fairvote.org/newmexico #rcv_in_new_mexico (last visited Feb. 12, 2020). Nor have there been reports of significant election administration issues in recent years. *See* MULROY, *supra* note 6, at 126–27.

[205]  *NCSL's The Canvas*, NCSL (Mar. 2017), http://www.ncsl.org/research/elections-and-campaigns /states-and-election-reform-the-canvass-march-2017.aspx.

[206]  *See, e.g.*, Sara Macaraeg, *Instant Runoff Voting: What Shelby County Data and Real-World Examples Show*, COM. APPEAL (Nov. 5, 2018), https://www.commercialappeal.com/story/news/2018/

not use a second runoff election, the cost of IRV-specific voter education would reduce after the inaugural use and could be folded into the existing voter education budget.

Another criticism of RCV is that of "exhausted" ballots. If a voter ranks fewer candidates than appear on the ballot, there is a theoretical possibility that all the candidates she lists will end up being eliminated in early or intermediate rounds. Once that occurs, all the candidates listed on the ballot are eliminated, and the ballot can no longer be counted. This is an "exhausted ballot." In the U.S., this only happens to about 10–15% of the ballots in RCV elections.[207]

Where voters are allowed to rank as many choices as there are candidates, any exhausted ballots are the result of the voter's choice to leave some slots blank. It is no different from a voter in a regular election skipping some races by not indicating a preference.

Even where voters are only allowed to rank, say, three candidates, exhausted ballots are relatively uncommon, and preferable to the alternatives. Exhausted ballots in this instance are caused by the voter choosing multiple unpopular candidates who do not garner many votes and are thus eliminated. In a plurality election, a voter gets only one chance to affect the outcome; if they cast a ballot for a losing candidate, their input into the system ends after only one round. In a two-round runoff system, a voter may have a second opportunity to provide input—if they are among the relatively low percentage of voters who are able to make it back for a second election. Under IRV, however, voters have at least three, and in some cases more, opportunities for input. If their first choice is eliminated, rather than putting their ballot aside as in a plurality system, they get a second chance, and, if need be, a third. IRV thus allows more voter input.

This is particularly true when one compares IRV to a second-round runoff system and considers how many voters in the first round are unable to make it back for the runoff. Turnout normally drops significantly, ranging from a 33% drop-off rate in Santa Fe to the whopping 80% drop-off rate in Memphis, but in all cases greater than the 10–15% rate of exhausted ballots one sees in RCV elections.[208]

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11/05/instant-runoff-voting-memphis-referendum/1860004002/; *Wake County Board of Elections Answers to Questions on IRV Election Administration*, FAIRVOTE, http://archive.fairvote.org/?page=2543 (last visited Oct. 8, 2019).

[207] *See* Theodore Landsman, *RCV Elections and Runoffs: Exhausted Votes vs. Exhausted Voters in the Bay Area*, FAIRVOTE (Oct. 19, 2016), http://www.fairvote.org/rcv_elections_and_runoffs_exhausted_votes_vs_exhausted_voters_in_the_bay_area (finding 12% rate of ballot exhaustion for set of RCV elections held in four California cities between 1995 and 2015).

[208] MULROY, *supra* note 6, at 128.

Whether it is used in single-office elections or multi-seat legislative elections, RCV has many good government advantages. But to achieve PR it must be used in multi-seat elections, using a related RCV system called the Single Transferable Vote (STV).

### C. Single Transferable Vote

#### 1. Generally

STV has been used for over half a century in Cambridge, Massachusetts, and for over ten years in Minneapolis, Minnesota.[209] It has been used since the 1940s at the national level to elect the Australian Senate.[210] Historically, New York City used it to elect local community school board members throughout the 1990s, and about two dozen American cities used it to elect city councils for a number of decades throughout the 20th century.[211] It is gaining more prominence. In addition to being adopted in Minneapolis in 2006,[212] it was also used to settle a Voting Rights Act lawsuit brought by the U.S. Department of Justice against the city of Eastpointe, Michigan.[213]

STV requires the election of multiple candidates in the same election to a legislative body. This can be done at large, or by dividing the jurisdiction up into multimember districts. Where the number of legislative seats is very large, it may be impractical to hold an at-large election because there could be too many candidates to fill on a ballot (or too many candidates for a voter to keep track of).

Either way, STV establishes a minimum quota of votes a candidate needs to get in order to be elected and fill one of the seats to be filled in a given election.[214] That quota is derived by dividing {the total number of votes cast} by the {number of seats to be filled, plus 1}.[215] Thus, to fill five legislative seats in the same election from a multimember district, any candidate with more than one-sixth of the vote would get elected.[216]

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[209] Steven J. Mulroy, *Nondistrict Vote Dilution Remedies Under the Voting Rights Act*, in AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 201 (Benjamin Griffith ed., 2012).

[210] *Id.*

[211] *Id.*

[212] Minneapolis adopted STV to elect members to its Park and Recreation Board. *See* Minn. Voters All. v. City of Minneapolis, 766 N.W.2d 683, 685–86 (Minn. 2009).

[213] Hicks, *supra* note 188.

[214] *Id.*

[215] *Id.*

[216] MULROY, *supra* note 6, at 136–40.

Under STV, voters rank their candidate preferences, just as in IRV. Any candidate who exceeds the quota in first-place votes is seated.[217] What is special about STV is that it minimizes not only the "wasted" votes cast for a losing candidate, but also the "wasted" votes cast for a winner over and above the bare minimum necessary to be elected.[218] So, if a candidate is seated, STV reallocates the "surplus" votes over and above the quota to remaining candidates based on second choices on the ballots. So, for example, if we are filling five seats and there are 500 total votes, the quota would be 100 votes. If a candidate got 150 votes, then there would be fifty "surplus" votes to be reassigned. [219]

Once "surplus" votes are reassigned, we look to see if any remaining candidate exceeds the quota. If so, that candidate is seated, and any "surplus" votes are reassigned as before. If not, then the weakest candidate is eliminated as in IRV, with the votes for that eliminated candidate reassigned to remaining candidates based on second choices.[220] This process of seating winners and reassigning their surplus votes, and when necessary eliminating the weakest candidates and reassigning votes as under IRV, continues for multiple rounds until all seats are filled.

While this method may at first sound complicated, it is actually somewhat intuitive when we recall the discussion above about the evils of "cracking" and "packing." Both cracking and packing are bad because of "wasted" votes. Under cracking, there are not enough votes to elect a candidate of choice of the voting group in question; under packing, there are too many votes.[221] The IRV reallocation of the ballots for weak candidates is analogous to a remedy for cracking. The STV reallocation of the surplus ballots for winning candidates is analogous to a remedy for packing.[222]

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[217] *Id.*

[218] *Voting Systems Explained*, LAB. CAMPAIGN FOR ELECTORAL REFORM, https://www.labour campaignforelectoralreform.org.uk/Voting-sytems (last visited Sept. 17, 2019).

[219] MULROY, *supra* note 6, at 137 n.15. This can be done in one of two ways. Under the "Cincinnati Method" in this example, 50 ballots would be randomly drawn from the 120 cast for the winning candidate, and those 50 ballots would be reassigned based on second choices. Under the "fractional method," each of the 150 votes would be reassigned and count as a fraction of the vote. The fraction would be {Surplus Amount 50} {Total Votes Cast 150} = 1/3 of a vote.

[220] Or, if a ballot's second choice has already been eliminated in a prior round, then that ballot's third choice would be used. If both the second and third choice had already been eliminated, the ballot's fourth choice (if any) would be used, and so on.

[221] Sam Kean, *The Flaw in America's 'Holy Grail' Against Gerrymandering*, ATLANTIC (Jan. 26, 2018), https://www.theatlantic.com/science/archive/2018/01/efficiency-gap-gerrymandering/551492/.

[222] Similarly, the "efficiency gap" measure of gerrymandering aims to look at wasted votes caused by cracking and packing in districting plans. *See* Stephanopoulos & McGhee, *supra* note 75, at 850–51.

## 2. Advantages Of STV

### a. Generally

There are many advantages to the use of STV, including all of the general advantages of RCV described above. Because STV achieves PR, there are no counter-majoritarian results. Politically cohesive minorities get their fair share and are not alienated. Gerrymandering is also minimized: where STV is used at large, there is no districting, and thus no redistricting every ten years. Where multimember districts are used, there is still some line-drawing, to be sure. But it is harder to game the system when one is drawing just a few large multimember districts, and easier to game the system when drawing many smaller SMDs.[223]

### b. Opportunity, Competition, & Turnout

By reducing the quota percentage of the vote needed from 51% to a lower figure, STV further lowers barriers to entry for candidates, over and above the lowering of such barriers already achieved by its use of RCV.[224] For example, in a five-seat race, any minority group which thinks it can muster just 17% (one-sixth) of the vote has a decent chance of obtaining at least one seat. With concrete electoral results realizable, mobilization of the community will make sense. And if different groups think that, considering first and second choices, they might be able to muster close to 34% (two-sixths) of the vote, they might be able to win *two* seats, the motivation to participate is even greater. Heightened registration and turnout is more likely to be outcome-determinative; instead of determining only the all-or-nothing proposition of whether one can win it all, a rare situation applicable only in the odd competitive district, such increased mobilization might make the difference between, say, a group gaining two seats or three seats in a multimember district. Thus, STV elections tend to be more competitive, boosting turnout.

This has been the empirical experience with RCV in the U.S. In 2017, turnout dramatically increased in all cities which used RCV.[225] Comparative studies among Western industrialized democracies have found that on

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[223] MULROY, *supra* note 6, at 145. Because election outcomes are less of a foregone conclusion under STV than under an SMD system with many "safe" districts, STV depresses participation less.

[224] *Id.* at 159.

[225] Drew Penrose, *Voter Turnout Surges in All Four Cities with Ranked Choice Voting*, FAIRVOTE (Nov. 8, 2017), http://www.fairvote.org/voter_turnout_surges_in_all_four_citeis_with_ranked_choice_voting.

average, countries with PR systems tend to have turnout rates about ten percentage points higher than countries using winner-take-all.[226]

### c. Representation Beyond Geography

STV also transcends the tyranny of geography. Under SMD districting plans, even ones drawn without nefarious gerrymandering intent, plan drawers in a room somewhere assign voters to a designated Republican district, Democratic district, Black district, Hispanic district, etc. Voters "trapped" as minorities in such districts—Republicans in Democratic districts, Anglos in Hispanic districts, etc.—have no realistic chance of voting for a winning candidate. Instead, they must rely on what political scientists call "virtual representation"—the notion that such voters will be represented by a like-minded elected official in the next district over.[227]

Voters under STV need not rely on virtual representation. Almost every voter is able to point to at least one elected official and say, "I voted for that person—that is *my* representative." This sense of empowerment can have a significant psychological effect, reducing voter alienation. STV thus also allows for diversity of representatives along numerous dimensions—not just on party or racial lines, but ideological diversity, LGBT diversity, etc.

### d. Racial/Ethnic Representation

There are special advantages for STV which arise when one considers minority vote dilution under the Voting Rights Act. The canonical remedy for such dilution is to draw a single-member districting plan with one or more SMDs featuring a majority of the racial or ethnic minority in question.[228] Such remedies have all the flaws discussed above generally regarding winner-take-all SMD plans. Moreover, they depend on the persistence of racial and ethnic housing segregation. The more successful we are at ending such racial segregation, the harder it is to draw compact majority-minority districts.[229] Try too hard to draw such districts, stretching the compactness

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[226] *See* Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1, 7 (1997) (citing four different studies); Gary W. Cox et al., *The Contraction Effect: How Proportional Representation Affects Mobilization and Turnout*, 78 J. POL. 1249, 1250 (2016).

[227] *See* Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. REV. 1867, 1895 (1999).

[228] *Id.* at 1872.

[229] MULROY, *supra* note 6, at 4.

criterion, and a court may strike down the district as being a "reverse racial gerrymander."[230]

And drawing minority-majority districts can backfire. Doing so can "bleach" surrounding districts, making them whiter and more conservative, with the result that the overall legislative delegation will be less representative of the minority voters' policy preferences, even if it features one or two more representatives of color. Political scientists refer to this as the tension between "descriptive" representation (having persons of color in office) and "substantive" representation (having representatives voting the way minority voters prefer).[231] For example, after Georgia's 1991 congressional redistricting, the state went from having nine center-left Democratic congressmen (eight white, one black) and one Republican congressman (white) to only three Democratic congressmen (all black) and eight conservative Republican congressmen (all white).[232] From a purely descriptive representation, this was a win: the delegation went from having one black member to three. From the standpoint of substantive representation, the Georgia delegation went from being overwhelmingly center-left to overwhelmingly right-wing. This new status quo persisted in subsequent rounds of redistricting.[233]

Even where Voting Rights Act-inspired minority districts do not backfire in this way, they often leave a lot of racial and ethnic minority voters out. For example, in the minority vote dilution case involving the Village of Port Chester, New York, the court found illegal dilution of Hispanic voting strength in the at-large, winner-take-all electoral system for village council.[234] The plaintiffs' proposed SMD remedy would have featured a single Hispanic-majority district in one part of the village.[235] That plan would have left 82% of the village's Latino voting-age citizens outside that

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[230] *See* Miller v. Johnson, 515 U.S. 900, 916 (1995) (describing cause of action for using race as predominant motive in drawing districts designed to enhance racial and ethnic minority representation); Bush v. Vera, 517 U.S. 952, 979 (1996) (finding that racially motivated gerrymandering left three districts "bizarrely shaped and far from compact").

[231] Joe Mitchell, *Breaking out of the Mold: Minority-Majority Districts and the Sustenance of White Privilege*, 42 WASH. U. J. L. & POL'Y 235, 246–47 (2013) (discussing the difference between descriptive and substantive political representation).

[232] *Georgia Redistricting 2000*, FAIRVOTE, http://archive.fairvote.org/index.php?page=300 (last visited Sept. 28, 2019).

[233] *See* Damion Waymer, *How Gerrymandering Black Districts Backfired in the South*, NEWSWEEK (Sept. 17, 2016), https://www.newsweek.com/how-gerrymandering-black-district-backfired-south-498 036.

[234] United States v. Vill. of Port Chester, 704 F. Supp. 2d 411, 451 (S.D.N.Y. 2010). The author participated in the litigation, arguing for the use of cumulative voting.

[235] *Id.* at 416–17.

district.[236] Those Latino voters would have had to rely on virtual representation by the person elected from the single Latino district. Instead, the court adopted a semi-proportional non-SMD plan,[237] which elected a Latino candidate elected by and representative of Latino voters throughout the village.[238]

STV can resolve all these tensions. By providing representation proportional to a minority group's share of the electorate, it enhances representation for racial and ethnic minorities. For example, after the first STV election in New York City for local community school board, the percentage of black and Hispanic community school board members jumped to levels close to their corresponding citywide percentages.[239] These representation percentages increased with rising black and Hispanic population percentages in subsequent decades.[240] Indeed, STV resulted in more proportionality for black and Hispanics than in the SMD City Council races held during the same time period, despite their use of a number of minority-majority SMDs in the council districting plan.[241]

But because STV does not require the drawing of compact SMDs, it does so without relying on racial or ethnic housing segregation. Because STV, and the multimember districts they use, are race-neutral, it is not vulnerable to being struck down as a "reverse racial gerrymander."[242] By eschewing SMDs, STV features no tension at all between descriptive and substantive representation. And it does not require racial and ethnic minority voters covered by the Voting Rights Act to rely on virtual representation. Instead, it

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[236]  *Id.* at 423.

[237]  *Id.* at 448–53. At the suggestion of the Village, the court adopted a cumulative voting plan. *Id.* Under cumulative voting, elections are held either at large or in multimember districts. A voter can cast a number of votes, usually equal to the number of seats to be filled, but can distribute them more flexibly. For example, if a voter has five votes, rather than casting just a single vote for each candidate, she can plump all five votes down on a strongly preferred candidate, or divide the votes 3–2 among two preferred candidates, etc. MULROY, *supra* note 6, at 135–36. Political scientists refer to this kind of system as "semi-proportional"; it tends toward results reflective of minority preferences, but is not fully proportional. Mulroy, *supra* note 227, at 1891–93.

[238]  Christopher J. Eberhart, *Port Chester Voting Referendum Passes, Cumulative Voting Here to Stay*, ROCKLAND/WESTCHESTER J. NEWS (Oct. 10, 2018), https://www.lohud.com/story/news/local/westchester/port-chester/2018/10/10/port-chester-voting-referendum-passes/1596136002/.

[239]  AMY, *supra* note 196, at 138; *see also* MAX J. RUBIN, N.Y. STATE EDUC. DEP'T, COMMUNITY SCHOOL BOARD ELECTIONS IN NEW YORK CITY: A REPORT TO THE NEW YORK STATE COMMISSIONER OF EDUCATION 18 (1973), https://files.eric.ed.gov/fulltext/ED085884.pdf ("[T]he citywide figures would indicate that the [black and Hispanic] ethnic minorities, despite their low turnout compared to whites, are represented approximately in proportion to their relationship to the total population").

[240]  AMY, *supra* note 196, at 138.

[241]  *Id.*

[242]  Mulroy, *supra* note 227, at 1882–83.

allows all such voters a chance to vote for candidates of choice who win, candidates who are beholden to such voters and who will represent them.

### e. One Person, One Vote Conundrums

One final advantage of STV involves a relatively recent controversy regarding whether post-census reapportionment of SMDs should rely on total population figures or some other measure. Traditionally, reapportionment of SMDs after the decennial census to ensure equality of district population is based on total population figures, which includes children, noncitizens, felons, and others who cannot vote.[243] The rationale has been that districting is about *representation*, and all persons deserve representation, regardless of whether they are eligible to vote.[244] Incumbents still have to listen to, consider the interests of, and provide constituent service for children, immigrants (documented and undocumented), felons, the mentally impaired, and other people ineligible to vote. But in recent years, some have argued that to ensure the mathematical equality of each voter's vote across districts, theoretically the reason for the "one person, one vote" rule,[245] reapportionment should be based on Citizen Voting Age Population (CVAP) figures compiled by the Census Bureau.

In *Evenwel v. Abbot*, the Supreme Court ruled that states are not *required* to use CVAP or other data to maximize equality of votes, and are permitted to stick to the traditional "total population" method.[246] But it has not decided on whether states are *permitted* to use CVAP or other measures beyond total population.[247] Use of CVAP or voter registration figures would reduce representation for Latinos, who have disproportionately low citizenship rates as well as more children (and thus fewer members of voting age).[248] This issue has arisen more recently in the litigation and political controversy surrounding the Trump Administration's decision to add a citizenship question to the 2020 census. While debate has raged over the underlying motivation for this decision,[249] some reports suggest that part of the

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[243] KRISTIN D. BURNNET, U.S. CENSUS BUREAU, CONGRESSIONAL APPORTIONMENT: 2010 CENSUS BRIEFS 1, 7 (2011), https://www2.census.gov/library/publications/cen2010/briefs/c2010br-08.pdf.

[244] *See id.*

[245] *See* Reynolds v. Sims, 377 U.S. 533, 559–61 (1964).

[246] Evenwel v. Abbot, 136 S. Ct. 1120, 1126–27 (2016).

[247] *See* Mulroy, *supra* note 113, at 1274.

[248] *See id.* at 1273.

[249] State v. U.S. Dep't of Commerce, 333 F. Supp. 3d 282, 287–89 (S.D.N.Y. 2018) (outlining Commerce Secretary Ross' incongruous claims that he independently initiated inquiry on the question immediately upon taking office and that he only later took up the issue at the urging of Department of

motivation may have been to assist Republican lawmakers in drawing new post-2020 redistricting plans based on CVAP rather than total population.[250] Republican lawmakers have introduced bills to that effect in several state legislatures.[251] This issue may well prove to be the next intense partisan political and legal fight after the 2020 election, a bitter and divisive one with the potential for fundamental disruption of the allocation of political power in the U.S.

This controversy highlights an underlying and unavoidable tension at the heart of reapportionment and redistricting. To make each vote count mathematically equal, one would want to use figures for actual voters, or at least eligible voters. To ensure equality of representation, equalize the burdens of constituent service, and to ensure that the interests of those ineligible to vote are nonetheless adequately taken into account, one would want to continue to use total population. This tension does not exist with PR when it is used at large. Even under STV, using multimember districts, the tension is greatly alleviated.

### 3. Objections To STV

#### a. Generally

STV of course has its critics. All the objections which apply to RCV generally, discussed above,[252] apply to STV as well. The responses are the same: the track record of STV use in the U.S., in Cambridge, Massachusetts and Minneapolis, MN, has not borne out these concerns. Nor has the experience in Australia.[253] Of course, STV is more complex than IRV. But from a voter confusion standpoint, it is the same. In both systems, all a voter has to do is know how to rank their most-preferred candidate first, their next-preferred candidate second, and their third-choice candidate third. Anything beyond that is the realm of the election administrators.

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Justice officials); Hansi Lo Wang, *Trump Blocked Congress From Seeing These Emails About the Census Unredacted*, NPR (June 14, 2019), https://www.npr.org/2019/06/14/732599732/trump-blocked-congress-from-seeing-these-emails-about-the-census-unredacted.

[250] Nick Brown, *Republicans Want Census Data on Citizenship for Redistricting*, REUTERS (Apr. 8, 2019), https://www.reuters.com/article/us-usa-census-redistricting-insight/republicans-want-census-data-on-citizenship-for-redistricting-idUSKCN1RK18D.

[251] *Id.*

[252] *See supra* Part IV.B.3.

[253] Rick Hasen, *Mulroy: Proportional Representation Through the Single Transferable Vote*, ELECTION L. BLOG (Jan. 24, 2019), https://electionlawblog.org/?p=103265.

## b. Eliminating "Local" Representation and Candidacies

Beyond the basic objections to RCV, one can argue that by moving away from SMDs, STV destroys the advantages of locally-based representation. People who live near each other do indeed have things in common. They may share environmental concerns about a nearby river or industrial plant, or urban blight concerns in a nearby neighborhood, or economic development interests in a neighboring industrial park or business district. SMDs advance the focus on those shared local interests. SMDs also ensure that representatives will live relatively close to their constituents, facilitating constituent-incumbent interaction. They can also ensure that representatives' residences will be distributed throughout the jurisdiction at large, and not be clustered in just one area. We would not want all Chicago Councilmembers to live in Hyde Park, for example.

These are all valid concerns. Local issues can be important, and people who live near each other do have shared concerns. But are those local concerns *always* more important than other concerns which may transcend neighborhood? If not, then STV would be preferable, since it gives each voter the option of either voting on the basis of geography, or voting on issues or other salient factors. Under STV, if a voter prefers a representative who lives nearby, she is free to vote for the candidate who lives closest to her. Ditto if she considers a local issue paramount, and thinks a representative who lives nearby would be better able to understand such an issue. But if she prefers a candidate who lives across town who better represents her viewpoint on LGBT issues, or abortion, or taxes, she is free to choose that candidate instead (or rank that candidate higher). SMDs afford no such flexibility: voters are locked in to a specific geographic area.

Similarly, ease of constituent-incumbent interaction is important as well. But in the age of email and social media, there are many ways to facilitate such interaction short of having the incumbent's district office around the corner.

Likewise, it is reasonable to prefer not to have all members of a legislative body, or even all members of a large multimember district, live clumped together in one small corner of the jurisdiction/district. But this feared evil does not seem all that common in practice. In Cambridge, Massachusetts, for example, STV-elected council members tend to be rather dispersed geographically across the city, and often choose to campaign as "neighborhood" candidates.[254] The difference is that the neighborhoods are organic and voter-chosen, not fixed by arbitrary lines.

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[254] MULROY, *supra* note 6, at 155.

A related objection to moving away from SMDs is that it increases campaign costs. If a candidate has to reach a larger number of voters over a wider geographic area, then campaigns certainly will be more expensive. This could be problematic in an era in which many reformers are concerned with the rising costs of campaigns and the role of "big money" in politics. If true, it could somewhat belie, or at least detract from, the supposed leveling of the playing field that RCV achieves by providing more opportunities for first-time, less well-known, or less-financed candidates.

However, this criticism would have more force if the comparison were between SMDs and winner-take-all multimember district races, where a candidate has no choice but to try to reach all voters in the larger district, or at least enough to obtain a majority or plurality. But that is not the case under STV. Under STV, a candidate need not achieve a majority or plurality; she need only exceed the relevant quota. In our example above with a five-seat election, a candidate can win just by receiving 17% of first-choice votes in the first round, or a total of 17% of first-choice and other-choice reassigned votes in the second through fifth rounds. This allows a less-well-financed candidate to target the superdistrict, spending only enough as is necessary to reach likely or persuadable voters, far fewer than the entire superdistrict population.

### c. Fringe Candidates

Another objection to STV is one lobbed against all forms of PR: they can elect extremist, "fringe" candidates. A good example is Israel, which has representatives of some religious extremist parties in its Knesset.[255] Although they may not have enough numbers to actually pass legislation, they can be a disruptive and corrosive influence.[256] However, the party list form of parliamentary PR Israel uses has a relatively low quota for a party to get representation. Until the 1990s, it was only 1%; now, it is 3.25%.[257] When the threshold is that low, it is indeed possible for some pretty extreme fringe groups to get their members into office.

Under the forms of STV proposed herein (*see infra*), the quota would be much higher. Recall that the quota gets lower the more seats to be filled in a given election. This Article proposes the use of STV where no more than five or so seats would be filled in a single election. The quota would thus rarely

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[255] Raphael Ahren, *The Extremist Who Could Bring Kahanism Back to the Knesset*, TIMES OF ISR. (Feb. 18, 2015), https://www.timesofisrael.com/the-extremist-who-could-bring-kahanism-back-to-the-knesset/.

[256] *Id.*

[257] MULROY, *supra* note 6, at 164.

dip much below 17% [1/(5 +1)]. A group that commands more than 17% of the overall vote is not a fringe group; it is a significant minority which deserves a seat at the table.

## D. Implementing STV in the U.S.

### 1. Local/State Level

Implementing STV at the local level might be the easiest way to start. It is already being used at the local level in Cambridge and Minneapolis. Many local city councils, county commissions, school boards, etc. elect their representatives at large, or using multimember districts, or both.[258] In the case of seats elected at large, it would be relatively easy to adopt STV by simply changing the voting rules, allowing voters to rank their choices. It would be similarly easy for seats elected through multimember districts. If the multimember districts used numbered posts to isolate each seat into its own winner-take-all construct, it would be necessary to eliminate such numbered posts. Otherwise, adapting the electoral system to STV would be no more difficult than moving to STV from an at-large framework.

Even where the existing system uses SMDs, implementation of STV at the local level may be less fraught. For one thing, it is less subject to the objection discussed above[259] about moving away from "local" representation. At the village, city, or county level, there may be less concern about the difficulty of constituent-incumbent contact, or campaign costs, or being represented by people who do not understand your local issues. Accomplishing a switch to STV would normally require a change to the city or county charter, which is often accomplished by a local referendum.[260] The availability of STV would also depend on whether state law permits it. Although details vary from state to state, in most states, relevant statutes are silent on the question.

Implementation at the state level would vary depending on the state. Currently, there are nine states which use multimember districts to elect at

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[258]   *Id.* at 167.

[259]   *See supra* Part IV.C.3.

[260]   For example, this is how RCV was adopted in the last decade in Santa Fe, New Mexico and Memphis, Tennessee. *See* SANTA FE, N.M., MUNICIPAL CHARTER § 4.06 (2014); CHARTER AND RELATED LAWS CITY OF MEMPHIS, TENN. pt. I, art. 2, § 7 (2017). Another mechanism is where state law allows the local legislative body itself to adopt RCV by ordinance. This happened recently in two cities in Utah. Katie England, *Payson, Vineyard Will Pilot Ranked Choice Voting for State*, DAILY HERALD (Apr. 11, 2019), https://www.heraldextra.com/news/local/govt-and-politics/payson-vineyard-will-pilot-ranked-choice-voting-for-state/article_333d3def-c1a9-53ee-b8d0-525769309e0b.html.

least some members of their state legislature,[261] with the number of seats in each such multimember district ranging from two to eleven.[262] Such multimember districts (shorn of any numbered posts) would be ripe for conversion to STV. Maine already uses RCV in primary elections to elect its state House and state Senate.[263]

However, once the number of seats to be filled in any election got much past five, and certainly over nine, some caution would be in order. For one thing, the number of candidates involved might create practical problems in ballot design. For another, as the number of seats to be filled rises, the electability quota drops;[264] with nine seats to be filled at once, any candidate with 10% of the vote can win. Once the percentage of the vote hovers around the single digits, there may be some risk of "fringe" candidates being elected. If this is a concern, one could address it by staggering the terms, so that only half the seats in a multimember district are up in any one election. Or, one could redraw the multimember districts to make them smaller. Again, the availability of such reforms would depend on the specifics of each state's law.

### 2. Federal Level

Adopting STV at the federal level is trickier because of various legal obstacles.

#### a. Senate

In the Senate, each state is constitutionally guaranteed two Senators.[265] That can only be changed by amending the U.S. Constitution, which is generally not politically feasible because it requires a two-thirds vote in each House and ratification by three-fourths of the state legislatures.[266] Worse,

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[261] *See State Legislative Chambers that Use Multi-Member Districts*, BALLOTPEDIA, https://ballotpedia.org/State_legislative_chambers_that_use_multi-member_districts (last visited Oct. 9, 2019).

[262] MICHAEL BARRONE, WILLIAM LILLEY III & LAURENCE J. DEFRANCO, STATE LEGISLATIVE ELECTIONS: VOTING PATTERNS AND DEMOGRAPHICS *passim* (1998).

[263] 21-A ME. REV. STAT. § 1.35-A (2017); William Cummings, *GOP Rep. Bruce Poliquin Loses in First Race Decided by Maine's 'Ranked-Choice' System*, USA TODAY (Nov. 15, 2018), https://www.usatoday.com/story/news/politics/elections/2018/11/15/election-2018-rep-bruce-poliquin-loses-maine-race-jared-golden/2014423002/.

[264] *See supra* Part IV.C.1.

[265] U.S. CONST. art. I., § 3.

[266] U.S. CONST. art. V. Indeed, the Constitution's text itself states that this "equal suffrage in the Senate" cannot be changed through constitutional amendment. *Id.* Whether that provision itself is subject to amendment is a complicated question outside the scope of this Article.

Senate terms are staggered, so only one Senator is elected in each senatorial election.[267] STV, of course, cannot be used where there is only one seat up for election at a time.

The terms can be un-staggered through congressional action. If that were to occur, one could hold an STV election for Senate in each state. The quota for election would then be $1/(2+1) = 1/3$ of the vote. In some states which are more than 2/3 red or 2/3 blue, STV would likely not change the result; one party would still dominate both Senate seats. But in most states which are not that lopsidedly blue or red,[268] STV would likely ensure that at each state's Senate delegation had one Democrat and one Republican. Of course, this sometimes occurs under the current system in "purple" states.[269] So a conversion to STV would only make a real difference in those instances in which a "light red" or "light blue" state might not otherwise split its delegation.

This development might be a salutary thing for democracy. Because there are some issues common to a state which transcend partisanship, more R-D pairings could lead to more bipartisan cooperation on state-based issues of common concern. A similar dynamic occurred during Illinois' use of the semi-proportional "cumulative voting" system[270] during most of the 20th century. It resulted in the election of at least some Republicans in Democratic-dominated Chicago-area districts, and at least some Democrats in Republican-dominated upstate districts, thus fostering more opportunities for bipartisan compromise.[271] On the other hand, it might make assembling a legislative supermajority sufficient to override a filibuster, already a very difficult task, next to impossible. For those who consider the filibuster a too-frequently-used anti-majoritarian tool,[272] this may do more harm than good.

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[267] U.S. CONST. art. I, § 3, cl. 2. *See also Frequently Asked Questions about a New Congress*, U.S. SENATE, https://www.senate.gov/general/common/generic/NewCongress_faq.htm#class_assignments (last visited Feb. 4, 2020).

[268] Only four states (HI, NY, OK, & WY) had both Senate seats win by more than a two-thirds vote in the last Senate election. Only six states (RI, ME, ND, SD, UT, & VT) had one Senate seat win by such a margin. *See Senate Election Results*, N.Y. TIMES (Dec. 17, 2014), https://www.nytimes.com/elections/2014/results/senate; *Senate Election Results: GOP Keeps Control*, N.Y. TIMES (Aug. 1, 2017), https://www.nytimes.com/elections/2016/results/senate; *U.S. Senate Election Results 2018*, N.Y. TIMES (May 15, 2019), https://www.nytimes.com/interactive/2018/11/06/us/elections/results-senate-elections.html.

[269] Currently, four states have divided D-R Senate delegations. *State Partisan Composition*, NAT'L CONF. OF ST. LEG. (Aug. 19, 2019), http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx (last visited Feb. 4, 2020).

[270] *See* discussion of the Port Chester case *supra* Part IV.C.2.

[271] Mulroy, *supra* note 6, at 205 n.74.

[272] *See, e.g.*, Gerard N. Magilocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 303 (2011); Josh Chaffetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003 (2011).

### b. House

STV has more potential in the House. Currently, federal law requires the use of SMDs in U.S. House elections.[273] A pending bill, the Fair Representation Act (FRA), would change that so as to facilitate the use of STV.[274]

Under the FRA, States would be permitted to adopt STV for House elections. If a state had five or fewer House seats, STV elections would be held at large.[275] Otherwise, the state would be divided up into multimember districts drawn by a nonpartisan redistricting commission.[276] The multimember districts could have between three and five seats.[277]

STV would be used for both partisan primaries and the general election. In primaries, more than one candidate from each party would advance to the general election—normally, a number equal to the number of seats to be filled.[278] The system would thus encourage competition within each party as well as between the parties.

Experts at the RCV advocacy group FairVote have drawn simulated multimember district maps to illustrate how the FRA could work in practice.[279] Their illustrative maps substantially reduce partisan bias and substantially increase the number of competitive districts.[280] Representation of minority groups covered by the Voting Rights Act improves as well.[281]

On the subject of the Voting Rights Act, the FRA might benefit from one amendment. It might help to provide that no multimember districting plan could be adopted unless it did not make representation worse for Voting Rights Act-protected groups. This is similar to the "non-retrogression" principle which the Act used to provide for voting changes proposed in

[273] *See* 2 U.S.C. § 2c (2012).
[274] *See* H.R. 3057, 115th Cong. (2018).
[275] *Id.* at tit. II, § 202.
[276] *Id.* at tit. II, § 201. The commission would consist of equal numbers of Republican, Democratic, and Independent members. *Id.* tit. III, § 312(b). It could adopt a plan with a simple majority, but at least one member of each of the three above groups would have to be included in that majority. *Id.* at tit. III, § 311(b)(2). The commissioners would be required to draw districting plans under defined criteria such as Voting Rights Act compliance, competitive districts, ensuring each district has at least one representative from each major party, respect for political subdivision boundaries, etc. *Id.* at tit. III, § 313(a)(1).
[277] *Id.* at tit. III, § 313(a)(1)(C).
[278] *Id.* at tit. I, § 321(a).
[279] *See The Fair Representation Act in Your State*, FAIRVOTE, https://www.fairvote.org/the_fair_representation_act_in_your_state (last visited Feb. 12, 2020).
[280] *Id.*
[281] *Id.*

jurisdictions covered by the "preclearance" provision, section 5 of the Voting Rights Act.[282]

The FRA would be a revolutionary change in how we conduct elections at the federal level. In one fell swoop it would end gerrymandering as we know it, ensure majoritarian outcomes, and substantially reduce the votes-seats skew. Because of its use of RCV, it would also enhance opportunities for third-party candidates and discourage negative campaigning. It would also help to level the playing field somewhat for lesser-funded candidates, thus striking a blow in the direction of campaign finance reform (though by no means sufficient by itself for that purpose).

## V. CONCLUSION

Popular dissatisfaction with—and cynicism about—our electoral system is as widespread as it is justified. Concern about vote-splitting and spoilers in the presidential election is well-founded on recent experience. Counter-majoritarian outcomes are unfortunately not rare. And gerrymandering has gotten to the point that the people no longer choose their representatives, but rather the other way around. It brings to mind Bertolt Brecht's famous poem *The Solution*, which referred to leaflets:

> Stating that the people
> Had forfeited the confidence of the government
> And could win it back only
> By redoubled efforts. Would it not be easier
> In that case for the government
> To dissolve the people
> And elect another?[283]

Instead, we should dissolve our winner-take-all electoral system and establish another.

RCV for single-winner offices, and PR through STV for legislative elections, would revolutionize our political system. It would be the only truly

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[282] Under section 5, jurisdictions with a history of racial or ethnic discrimination in voting (determined by a coverage formula set out in section 4) had to get any voting chance pre-approved by either the U.S. Department of Justice or a three-judge district court in D.C. 52 U.S.C. §10304 (Supp. II 2014). To obtain approval, the jurisdiction had the burden of proving that the change would be no worse for minority voters' ability to participate in the electoral process and elect candidates of choice. *See* Beer v. United States, 425 U.S. 140, 140–41 (1976) (interpreting section 5 to incorporate this retrogression principle, and defining it). In 2013, the Supreme Court struck down the section 4 coverage formula, rendering the section 5 preclearance provision inoperative. Shelby Cty. v. Holder, 570 U.S. 529, 556–57 (2013).

[283] BERTOLT BRECHT, *The Solution, in* BERTOLT BRECHT: POETRY AND PROSE 119 (Reinhold Grimm ed., Derek Bowman trans., 2003).

effective, lasting remedy to gerrymandering. It would help to level the playing field between incumbents and challengers, between the established and the up-and-comers, between the well-heeled and the less-well-off. It would broaden voters' choices and encourage positive campaigning.

Most of all, it would make electoral outcomes more accurate reflections of the popular will. The majority would not be sidelined, but minorities would not be ignored.

These reforms are of course neither perfect nor panaceas. Even if they were adopted, other fundamental election reforms would still be necessary, including campaign finance reform, and the removal of barriers to registration and voting like photo ID laws. But without them, spoiler problems, counter-majoritarian results, and gerrymandering will continue to haunt us.