

# TOWARD FAIRER REPRESENTATION IN STATE LEGISLATURES

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*Many state legislatures lack democratic legitimacy in that they comprise legislators who, in total, do not accurately reflect the views of the state's voters. In several states, for instance, the party that wins a minority of votes for the statehouse routinely wins the seat total by large margins. This reality leads to all kinds of problems, including a disconnect between voters' policy preferences and the policies that their state legislature produces. There are two key factors that aid this phenomenon: intentional partisan gerrymandering and "unintentional gerrymandering," the latter of which arises due to the geospatial sorting of voters. As much as reformers try to take the politics out of district drawing, under current geopolitical alignments, voters in more densely populated areas will be at a disadvantage at translating their votes into seats in the state legislature. Hence, to better align voters' preferences with legislative outcomes, more substantial reform may be needed than merely depoliticizing districting.*

*As a proposal for such reform, this article uses a bill that has been proposed at the federal level—the Fair Representation Act—as a template for reforming state legislatures. By using multi-member districts and ranked-choice voting, the FRA aims to provide more diverse and balanced representation in the House of Representatives. States could do the same for their legislatures, although the means of implementing such reform would vary by state, and there are a number of threshold questions each state would need to resolve for itself about such a system's scope and details. This paper walks through those steps and choices in an attempt to illustrate how FRA-type reform at the state level could make state democracy more representative.*

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INTRODUCTION .....	136
I. FIRST-PAST-THE-POST, SINGLE-MEMBER DISTRICTS AND THE POTENTIAL FOR MINORITY RULE. ....	142
A. Intentional Partisan Gerrymandering.....	144
B. Geospatial Political Sorting and “Unintentional Gerrymandering” .....	152
C. Previous Attempts to Remedy Political Gerrymandering .....	160
II. THE FRA MODEL FOR MOVING AWAY FROM FPP SMD IN THE STATES .....	168
A. The (Federal) Fair Representation Act .....	170
B. Adapting the FRA to the state level .....	172
C. Potential Legal Obstacles to RCV .....	177
III. EVALUATING TEST STATES FOR FRA-LIKE REFORM .....	177
IV. VOTING RIGHTS ACT CONCERNS .....	182
CONCLUSION .....	184

#### INTRODUCTION

At the federal and state levels, American government suffers from a crisis of legitimacy. At the federal level, the electoral college and the Senate’s egregious deviation from a one-person, one-vote norm can enable minority rule, or at least stunt majoritarian governance.<sup>1</sup> Minority rule and stunted majoritarian governance are also significant problems in many states, even if their causes are more subtle. Gerrymandering and the uneven translation of votes into seats has entrenched political parties in control of the legislature in many states across election cycles despite often lacking a majority of statewide support. In some states—particularly those that lack direct democracy—the normal political process cannot break this cycle. In these states, elections often do *not* have consequences in terms of being a vehicle for influencing state legislative outcomes, or at least not the democratically legitimate consequences one might expect. Indeed, a political party is capable of retaining control of one or both legislative chambers in certain states despite overwhelming and consistent losses of the cumulative vote total for either chamber. Given the power that state legislatures wield over their residents, as well as most states’ broad authority to preempt local governments, a minority is often capable of both setting state policy and overriding the policies of lower levels of government. In many states, therefore, the state government—

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1. On the Senate’s egregious deviation from one-person, one-vote, see Jonathan S. Gould et al., *Democratizing the Senate from Within*, 13 J. LEGIS. ANALYSIS 502, 502 & n.1 (2021) (“The U.S. Senate is an undemocratic institution [that] undermines effective government and threatens the long-term health of the Republic.” (citing numerous scholarly pieces exploring this proposition)).

particularly, the legislature—leans decidedly *minoritarian*, while in others majoritarianism may be muted by the legislature’s distorted makeup.<sup>2</sup>

A significant factor in the minoritarian nature of many state legislatures is the widespread use of first-past-the-post, single-member districts (“FPP SMDs”) to determine the winners of legislative seats.<sup>3</sup> FPP SMDs do not ensure that the views of those who vote for a losing candidate are heard. It is theoretically possible, after all, in a two-party system, for all of the candidates representing Party A to win each state legislative district by a vote of 51 to 49% over the candidates of Party B. In such a scenario, Party A would gain 100% of the seats with only 51% of the cumulative vote. Party B would have zero representation in the state legislature, despite having substantial support among the voting public. The seats-votes disparity—that is, the degree to which a party’s seats in the legislature diverge from its share of the popular vote—would be massive. Few, if any, would consider such an outcome, repeated on a consistent basis, healthy for a liberal democracy.<sup>4</sup>

While that extreme scenario has not materialized in recent years, a more subtle variation thereof occurs consistently in several states. In states such as Michigan and Wisconsin, for instance, the Republican Party repeatedly controls—in Wisconsin, overwhelmingly controls—the state legislature despite significant cumulative losses in some state legislative elections in the last decade. In other states, such as North Carolina, Republicans maintained control of the legislature despite pro-Democratic “waves” like in 2018. In Colorado, Nevada, Rhode Island, and Vermont, by contrast, districting has favored Democrats in the state legislature in the last decade.

A significant cause of seats-votes disparity in many states is intentional partisan gerrymandering, which is the process whereby a party in power draws districts to maximize its seat yield. Partisan gerrymandering usually combines two techniques: “packing” voters who generally support the opposing political party into fewer districts that the opposing party’s candidates win overwhelmingly, and “cracking” other voters who generally support the opposing political party into districts in which they constitute an electoral minority.<sup>5</sup> For example, a gerrymander of 30 seats in favor of Party A might allow Party B to win 8 seats in

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2. See generally Miriam Seifter, *Counter-majoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021).

3. Because the United Kingdom has used FPP SMD to elect its Parliament for centuries, FPP SMD is sometimes referred to as the “Westminster system,” so named for the section of London in which Parliament is located, although that phrase sometimes also implies a parliamentary democracy in which the chief executive of the government—usually, a prime minister—is elected from the majority party, which is not the case in any state. AREND LIJPHART, *PATTERNS OF DEMOCRACY* 9 (2d ed. 1999).

4. Cf. Guillermo O’Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 55, 59 (1994) (discussing democracies in which the candidate who wins a majority holds all state power after an election, and noting that such a system is “more democratic, but less liberal, than representative democracy”).

5. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2492 (2019) (discussing “packing” and “cracking” of voters as part of gerrymandering).

safe districts with between 70 and 95% of the vote, Party A to win 18 seats in less safe, but still not particularly competitive districts, with between 55 and 70% of the vote, while allowing for only 4 truly competitive, “swing” districts. Even in a “wave” year in its direction, therefore, Party B would likely win only 12 seats and still be in the minority.

While gerrymandering has been around since the dawn of the Republic,<sup>6</sup> it has recently reached new heights—or perhaps more appropriately, depths—as political parties and their consultants can now predict voting behavior with unprecedented accuracy. Hence, complete control of a districting process by one party, unchecked by any enforceable legal constraints, allows for the manipulation of FPP SMD’s to overrepresent one party in the state legislature. For this reason, advocates have pushed for years to make the districting process more neutral and fair, with the cause taking on increased urgency in the last two decades.

Reformers have sought, with some distinct but limited successes, to stymie partisan gerrymandering through both litigation and law reform. With respect to litigation, the Supreme Court in 2019, by a vote of five to four, quashed the long-running effort to recognize federal constitutional constraints on political gerrymandering.<sup>7</sup> Barring a significant, unexpected change in the Court’s composition, federal litigation regarding partisan gerrymandering is a dead letter for at least the near future.<sup>8</sup>

Though partisan gerrymandering claims are non-justiciable in federal court, anti-gerrymandering reformers have achieved some success in contesting politically motivated districting under *state* constitutions. In Pennsylvania, Florida, and North Carolina, state courts have found that certain districting plans violate state constitutional guarantees of free and fair elections.<sup>9</sup>

Reformers’ other strategy of enacting positive statutory or constitutional change to reform the districting process has also succeeded to some extent in the last decade. In the 2018 election cycle alone, voters in five states—Colorado, Michigan, Missouri, Ohio, and Utah—adopted statutory or constitutional changes to their districting processes, with Virginia following in 2020.<sup>10</sup> These changes follow successful efforts in Arizona, California, and Florida within the

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6. *Id.* at 2494-95 (discussing gerrymandering’s long history in the United States, stretching back to colonial times).

7. *See id.* at 2508.

8. *See* Travis Crum, *Deregulated Redistricting*, 107 CORNELL L. REV. (forthcoming 2022) (manuscript at 110) (<https://perma.cc/F3EA-EHDG>) (archived Jan. 28, 2022) (“Justice Kennedy’s replacement by Justice Kavanaugh likely sealed the fate of partisan gerrymandering claims . . . [a]nd Justice Ginsburg’s untimely death and replacement by Justice Barrett . . . will reverberate for decades to come.”). The *Rucho* Court left the door open for bringing racial gerrymandering claims under the Fourteenth Amendment, however. *Rucho*, 139 S. Ct. at 2495-96.

9. *See infra* notes 197-201 and accompanying text.

10. *See infra* note 182 and accompanying text. As noted below, Missouri already effectively rescinded its districting initiative in 2020. *Id.*

previous decade to remove or reduce political influence on the districting process.<sup>11</sup> With scant exceptions, the states that have passed districting reform have done so through direct democracy. Although their reforms vary in their particulars, most states' new systems remove districting decisions from the legislature's domain and vest them within a politically balanced or apolitical districting commission.<sup>12</sup>

Another significant cause of unrepresentative state legislatures in many states is the effect that the geographic distribution of each major political party's voters has on the legislature's makeup within an FPP SMD system. As Stanford political scientist Jonathan Rodden convincingly demonstrates, urban parties of the "left" are uniquely disadvantaged by FPP SMD, even in the absence of intentional partisan gerrymandering.<sup>13</sup> FPP SMD systems result in "unintentional gerrymandering," whereby supporters of left parties clustered in densely populated urban areas "waste" proportionally more votes in winning seats. Hence, for those concerned by the consistent deviation between the cumulative popular vote for a party's candidates and the corresponding legislative seat count, there is only so much that can be done within the confines of FPP SMD. Taking the politics out of districting may shrink the seats-votes disparity, but as long as there is a geographic cleavage between two major political parties' support, as currently exists in much of the United States, FPP SMD institutionalizes a disadvantage for the urban-favored party.

Proportional representation ("PR"), used in many of the world's other democracies, is one obvious solution to FPP SMD's seats-votes disparity. If applied to state legislatures, PR would mean that voters would select a particular party that fields a slate of candidates.<sup>14</sup> The seats would then be apportioned based on the party's percentage of the vote total. Most PR systems use a threshold cutoff to exclude fringe parties. In Israel, for instance, a party must receive at least 3.25% of the total vote to receive any seats in the Knesset.<sup>15</sup> For that reason, even with PR, a party's seat total may not exactly reflect its vote total. But to the extent that there are advantages in any of the party's geographical spreads, they do not

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11. Florida passed an amendment that required litigation, which is why it is in both the constitutional and statutory categories. *See infra* Section I.C.

12. *Id.*

13. *See generally* JONATHAN A. RODDEN, *WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE* (2019).

14. This particular form of PR, which is "by far the most common," is more specifically known as closed party list voting. *Proportional Representation*, FAIRVOTE, <https://perma.cc/WC7T-9U6K> (archived Jan. 28, 2022). There are other forms of PR that allow voters to select the candidate rather than just vote for the party, as well as "mixed member proportional," in which votes are cast for individual candidates and for the party. *Id.* For more on MMP, see *infra* note 23 and accompanying text (discussing MMP in New Zealand and Germany).

15. Indeed, Israel has steadily raised its threshold over time; until 1992 its threshold was 1%. *Lexicon of Terms*, KNESSET, <https://perma.cc/Y2VD-58EV> (archived Jan. 28, 2022).

translate into a seat advantage in PR. 50% of the statewide vote would lead to (approximately) 50% of the total seats.<sup>16</sup>

Despite its advantages, critics fault PR for enabling parties to wield outsized support due to their role in making or breaking a majority coalition necessary to govern. By rewarding parties with relatively low levels of support with *some* seats, as opposed to *no* seats as in a two-party, FPP SMD system, PR often leads to a greater diversity of viable political parties.<sup>17</sup> Hence, a party that receives 45% of the vote may have to share power with a party that garnered a mere 6% in order to cobble together a majority of seats necessary to govern. In exchange for its support, the minor party may be able to extract serious concessions that skew the majority government's policies more toward the 6% than the median views of the 51% it nominally represents.<sup>18</sup> The significant concessions by minority parties can then lead coalitions within parliamentary systems to collapse.<sup>19</sup>

Another critique of PR systems is that when representatives are not associated with districts, they are less attuned to the needs of constituents. It is possible, after all, in a PR system for any party to run a "slate" of candidates that reside entirely within one city or county or region of the state.<sup>20</sup> If victorious, this slate would not represent the state in a geographical sense. This scenario could lead to parties ignoring the issues important to and views of residents in the un- (or under-) represented regions.<sup>21</sup>

How might a political system thread the needle between FPP SMD and PR? One option, as practiced in Germany and New Zealand, is to use a combination

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16. The seat percentage will deviate from the vote percentage if and when minor parties' vote shares are excluded, *see, e.g., supra* note 15, but geopolitical distribution of voters would not affect this redistribution of votes to seats.

17. This expectation is often associated with the work of French political scientist Maurice Duverger, who posited that PR will tend to lead to the formation of many, independent parties. MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 248 (Barbara & Robert North trans., Meuthen 1954) (1951). While data generally supports Duverger's views, there have been exceptions, such as Ireland and Austria, which were dominated by two principal parties despite using PR. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *STAN. L. REV.* 643, 675-76 n.121 (1998).

18. Nicole Bolleyer, *Small Parties: From Party Pledges to Government Policy*, 1 *W. EUR. POL.* 121, 135-36 (2007) (discussing the leverage that small parties may wield to demand concessions in order to form a majority government in a coalition government).

19. Joe Clare, *Ideological Fractionalization and the International Conflict Behavior of Parliamentary Democracies*, 54 *INT'L STUD. Q.* 965, 970 (2010) (explaining why coalition member parties may leave ruling coalitions rather than forfeit future electoral gains).

20. Data from the Netherlands and Israel, interestingly, show an over-representation of both central metropolitan areas and peripheral regions in their PR systems. Michael Latner & Anthony McGann, *Geographical Representation Under Proportional Representation The Cases of Israel and the Netherlands*, 24 *ELECTORAL STUD.* 709 (2005).

21. *But see* Jon H. Fiva et al., *Local Candidates and Distributive Politics Under Closed-List Proportional Representation* (CESifo Working Paper Series 7039, May 2018), <https://perma.cc/75LL-JZ8B> (analyzing Norwegian parliamentary PR elections over 60 years and finding that while candidate residence influences elections, there is no clear effect on policy outcomes).

of PR and district representation, or “mixed-member proportional” (MMP).<sup>22</sup> At the federal level in the United States, the reform organization Fairvote.org has proposed an alternative: the Fair Representation Act (“FRA”).<sup>23</sup> Rather than dispense with the notion of districting entirely, the FRA opts for larger, multi-member districts (“MMD’s”) that use ranked-choice voting (“RCV”). In doing so, the FRA aims to increase diversity of representation from all corners of the country in the U.S. House of Representatives.

For a quick understanding of how the FRA would affect the U.S. House’s composition, consider staunchly Democratic Massachusetts and staunchly Republican West Virginia.<sup>24</sup> Massachusetts has nine representatives in Congress, each one a Democrat, despite the fact that Republican presidential candidates routinely garner at least a third of the presidential vote and occasionally win the governorship or even a Senate seat.<sup>25</sup> There has not been a Republican representative from Massachusetts in the U.S. House in over two decades.<sup>26</sup> West Virginia, by contrast, has three Republican representatives, despite around 30% of voters routinely voting for Democratic presidential candidates statewide (and it has a Democratic senator).<sup>27</sup> In a more representative system, there would be at

22. See generally Jeffrey A. Karp, *Political Knowledge About Electoral Rules: Comparing Mixed Member Proportional Systems in Germany and New Zealand*, 25 ELECTORAL STUD. 714 (2006).

23. See *The Fair Representation Act*, FAIRVOTE, <https://perma.cc/UF9K-RR83> (archived Jan. 28, 2022).

24. Of course, it wasn’t that long ago that the scripts were somewhat reversed. As late as the 1970s, Massachusetts sent (liberal) Republican senators and congressmen to Washington. See Andrew Natsios, *On Being a Republican in Massachusetts*, 6 N. ENG. J. PUB. POL’Y 35, 36-37 (1990) (tracing the history of the Republican party in Massachusetts). By contrast, Democrats dominated West Virginia from the New Deal until only about ten years ago. See, e.g., Lawrence Grossback & Allan Hammock, *Overcoming One-Party Dominance: How Contextual Politics and West Virginia Helped Put George W. Bush in the White House*, 31 POL. & POL’Y 406, 406 (2008) (noting Democratic dominance of the state for decades after the New Deal).

25. The current governor of Massachusetts is Charlie Baker, a Republican initially elected in 2014 and re-elected in 2016. *Charles D. Baker*, BALLOTPEDIA, <https://perma.cc/46FN-MPH6> (archived Jan. 28, 2022). The last Republican senator from Massachusetts was Scott Brown, who won a special election in 2010 to fill the seat vacated by Democrat Ted Kennedy’s death. *Scott Brown (Massachusetts)*, BALLOTPEDIA, <https://perma.cc/779T-8RZ7>. In the last three presidential election cycles, from 2012 to 2020, Republican candidates have won 32, 33, and 37.5% of the vote statewide, counting backwards. See David Leip, *David Leip’s Atlas of U.S. Presidential Elections*, <https://uselectionatlas.org/>. Of course, the 2012 number may have been higher than normal because the Republican nominee was a former governor of Massachusetts, Mitt Romney, who had amassed a moderate record while in office there. See Glenn Thrush, *Mitt Romney in Mass.: The Lost Years*, POLITICO (May 24, 2012) <https://perma.cc/AS35-SJUW> (archived Jan. 28, 2022) (reviewing Romney’s record as governor of Massachusetts).

26. See *List of United States Representatives from Massachusetts*, BALLOTPEDIA, <https://perma.cc/G42E-N94C> (archived Jan. 28, 2022) (showing that the last two Republican representatives from Massachusetts were Peter Torkildsen and Peter Blute, who each lost in 1996).

27. See CQ, *Congress at Your Fingertips, Early Guide to the 117th Congress, 1st Sess.*

least a few Republicans from Massachusetts and probably one Democrat from West Virginia in the U.S. House as long as it has three seats.<sup>28</sup> These members would bring unique perspectives to their parties, tempering each party's current geographical skews.

While the FRA proposes fixing only the federal House of Representatives, its basic logic could improve the representative nature of state legislatures as well. This article explores that idea and makes that recommendation. In doing so, the article considers specific barriers and advantages to adopting a "mini-FRA" within states. Part I of this article lays out the crisis of democratic legitimacy in several state legislatures over the last several years. It highlights intentional partisan gerrymandering and efforts to cure it, but also demonstrates why any such efforts will necessarily fall short at achieving anything approaching seats-votes partisan symmetry in many states under the current geopolitical divide.<sup>29</sup> Part II describes the FRA and why its proponents believe that it will help make representation fairer at the federal level. Part II then looks at the specific issues that must be addressed in translating the FRA to the state legislative context. In particular, Part II discusses the number of districts that should be used and the method by which states would need to implement an FRA-like change. Building on Part II, Part III examines how an FRA-type reform might play out in four test states: Massachusetts, Michigan, Nevada, and Wisconsin. Part IV discusses the potential Voting Rights Act implications of a state-level FRA. The Conclusion suggests some potential longer-term implications of a move to an FRA-like system at the state level, such as the possibility of more room for additional political parties, including parties that focus more on state-specific issues.

#### I. FIRST-PAST-THE-POST, SINGLE-MEMBER DISTRICTS AND THE POTENTIAL FOR MINORITY RULE.

FPP, SMD systems are now more engrained in the American way of governing than they were historically. Since 1967, federal law mandates that states use SMD's to elect their allotted members of the House of Representatives.<sup>30</sup> At the state legislative level, SMD's have surged in popularity since the 1970s. As late as the 1960s, more than half of all state legislators were elected from MMDs.<sup>31</sup> As of 2019, however, only nine states plan to retain MMDs moving

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(2019). In the last three presidential elections, Democratic candidates, from 2012 to 2020, garnered 35.5, 26, and 30% of the vote, respectively. *Id.*

28. After the 2022 midterm elections, West Virginia will have only two members of the U.S. House due to its population decline between 2010 and 2020. Michael Lemley, *West Virginia to Lose U.S. House Seat After Census Reapportionment*, WVNEWS (Apr. 26, 2021), <https://perma.cc/2SJ8-CSR8>.

29. For more on partisan symmetry and its obverse, partisan bias, see *infra* Section I.A.

30. Pub. L. No. 90-196, 81 Stat. 581 (1967) (codified at 2 U.S.C. § 2(c) (2020)).

31. Andrew Gripp, *Do Multi-Member Districts Improve Representation in State Legislatures?*, INDEP. VOTER PROJECT (Aug. 26, 2015), <https://perma.cc/7PCF-L9ZC>. *But see* John



forward, with West Virginia having most recently decided to switch from MMDs to SMDs only effective after the 2020 census.<sup>32</sup> As of 2015, just 14.7% of state legislators were elected from MMD's, a number that will decline as West Virginia switches to SMDs in 2022.<sup>33</sup>

All but three states use FPP—or, in the case of MMD's, “first and second” or “first, second, and third” past-the-post—systems as well, thus allowing the possibility of a candidate winning a legislative seat with a mere plurality of the vote.<sup>34</sup> Indeed, if third-party candidates are on the ballot, as is more common in some states than others,<sup>35</sup> a plurality between 45 and 48% will sometimes suffice to win a state legislative election in an SMD state (outside of California, Louisiana, and Washington, which use a top-two primary).<sup>36</sup>

The decreasing number of states that use MMD's also now use them in a way that elects fewer representatives per district. In the 1950s, state lower house MMD's regularly included four, five, or six members.<sup>37</sup> Urban areas sometimes had districts with as many as twenty-one representatives!<sup>38</sup> Even state senate MMD's included up to six senators per district in some states, and frequently included two, three, or four.<sup>39</sup> Of the nine states with MMD's moving forward,

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F. Banzhaf III, *Multi-Member Electoral Districts—Do They Violate the “One Man, One Vote” Principle?*, 75 YALE L.J. 1309, 1309 n.2 (1966) (noting that 45% of the members of state lower houses were elected from MMD's as of 1960). Put alternatively, as of 1955, all but nine states elected at least some members of their legislature from MMD's. Maurice Klain, *A New Look at the Constituencies: The Need for a Recount and Reappraisal*, 49 AM. POL. SCI. REV. 1105, 1106-07 (1955) (noting the nine states that did not use MMD's as of 1955 were Cal., Del., Kan., Ky., Mo., Neb., N.Y., R.I., and Wisc.).

32. Ben Williams, *West Virginia Moves to Single-Member Districts*, NCSL BLOG (Apr. 10, 2018), <https://perma.cc/E5NU-S5MF> (archived Jan. 28, 2022).

33. *Id.*

34. California and Washington use a “top-two” system, whereby anyone can run in a primary that winnows the field of candidates down to two, regardless of party affiliation, for the general. See *Other Primary Types*, FAIRVOTE, <https://perma.cc/4SGX-7Y4A> (archived Jan. 28, 2022). Louisiana uses a runoff for elections in which no candidate finishes with a majority. *Id.* Of the three states, only Washington allows write-ins in its final election, and even there, it requires that write-in candidates file a declaration ahead of time for their votes to count. REV. CODE WASH. § 29A.60.021 (2020). Hence, in Louisiana and California it is guaranteed that the winner of the final election will win a majority, and in Washington this is also highly likely to be the case.

35. Cf. Euel Elliott et al., *Minor Party Support in State Legislative Elections*, 22 STATE & LOCAL GOV'T REV. 123 (1990) (comparing different states and finding that minor parties perform strongest in the West and weakest in the South).

36. *Plurality-Majority Systems*, FAIRVOTE, <https://perma.cc/8CJC-MKMN> (archived Jan. 28, 2022) (criticizing SMD plurality voting for leading to “manufactured majorities” and “high levels of wasted votes,” among other problems).

37. Klain, *supra* note 31, at 1109.

38. *Id.* at 1110 (citing Detroit's house district as the “giant of the giants,” with twenty-one seats until 1954 (citing numerous other cities or urban counties with large MMD's, including Cuyahoga, Ohio (containing Cleveland) (seventeen); Multnomah, Oregon (containing Portland) (sixteen); Denver (fifteen); Las Vegas (nine))).

39. *Id.* at 1108 (“Most multi-member senate constituencies elect two or three at a time; half a dozen or so elect four. Six senators representing Cuyahoga County . . . comprise the

only one—Vermont—has MMD’s for the senate, and even then only one MMD among its several state senate districts.<sup>40</sup> With respect to their lower houses, seven of the nine have two representatives (or assemblymen) in MMD’s,<sup>41</sup> while an eighth—Maryland—has three.<sup>42</sup> Only New Hampshire resembles the MMD’s of old in numerosity of representatives, with districts that elect as many as eleven delegates.<sup>43</sup>

Forty-one state legislatures, therefore, operate solely on the basis of SMD’s, and of the remaining several that use MMD’s, only New Hampshire departs markedly from the SMD framework by electing a large slate of candidates in a district.

#### A. Intentional Partisan Gerrymandering

The Introduction explained how a party’s percentage of SMD seats in a legislature can deviate greatly from that party’s share of the statewide popular vote. Assuming that each party represents some coherent platform of policies, a significant seats-votes disparity is democratically problematic insofar as the legislature might be expected reasonably to represent, as a whole, the views of the entire state.<sup>44</sup> This problem is particularly acute when the party that wins fewer votes statewide consistently wins the most seats in the legislature. What can result in such a situation is long-running rule by a political party that represents a political minority of the state’s voters.

To be sure, the argument that seats-votes disparity is inherently democratically problematic may have its limits. Partisan affiliation is just one of several factors voters consider in voting for a candidate. Other factors include education, experience, personal character, effectiveness, personality, charm, and even physical appearance.<sup>45</sup> It is possible, therefore, that the seats-votes disparity results

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largest bloc [of] any one senatorial district in the United States.”).

40. Vermont currently has six senators from one district, Chittenden County, which contains populous Burlington, although there is a legislative effort underway to lower that number to three. See Bob Kinzel, *Vt. Senate Votes to Divide Up 6-Member Chittenden County District (The Biggest in the US)*, VPR (Feb. 11, 2019), <https://perma.cc/LGQ2-69U9>.

41. These states include Arizona, New Jersey, North Dakota, and South Dakota, which use bloc voting to elect their representatives from MMD’s, whereby voters have as many votes as there are candidates. *State Legislative Chambers that Use Multi-Member Districts*, BALLOTPEdia, <https://perma.cc/7AEF-2BM6> (archived Jan. 28, 2022). Vermont elects some of its state representatives from 2-member districts using bloc voting, and others from SMD’s. Idaho and Washington elect its members in “post” format, whereby candidates run for a designated seat (e.g., 1A or 1B) within a district. *Id.*

42. Maryland uses a combination of bloc and post elections for its 3-member House of Delegate districts. *Id.*

43. *Id.*

44. Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 287 (2014) (reviewing the “impressive range of thinkers [who] have made the normative argument that the preferences of voters ought to be aligned with those of their representatives”).

45. See Rosie Campbell & Philip Cowley, *What Voters Want: Reactions to Candidate*

from an amalgam of these kinds of idiosyncratic voter preferences. Nonetheless, despite the importance of all of these nonpartisan factors, recent data suggest that partisan affiliation matters more than ever in choosing legislative candidates.<sup>46</sup> Hence, while candidate-specific factors may make a difference on the margins—particularly in swing districts—in the vast majority of partisan contests in the contemporary United States, party affiliation is highly determinative.<sup>47</sup> Moreover, parties use primaries and other tools, such as endorsements and contributions from incumbents and institutional donors, to field candidates in the general election who are likely to present well on the candidate-specific factors.<sup>48</sup>

Proceeding from the premise that partisan preference frequently determines the outcome of an election, parties can manipulate district boundaries to their advantage if they know the voters' partisan preference. Political strategists in the United States have understood this phenomenon since early in the Republic's history when political parties first emerged as significant forces.<sup>49</sup> The practice continued over time, becoming a political custom in the United States. Indeed, before the Supreme Court's decisions in *Reynolds v. Sims* and *Wesberry v. Sanders*—which required the apportionment of state legislative and U.S. House districts on a one-person, one-vote basis—partisan motives affected not just the shape of districts, but also the allocation of *seats* to districts.<sup>50</sup> Democratic legislatures, for instance, sometimes allocated more seats to more reliably Democratic parts of the state, a practice which is now largely restrained by *Reynolds* and *Wesberry*.<sup>51</sup>

The United States traditionally allows elected officials to draw district maps, thus making it uniquely susceptible to partisan gerrymandering. Other democracies employ mechanisms that aim to remove politics from the line-drawing process.<sup>52</sup> While professional staff and independent commissions now draw districts

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*Characteristics in a Survey Experiment*, 62 POL. STUD. 705 (2014) (discussing candidate characteristics).

46. See DANIEL J. HOPKINS, *THE INCREASINGLY UNITED STATES* 168 (2018).

47. *Id.*

48. Hans J.G. Hassell, *Party Control of Party Primaries: Party Influence in Nominations for U.S. Senate*, 78 J. POL. 75, 76 (2015) (“Political parties have an interest in ensuring that the right election candidate emerges from the party’s nomination process to give themselves the best chance to win a majority of seats . . .”).

49. See generally ELMER CUMMINGS GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* (1907).

50. Ruth C. Silva, *Relation of Representation and the Party System to the Number of Seats Apportioned to a Legislative System*, 17 W. POL. Q. 742, 767 (1964) (discussing the combination of “misapportionment and gerrymandering” in state legislatures). Indeed, one wonders whether the ability to deviate from one-person, one-vote led to even *more* gerrymandering than is seen now, at least in some states.

51. There is still some room around the margins for partisans to pad their advantage through allocation decisions, such as by deciding in which district(s) to count prisoners or students. *E.g.*, Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL’Y REV. 355 (2011).

52. Bernard Grofman & German Feierherd, *The U.S. Could Be Free of Gerrymandering. Here’s How Other Countries Do Redistricting*, WASH. POST (Aug. 7, 2017),

in an increasing number of states,<sup>53</sup> politicians still draw districts across most of the country. In most states, the legislature draws districts every ten years through something like the normal legislative process. Hence, when one party controls all of the prongs of the legislative process—both houses of the state legislature and the governorship, or a “trifecta”—the opportunity for drawing lines to favor that party is ripe, even when the state constitution or state law require districts to adhere to neutral principles like contiguity and connecting communities of interest. By contrast, when control of a state’s legislative process is divided between parties, then both parties must compromise to some extent in approving a districting map. When compromise is not feasible, the map-drawing responsibility usually goes to another entity, which may be the office of a partisan official<sup>54</sup> or a court.<sup>55</sup>

Although gerrymandering is long-established in the United States, advances in districting technology over the last few decades increase the precision of partisan gerrymanders and their ability to withstand mid-decade demographic changes. As recently as the 1980s, officials hand-drew maps based on precinct-level aggregate data, which at best served as rough estimates of future collective voter behavior.<sup>56</sup> In those times, it may have been accurate to say, as Justice Antonin Scalia said in 2004, that one “cannot really tell until after the election is done how many Republicans and how many Democrats there are in each district.”<sup>57</sup> By the 2010s, however, redistrictors could avail themselves of “vastly improved computer speed, memory, and storage,” allowing them to draw “district lines so precisely that they . . . ensur[e] . . . an electoral advantage that endures throughout the following decade.”<sup>58</sup>

Moreover, in addition to vastly increased computing capacity, “big data,” in combination with the heightened partisan voter behavior discussed earlier, allows today’s gerrymandering to produce more reliably partisan results in elections over the course of the districting cycle. Political parties previously relied only on available information in the public record to profile voters, such as home

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<https://perma.cc/A4YP-E7UB> (“In most other long-term democracies, a politically neutral body draws new districts. . .”).

53. See *infra* Section I.C.

54. In Oregon, for instance, if the legislature fails to pass redistricting legislation, the responsibility for redistricting goes to the secretary of state, which is a partisan elected official. OR. CONST. art. IV, § 6(3)(a).

55. Sometimes courts order districting plans as a result of a lawsuit brought challenging the legislature’s *failure* to redistrict. *E.g.*, Thomas Kaplan, *New Congressional Lines Imposed by Federal Court*, N.Y. TIMES (Mar. 19, 2012) at A23, <https://perma.cc/V68H-RQ8E>.

56. Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1441 (2020).

57. *Id.* at 1384 (citing oral argument at 14:43 (Scalia, J.), *Vieth v. Jubilerer*, 541 U.S. 267 (2004) (No. 02-1580), <https://perma.cc/Y22E-QJ9K> (archived Feb. 13, 2020)).

58. Brief for Bernard Grofman and Ronald Keith Gaddie as Amici Curiae in Support of Neither Party at 4-5, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161); see also DAVID DALEY, RATF\*\*KED: WHY YOUR VOTE DOESN’T COUNT 51-60 (2016).

address, voting history, and party affiliation (where applicable<sup>59</sup>).<sup>60</sup> Now, parties—whether campaigning or districting—can use all sorts of modern data used by the most sophisticated marketing firms.<sup>61</sup> In addition to demographics, these data include views on specific issues such as abortion, firearm availability, and marijuana legalization,<sup>62</sup> as well as consumer data that highly correlate to expected voter behavior.<sup>63</sup> Hence, rather than merely rely on the crude metrics of party affiliation, census demographic data, and collective election results, map-drawers can now incorporate far more sophisticated metrics.<sup>64</sup> Such metrics are especially useful to map-drawers to help identify the partisan leanings of the large number of voters who opt to affiliate with neither major party and thus do not provide a publicly registered clue of their partisan preferences.<sup>65</sup>

Evidence from the last two decades confirms that partisan gerrymanders have been extremely effective in several states, at both the Congressional and state legislative levels. In measuring the effectiveness of a gerrymander, political scientists usually refer to a districting plan's "partisan bias," by which they usually mean an asymmetry in the seats-votes ratio for each party.<sup>66</sup> Partisan bias (also called "advantage") is not the same as disproportional results within a given election. In a two-party system, if Party A wins 60% of the vote but 100% of the seats, while Party B wins 40% of the votes and zero seats, the result is clearly disproportionate, but it is not necessarily biased. If Party B likewise would have won 100% of the seats with 60% of the votes, then the system is perfectly symmetrical and exhibits no partisan bias. In a districting system with partisan bias, by contrast, one party has an identifiable, structural, and asymmetrical advantage at converting its votes to seats. Hence, continuing with the hypothetical above, if

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59. For the different ways states approach voter registration by party, see *State Primary Election Systems*, NCSL, <https://perma.cc/FW47-NHZK> (archived Jan. 28, 2022). Nineteen states do not have partisan registration processes. North Dakota, for one, does not register voters at all. See *Voter Registration in North Dakota*, N.D. SEC'Y OF STATE, <https://perma.cc/LEW6-X2X9> (archived Feb. 1, 2022).

60. Dan Patterson, *How Campaigns Use Big Data Tools to Micro-target Voters*, CBS NEWS (Nov. 6, 2018), <https://perma.cc/6RDB-U93K> (archived Jan. 28, 2022).

61. *Id.*

62. *Id.*

63. E.g., Michael Hendrix, *Why 2016 Came Down to Whole Foods vs. Cracker Barrel*, MEDIUM (Nov. 10, 2016), <https://perma.cc/RT26-3LPK>.

64. Indeed, the kind of information that may have been used years ago, such as party registration, can be highly imprecise at predicting voting behavior. Brad Jones, *What Voter Files Can Tell Us About Trends in Party Registration*, MEDIUM (Oct. 23, 2018), <https://perma.cc/SM68-4UDJ> ("[P]arty registration in southern states over the last several decades has not tracked with their voting patterns in national elections.").

65. *Id.*

66. Thomas W. Gilligan & John G. Matsuzaka, *Structural Constraints on Partisan Bias Under the Efficient Gerrymander*, 100 PUB. CHOICE 65, 69 (1999). As noted below, "partisan bias" can have subtly different meanings for political scientists that are important theoretically, but do not affect the analysis offered here. Eric McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 LEGIS. STUD. Q. 55, 59 (2014) (discussing differences in measuring partisan bias).

Party B would win only 60% of the total seats with 60% of the total vote, but Party A would win 90% with the same vote total, there is a clear partisan advantage in favor of Party A. While one can attempt to *predict* partisan advantage ahead of time, it is most accurately measured retrospectively and across numerous elections, so that the effects of “swings” on the voters collectively can be analyzed under the particular districting map in effect.<sup>67</sup>

Political scientists use at least four metrics to measure partisan advantage. These include the mean-median difference, the declination, partisan asymmetry, and the efficiency gap.<sup>68</sup> The details of each and the distinctions among them are not particularly relevant here. Indeed, the four are all “closely related theoretically and empirically.”<sup>69</sup> All are designed to measure how cumulative (i.e., statewide) votes for party candidates are distributed across districts.<sup>70</sup> The “efficiency gap” (EG) became the most familiar metric to the public due to its prominence in the high-profile litigation, *Gill v. Whitford*, that sought to establish constitutional limits on partisan gerrymandering, discussed below.<sup>71</sup> Following *Gill*, the Associated Press and some other media outlets used EG in measuring the impacts of gerrymandering.<sup>72</sup> Hence, this article uses the EG as the metric for the quantitative component of gerrymandering, even if it makes no claim as to which of the four (or more) metrics of partisan bias is best or most accurate.

Of course, metrics of partisan advantage do not necessarily reveal intent. For reasons discussed further in Section I.B, it is possible that a districting plan may demonstrate partisan advantage but not be the result of a districting plan enacted with a partisan intent. Conversely, as Justice Scalia noted, a plan enacted with a partisan intent may not be as effective as designed, or even backfire, although with the advances in technology and data described above, this phenomenon is much less common than decades ago.<sup>73</sup>

As a legal matter, in attempting to establish partisan gerrymandering as a constitutional violation, litigants—and the courts that have accepted their arguments, whether they be state courts interpreting state constitutional provisions or federal courts before *Rucho*—have generally included an intent prong in their

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67. *Cf. Rucho*, 139 S. Ct. at 2503-04 (“[A]sking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.”).

68. Nicholas O. Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties*, 45 LEGIS. STUD. Q. 609, 610 (2020).

69. *Id.* at 618; *see also* Eric McGhee, *Measuring Efficiency in Redistricting*, 16 ELEC L. J. 417 (2017).

70. Stephanopoulos & Warshaw, *supra* note 68, at 618 (citing Gregory S. Warrington, *Introduction to the Declination Function for Gerrymanders* (draft Mar. 2018), <https://perma.cc/C58U-MW3S>).

71. 138 S. Ct. 1916 (2017).

72. *See infra* note 74.

73. *See Rucho*, 139 S. Ct. at 2512-13 (Kagan, J., dissenting) (“[B]ig data and modern technology . . . make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides.”).

analysis.<sup>74</sup> In other words, if a plan has a partisan advantage but there was no partisan intent in its drawing, then it is unlikely, if not impossible, that it will be found illegal.

Looking for both a partisan intent and a record of partisan bias in operation, the following states show strong indicia of gerrymandering in their state legislature lower houses in the 2010s. When considering the 2012, 2014, 2016, and 2018 elections, these states exceeded an EG threshold of 7% multiple times:<sup>75</sup>

4 of 4: MI (R), WI (R), FL (R)<sup>76</sup>

3 of 4: IN (R)

2 of 4: SD (R), NC (R), OH (R), VT (D), KS (R)

In all but one of the states listed above, the apparent gerrymandering worked in favor of Republicans. In all but one state, the party implementing the EG held a trifecta in state government for the post-2010 redistricting.<sup>77</sup> The exception is North Carolina, where Republicans controlled the legislature in 2011 under a

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74. See, e.g., *Whitford v. Gill*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016), *rev'd sub nom.* *Gill v. Whitford*, 138 S. Ct. 1916 (2017); *League of Women Voters of Florida v. Detzner*, 172 So.3d 363, 375 (Fla. 2015) (“[T]here is no acceptable level of improper intent [under Florida constitutional prohibition on partisan gerrymandering, Fla. Const. art. III, § 20.]” (quoting *In re Senate Joint Resolution of Legislative Apportionment 1176*, 80 So.3d 597, 617 (Fla. 2012))).

75. The paper uses 7% as a threshold for significant gerrymandering since that standard was proposed by the plaintiffs in *Gill v. Gill*, 218 F. Supp. 3d at 860-61 (quoting expert Simon Jackman). To be clear, Jackman proposed the threshold for analyzing the *first* post-redistricting results, not subsequent, but this was likely because the plaintiffs were seeking to establish a standard that could be used going forward to challenge redistricting plans shortly after their enactment. *Id.* For 2016 and 2018, the author used data from a proprietary Associated Press data set (on file with author) [hereinafter “AP data set.”] For 2012 and 2014, the author used data presented by *Gill* expert Jackman. See Expert Report of Simon Jackman at 73, *Whitford v. Nichol*, No. 3:15-cv-00421-bbc (W.D. Wis. July 7, 2015), <https://perma.cc/D7SZ-2QK5>. Note that Jackman does not include all states, including one that under the AP data had greater than 7% EG twice: South Dakota. *Id.* He also does not include states with off-year elections, such as Virginia and New Jersey. *Id.*

76. It is worth noting that although Florida’s constitution has prohibited political influence in districting since 2010, that provision was used to challenge the post-2010 drawing of senate districts, but never house districts. See Mary Ellen Klas & Jeremy Wallace, *Florida Legislature Won’t Appeal Redistricting Ruling*, TAMPA BAY TIMES (Jan. 20, 2016), <https://perma.cc/6H6W-V2KX> (noting that the Florida legislature chose not to appeal a state circuit court judge decision rejecting the legislatively drawn senate maps). Indeed, the Florida Supreme Court rejected a challenge to the state house districts in 2012. *In re Senate Joint Resolution of Legis. Apportionment 1176*, 83 So.3d 597, 684 (Mem) (Fla. 2012) (concluding that the state senate plan was invalid under the Fair Districts Amendment, but the state house plan was valid).

77. Again, however, it bears noting that the Florida Supreme Court rejected an allegation of political influence in the Florida house’s makeup. See *id.*; see also Mark Caputo, *Fla. Senate Broke Law, Will Redraw Districts*, POLITICO (July 28, 2015), <https://perma.cc/5PBL-GDSW> (noting that the House Speaker “worked to make sure the House maps were conspicuously clean of any partisan influence”).

Democratic governor; unlike in almost every other state, however, the governor of North Carolina may not veto legislatively-enacted districting.<sup>78</sup>

Several other states had high EG's for their state lower house elections through the 2010s but their district plans likely did not meet the intent prong of partisan gerrymandering because they resulted from bipartisan processes.<sup>79</sup> New York, for instance, has a high pro-Republican EG in its state assembly for three of the four cycles, but its districts were drawn by a Republican-controlled senate and a Democratic-controlled assembly.<sup>80</sup> Virginia had very high pro-Republican EG's in 2011 and 2013, yet Democrats controlled one house of the bicameral state legislature when it drew those districts.<sup>81</sup> Rhode Island had very high pro-Democratic EG's in 2012 and 2014, but it had a Republican governor during post-2010 redistricting, and its 2016 and 2018 EG's were more modest (4% and 2%, respectively).<sup>82</sup> Nevada had pro-Democratic EG's greater than 7% in 2016 and 2018, but it had a Republican governor in 2011 despite state legislative control.<sup>83</sup>

In some of the states with clear evidence of partisan gerrymandering in the 2010s, such as Michigan and Wisconsin, it became routine for a party that lost outright the cumulative vote share in state legislative elections to win a majority of legislative seats nonetheless. In Wisconsin, in particular, Republicans have maintained a lock on both houses of the state legislature despite losing statewide vote totals for the assembly multiple times in the 2010s. Even when they won bare pluralities of the total statewide votes for assembly candidates, Wisconsin

78. N.C. CONST. art. II, § 22(5)(b) & (c).

79. The mere fact that both parties exercised control at some point in the legislative process does not, on its own, rule out the possibility of partisan gerrymandering. If a party has slim control of just one house, or controls only the governorship but neither house of the legislature, it may give in on districting perhaps to achieve other legislative or governing priorities.

80. See *Redistricting in New York After 2010 Census*, BALLOTPEDIA, <https://perma.cc/F62Z-NJGY> (archived Jan. 28, 2022). Indeed, conventional wisdom about New York was that the Republican-controlled state senate and Democratic-controlled state assembly generally avoided redistricting fights as each party let its own members retain their seats. *E.g.*, Michael Gormley, *Cuomo to Sign NY Legislature's Redistricting Plan*, NBC NEW YORK (Mar. 14, 2012), <https://perma.cc/8TV8-3LSL> (archived Jan. 28, 2022) (“The Senate Republican and Assembly Democratic majorities planned to pass the plan Wednesday night, despite condemnation from some good-government groups that the district lines were gerrymandered to protect the majorities’ political power and perks for the next 10 years.”).

81. See *Party Control of Virginia State Government*, BALLOTPEDIA, <https://perma.cc/M3DZ-4S3S> (archived Jan. 28, 2022) (showing that Democrats controlled the Virginia state senate in 2010-11).

82. Republican Lincoln Chafee was governor of Rhode Island beginning in 2011. *Lincoln Chafee*, BALLOTPEDIA, <https://perma.cc/LDE2-D29X> (archived Jan. 28, 2022).

83. Nevada’s Republican governor in 2011 was Brian Sandoval. *Brian Sandoval*, BALLOTPEDIA, <https://perma.cc/SFA9-VYT7> (archived Jan. 28, 2022). Moreover, while the Democrats controlled the state assembly by a healthy 26-16 margin after 2010, the Democratic majority in the senate was a mere 11 to 10. *Nevada State Legislature*, BALLOTPEDIA, <https://perma.cc/6MUE-5UBS> (archived Jan. 28, 2022).



Republicans enjoyed an outsized “winner’s bonus” of seats.<sup>84</sup> The following table demonstrates the strength of Wisconsin Republicans’ apparent 2011 gerrymander through four election cycles.

**Table 1.** Wisconsin State Assembly Elections 2012-18<sup>85</sup>

Year	R statewide vote share	R seats in Assembly	D statewide vote share	D seats in Assembly	Pro-R EG
2012	48.6%	60	51.4%	39	13%
2014	52%	63	48%	36	10%
2016	51.7%	64	45.5%	35	10%
2018	44.8%	63	53%	36	16%

As epitomized by the Wisconsin assembly in the 2010s, but as has been the case to a lesser degree in many states, a state legislature can be distinctly *unrepresentative* of the voting public. This causes all kinds of problems: excessive preemption of local governments,<sup>86</sup> protracted conflict with governors and other executive officials who were elected by majorities or at least winning pluralities,<sup>87</sup> passage of laws that do not reflect public opinion,<sup>88</sup> and the stalling of legislation that has popular support.<sup>89</sup> Further effects include disillusionment with government, reduced turnout rates, and reduced involvement in political

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84. In political science jargon, the “winner’s bonus” is the extra share of seats that a party wins on top of its cumulative vote total. *Gill*, 218 F. Supp. 3d at 855 n.88 (citing Jackman report).

85. The efficiency gap for 2012 and 2014 came from the *Gill* litigation. The EG’s for 2016 and 2018 came from the Associated Press. David Lieb, *GOP Won More Seats in 2018 than Suggested by Vote Share*, ASSOCIATED PRESS (MAR. 21, 2019), <https://perma.cc/BG3S-NQNC>.

86. Paul A. Diller, *The Political Process of Preemption*, 54 U. RICHMOND L. REV. 343, 364-81 (2020) (reviewing five states’ records of gerrymandering and preemption).

87. See Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 910-16 (2021) (discussing legislatures stripping powers from governors in North Carolina and Wisconsin). To be sure, it is possible for a governor to be elected by such a relatively small plurality—perhaps due to a strong third-party candidate—that his or her claim to majoritarian legitimacy becomes quite weak. For instance, Paul LePage won the Maine governorship in 2010 with a mere 37.6% of the vote and clashed with the legislature incessantly thereafter. Colin Woodard, *How Did America’s Craziest Governor Get Reelected?*, POLITICO (Nov. 5, 2014), <https://perma.cc/U3DH-NYLT>.

88. Devin Caughey et al., *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies*, 16 J. ELEC. L. 453, 467 (2017) (discussing examples from Michigan and Vermont).

89. *Id.* at 467-68; see also Alex Tausanovitch & Emily Gee, *How Partisan Gerrymandering Limits Access to Health Care*, CENTER FOR AMERICAN PROGRESS (Feb. 24, 2020), <https://perma.cc/S6SY-CMAG> (“In each of the following four states—North Carolina, Michigan, Wisconsin, and Georgia—gerrymandering appears to have been a decisive factor in blocking more residents from receiving Medicaid.”).

activity.<sup>90</sup> This dynamic is unsustainable going forward as it can cause state democracy to lose more legitimacy each decade, at least in certain states.

#### B. Geospatial Political Sorting and “Unintentional Gerrymandering”

In addition to the concern regarding intentional political gerrymandering and how it can skew a legislature’s makeup and output, recent political science has demonstrated that under-representation of left-leaning political parties is baked into FPP SMD. Most thoroughly and convincingly explained in Rodden’s *WHY CITIES LOSE*, this phenomenon developed in the late nineteenth and early twentieth centuries around the world.<sup>91</sup> This section will explore the historical reasons why, on balance, Democrats win their densely populated, urban districts by more overwhelming margins than Republicans win their rural and exurban districts, and how this dynamic leads to Democratic underrepresentation in Congress and state legislatures.<sup>92</sup>

Before explaining how FPP SMD sells urban left parties short, a brief history is in order. With the industrial revolution and the gradual expansion of the franchise to more men (and then women) in the late nineteenth and early twentieth centuries, political parties of the “left”—often called “Labor” parties, as in the United Kingdom and Australia—emerged that appealed to the economic interests of factory workers in urbanized areas.<sup>93</sup> These parties often won seats by overwhelming margins in core urban districts but were less competitive in suburban and rural areas.<sup>94</sup> Quickly realizing that they would do better under a PR than a districted system, many of these leftist parties incorporated a PR plank into their platforms and, in many nations—particularly, on the European Continent—they succeeded in implementing this plank.<sup>95</sup>

For a variety of historical and political reasons, urban left parties failed to enact PR in the United Kingdom and its former colonies, such as Australia, New Zealand, Canada, and the United States.<sup>96</sup> These nations retained some version

90. See Stephanopoulos & Warshaw, *supra* note 68, at 609 (finding results that “suggest that gerrymandering has long-term effects on the health of the democratic process beyond simply costing or gaining parties seats in the legislature”).

91. RODDEN, *supra* note 13, at 22-27.

92. *Id.* at 181-88.

93. *Id.* See also GORDON PHILLIPS, *THE RISE OF THE LABOUR PARTY 1893-1931*, 36 (1992) (noting that the Labour “party proceeded to establish itself” in the coalfields and “almost all the other urban concentrations [in Britain] in the early 1920s”); ANDREW THORPE, *A HISTORY OF THE BRITISH LABOUR PARTY* 55 (1997) (“Labour was a party based on the votes of the urban working class.”); ROSS McMULLIN, *THE LIGHT ON THE HILL: THE AUSTRALIAN LABOUR PARTY 1891-1991* (1991).

94. THORPE, *supra* note 93, at 60 (noting that the British Labour Party recognized the need to increase support in agricultural areas).

95. RODDEN, *supra* note 13, at 27-30 (“Recognizing their electoral geography problem, leaders of European socialist and labor parties . . . came to see proportional representation (PR) as their salvation.”).

96. *Id.* at 30-37 (discussing the “unique features” of Australia, New Zealand, Britain,

of SMD or MMD for their national and subnational lawmaking bodies, never fully embracing PR; as noted above, New Zealand is the lone (partial) exception, having incorporated PR into the MMP system it enacted in the mid-1990's.<sup>97</sup>

In the United States, neither of the two major political parties—Democrat or Republican—were strongly associated with urban leftist views at the turn of the twentieth century, and each had strong “machines” in different urban strongholds.<sup>98</sup> As late as the 1920s, a Democratic party that advocated for higher tariffs and opposed the gold standard performed better in rural areas than it did in urban areas in many states.<sup>99</sup> The Socialist party made some notable inroads in municipal government in some cities, but at the federal and state levels it never gained more than just a handful of seats.<sup>100</sup>

With the candidacy of New York Governor Al Smith, a Catholic Irish-American, in 1928, the Democratic Party began to identify more with urban areas that had large populations of non-Protestants who had immigrated within the preceding several decades.<sup>101</sup> Urban affinity for the Democrats strengthened considerably with Franklin Delano Roosevelt's New Deal coalition in the 1930s.<sup>102</sup> After the 1930s, most densely populated urban areas were strongly Democratic, although there remained pockets of Republican support among and within some

Canada, and the United States that “led to the retention of single-member districts”).

97. See Karp, *supra* note 22.

98. RODDEN, *supra* note 13, at 39-40 (“Well into the 1920s . . . support for Democrats in the Northeast still came predominantly from rural areas, and Republicans controlled many of the cities.”). In Pennsylvania, for instance, Republican political machines controlled both Philadelphia and Pittsburgh into the 1930s. See generally PETER MCCAFFERY, WHEN BOSSES RULED PHILADELPHIA: THE EMERGENCE OF THE REPUBLICAN POLITICAL MACHINE, 1867-1933 (1993); Stefano Luconi, *Building a Democratic Machine in Pittsburgh's Italian-American Community*, PITTSBURGH HIST. 182, 183 (Winter 1994/1995) (explaining that Pittsburgh was a “Republican stronghold” until the 1930s with a “machine” that effectively controlled all offices).

99. RODDEN, *supra* note 13, at 41; Gary Miller & Norman Schofield, *The Transformation of the Republican and Democratic Party Coalitions in the U.S.*, 6 PERSPECTIVES ON POL. 433, 437-38 (2008) (“Prior to Al Smith's presidential race in 1928, the Democratic Party had been a socially conservative, agrarian party that . . . [lacked] support [in] the increasingly urban states in the Northeast.”); THOMAS FRANK, THE PEOPLE, NO 54-56 (2020) (discussing William Jennings Bryan's nomination as Democratic presidential candidate in 1896 and his opposition to the gold standard).

100. See, e.g., Douglas E. Booth, *Municipal Socialism and City Government Reform: The Milwaukee Experience, 1910-1940*, 12 J. URB. HIST. 51, 51 (1985) (“Socialist regimes came into office in Milwaukee and other cities during the first part of the twentieth century.”); see also Euel Elliott et al., *Minor Party Support in State Legislative Elections*, 22 STATE & LOCAL GOV. REV. 123, 124 (1990) (“[T]he Socialist party had some success in state races, managing to elect state representatives in New York and other northern states in the earlier decades of the century.”); see generally JACK ROSS, THE SOCIALIST PARTY OF AMERICA: A COMPLETE HISTORY (2015).

101. Miller & Schofield, *supra* note 99, at 437-38.

102. RODDEN, *supra* note 13, at 45-46 (noting that the association between population density and Democratic voting was particularly strong in the North and Midwest in the 1930s and 40s).

cities.<sup>103</sup> Until the 1990s, however, while the Democratic Party performed strongly in urban areas, it also retained significant strength throughout the South, particularly in rural areas and down the ballot.<sup>104</sup> Southern affinity for the Democratic Party stretched back to before the Civil War, and, of course, the Democratic Party was the “Redeemer” party responsible for re-instituting white supremacy and Jim Crow in the South after Reconstruction.<sup>105</sup> Despite its odd pairing of urban liberals and Southern segregationists, FDR’s New Deal coalition persevered largely intact through the 1960s, and, although weakened by white opposition to the Civil Rights movement, particularly in the South, showed diminished strength into the 1990s.<sup>106</sup>

The ideological heterogeneity within the Democratic and Republican parties before the 1990s was due to myriad factors, including federalism (and the regional differences it spawned and permitted), history, and the broader consensus of views within American politics after World War II, which allowed for more moderates in each party.<sup>107</sup> Of most significance, however, was the fact that the United States, by electing the President and Vice President separately from members of Congress, never had a strict system of party discipline the way parliamentary systems do. Hence, it was possible for a “conservative” Democratic Congressman or senator from the South to distance himself ideologically from a more liberal Democratic president or presidential candidate.<sup>108</sup> Likewise, a “liberal” Republican in the North or Midwest could do the same vis-à-vis his own party’s standard-bearer. Intuitively, the same phenomenon should have been possible *within* states, with state legislators and other local officials able to distance themselves from presidents and even governors of their party.

Since the 1990s, however, ideological uniformity increased significantly within the two major political parties in the United States. Conservative Southern Democrat politicians largely disappeared during the 1990s, whether because they

103. See THOMAS K. OGORZALEK, *CITIES ON THE HILL: HOW URBAN INSTITUTIONS TRANSFORMED NATIONAL POLITICS* 209 (2018) (noting “intermittent” wins by Republicans in urban Congressional districts into the 1960s).

104. *Id.*

105. See MICHAEL TODD LANDIS, *NORTHERN MEN WITH SOUTHERN LOYALTIES: THE DEMOCRATIC PARTY AND THE SECTIONAL CRISIS* 3 (2014) (stating that before the Civil War, the Democratic Party was “ruled by a cadre” of Southern “bosses”); see also C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH, 1877-1913*, at 211 (1964). In some states, the term “Bourbon Democrats” was used for this contingent. FRANK, *supra* note 99, at 79-80. For more on post-Civil War “Redemption” and the Democrats’ role in it, see HEATHER COX RICHARDSON, *THE DEATH OF RECONSTRUCTION* (2001), and MICHAEL PERMAN, *THE ROAD TO REDEMPTION* (1985).

106. OGORZALEK, *supra* note 103, at 209 (discussing the “New Deal . . . city-based coalition of labor, newly mobilized ethnic whites, and eventually African Americans”).

107. See RODDEN, *supra* note 13, at 189-90 (discussing “partisan fluidity” from the 1960s to 1980s); see also *id.* at 46 (“The flexibility of party labels in a decentralized presidential system allowed the Democrats to continue as a completely different type of party outside the manufacturing core.”).

108. See RODDEN, *supra* note 13, at 189-90.

defected to the Republican party or lost re-election.<sup>109</sup> Liberal Republicans from Northeastern states have similarly largely faded as a political force by similar means.<sup>110</sup> Results of Congressional elections now generally mirror much more closely the results of presidential elections within those districts, a trend that political scientists refer to as the “nationalization” of politics.<sup>111</sup> Midterm election “swings,” of course, such as in 1994, 2010, and 2018, can make districts vary in one direction or the other *en masse* from the previous presidential election. But the long-term dynamic is clear: political parties in the United States are each now internally more ideologically uniform, and also more ideologically divided from each other, than they used to be.<sup>112</sup>

At the same time, the nation’s political parties and their supporters have become more *geographically* divided. The famous “red-and-blue” maps graphically demonstrating how each state votes in a presidential election were once much more fluid. States such as Kentucky, Louisiana, and West Virginia—now considered solid “red”—were swing states just twenty-five years ago.<sup>113</sup> Similarly, solidly “blue” Oregon, New Jersey, and even Vermont were up for legitimate contention just two or three decades ago.<sup>114</sup> Presidential election landslides indicating a broad, national consensus, like those won by Lyndon Johnson in 1964, Richard Nixon in 1972, or Ronald Reagan in 1984, appear to be a thing of the past; the nation’s political divisions are now simply too interwoven with geography.<sup>115</sup> This is due to the sharpening of each party’s brand and its increasing association with the values and economic priorities of specific parts of the nation: Democrats with culturally liberal, knowledge-based-economy spaces, such as large coastal metropolitan areas, and Republicans with culturally conservative, extraction-based communities, such as Appalachia, parts of the South, and much of the interior West.<sup>116</sup> With each party digging more deeply into its ideological and geopolitical trench, it has become more difficult for each to reach across

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109. HOPKINS, *supra* note 46, at 136-37.

110. *Id.* at 133.

111. *Id.*

112. *Id.* at 135. As Hopkins makes clear, the dynamic of *polarization* is different from *nationalization*, although they appear to be related recently. *Id.* But the implication of that distinction is that it is possible for parties to be less polarized within states than they are nationally. See Measuring American Legislatures, Updated Polarization Plot for 2015-16, <https://perma.cc/HZ4H-NB3E> (archived Jan. 28, 2022) (ranking states by polarization of their state legislatures).

113. Indeed, Democrat Bill Clinton won all three states twice, in 1992 and 1996. In 2016, Donald Trump won Kentucky by almost 30 percentage points, Louisiana by almost 20, and West Virginia by almost 40. See David Leip’s Atlas of U.S. Presidential Elections, <https://perma.cc/2L4K-CRC5> (archived Jan. 28, 2022).

114. In 2000, Al Gore beat George W. Bush by 0.14% in Oregon; Bill Clinton won New Jersey by just 2.4% in 1992; and George H.W. Bush won both Vermont and New Jersey in 1988. *Id.*

115. Barack Obama’s 2008 election was the largest popular vote win margin (7.26%) since George H.W. Bush’s in 1988 (7.72%). Nonetheless, Obama still lost 22 of 50 states, whereas George H.W. Bush lost only 10 (plus the District of Columbia). *Id.*

116. See RODDEN, *supra* note 13, at 9, 76-83.

issues and spaces to attract a coalition that can assemble a majority or plurality in a wide swath of states.

What political scientists refer to as “the left” has long been concentrated in urban areas. It is only relatively recently, however, that the left has become more closely identified with the Democratic party in the United States.<sup>117</sup> “Left politics” of the late 1800s and early 1900s primarily focused on economic redistribution and union organizing.<sup>118</sup> Economic themes and social welfare remained the dominant cleavages in national politics throughout the New Deal era and into the early 1960s. The prominence of civil rights, feminism, and other cultural issues like abortion in the 1960s and 1970s fundamentally transformed what “left” politics means in the United States.<sup>119</sup> The Democratic Party has been more supportive of social safety net programs, economic redistribution, and labor unions than the Republican Party fairly consistently since the 1930s. The emergence of cultural and civil rights issues since the 1960s, however, have provided additional or sufficient reasons for many urban—and increasingly, suburban—residents to vote for Democrats overwhelmingly.<sup>120</sup>

While it is difficult to separate the chicken from the egg, it appears that the strong association of Democrats with urban areas has outlived many of the original reasons for it. Indeed, while cities like Boston and San Francisco have almost no heavy manufacturing any more, they still vote strongly Democratic.<sup>121</sup> This can be attributed to the Democratic Party’s association with cosmopolitanism and socially liberal values; its support of educational, university, and scientific funding; as well as, more recently, a more open approach to immigration.<sup>122</sup> Since 2020 alone, the Democrats have only reinforced their connection to the non-economic preferences of urban voters by pursuing a much stricter approach to the Covid-19 pandemic, embracing longer school closures, mask mandates, vaccine proof entry requirements for public accommodations, and vaccine mandates for various kinds of workers.<sup>123</sup> Democrats have also much more eagerly

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117. *Id.* at 71-91 (explaining how Democrats became the party associated with urban interests).

118. *Id.* at 17 (discussing late 19th century workers’ parties).

119. *Id.* at 86-90.

120. *Id.* at 90 (“The Democrats . . . have become a heterogenous coalition of urban interests, many of which would be quite unrecognizable to . . . New Deal Democrats.”).

121. In 2020, for instance, San Francisco voted 85 to 13% for Biden over Trump, see David Leip, *David Leip’s Atlas of U.S. Presidential Elections*, <https://uselectionatlas.org/>, *supra* note 25 (click on California, click on City and County of San Francisco), and Boston voted 83 to 16% for Biden. William Smith, *Map: See How Your Town or City Voted in the 2020 Election*, WBUR (Nov. 3, 2020), <https://perma.cc/98FW-JFJG>.

122. RODDEN, *supra* note 13, at 90.

123. See, e.g., Paul Diller, *Taking a Jab at the Legal Issues for Vaccine Passports*, SLOG: STATE & LOC. GOV’T BLOG (Jan. 4, 2022), <https://perma.cc/EXH9-GJDY> (discussing the rapid proliferation of vaccine passport requirements in “big ‘blue’ cities” in the second half of 2021). Some commentators have questioned whether strict Covid containment policies popular in Democratic-leaning areas truly reflect leftist ideology. E.g., Jenin Younes, *What’s Gone Wrong with Left-Liberalism and Lockdowns?*, AIER (Sept. 3, 2020),

embraced heightened awareness of “racial justice” since George Floyd’s 2020 murder and the ensuing mass protests and unrest; Republicans, reflecting the views of their more rural and exurban base, have criticized notions like “defund the police” and the teaching of “critical race theory” in schools.<sup>124</sup>

Indeed, as evidenced by the Democrats’ strong embrace of Black Lives Matter in 2020, race is also a major factor in explaining the urban-rural ideological and partisan divide. In many states with notable communities of color—primarily African-American—concentrated in urban areas, the perception of the Democratic party as stronger on civil rights since the 1960s, and particularly since the 1980s, has cemented the Democrats’ urban advantage. Particularly in many Midwestern and Northeastern states, Democrats win overwhelmingly among African-Americans, who overwhelmingly live in those states’ urban areas, often in very populous central cities, but increasingly in inner-ring suburbs as well.<sup>125</sup> In the South and the Southwest, Democrats do well among urban minorities, but maintain their strength among minority communities in rural areas as well, such as African-Americans in Deep South states and Hispanic and Native American voters in states like New Mexico, Arizona, Texas, and Colorado.<sup>126</sup>

Interestingly, although race explains some of Democrats’ outsized success in urban areas, their strength in urban areas now often transcends race and class in votes for top-tier partisan candidates. Joe Biden, for instance, won the lowest-income precincts of the Bronx, which are also largely African-American and Latino, by overwhelming percentages, just as he won the higher-income, mostly white parts of Manhattan overwhelmingly.<sup>127</sup> Precincts across Boston and San

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<https://perma.cc/6SLJ-F88A>. Covid mitigation policies like workplace vaccine mandates have also raised some tensions with the Democrats’ traditional union base. Nicholas Riccardi, *Unions Split on Vaccine Mandates*, ASSOCIATED PRESS (Sept. 11, 2021), <https://perma.cc/TAE3-V9AZ>.

124. E.g., Giulia Heyward, *Democrats Fear GOP Targeting Racial Justice Protests*, POLITICO (Apr. 22, 2021), <https://perma.cc/9K4H-RLSE>.

125. David Harshbarger & Andre M. Perry, *The Rise of Black-majority Cities*, BROOKINGS (Feb. 26, 2019), <https://perma.cc/BYH8-JDKL> (archived Jan. 28, 2022) (“[A]n increasing number of black-majority cities [are] in inner-ring suburbs.”); Sonya Rastogi et al., U.S. Census, 2010 Census Briefs, *The Black Population: 2010* (Sept. 2011), at 10-14, <https://perma.cc/K6GU-JNMP>.

126. Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q. J. POL. SCI. 239, 242 (2013) (observing that “the relationship between population density and voting behavior . . . is less pronounced or absent in less industrialized Southern states with large rural African American populations and in relatively sparse Western states”); Rebekah Herrick & Jeanette Mendez, *American Indian Party Identification: Why American Indians Tend to Be Democrats*, 8 POL., GROUPS & IDENTITIES 275 (2017); Dante J. Scala et al., *Red Rural, Blue Rural? Presidential Voting Patterns in a Changing Rural America*, 48 POL. GEOGRAPHY 108, 115 (2015) (“The percentage of African Americans and Hispanics in a rural county also has a significant influence on the percentage voting for Obama . . .”).

127. Compare Alice Park et al., *An Extremely Detailed Map of the 2020 Election*, N.Y. TIMES, <https://perma.cc/5FE3-VX7X> (click on New York City), with Linda Poon, *Mapping the Stark Rich-Poor Divide in Major U.S. Cities*, CITYLAB (Dec. 13, 2016), <https://perma.cc/3XD7-6DNV>. There are some differences between the two. Biden won about

Francisco voted for Biden by margins as large as those in Cleveland, Buffalo, and Jackson, Miss.<sup>128</sup> The 2020 presidential election featured a moderate urban shift toward the Republican candidate, Donald Trump, as compared to 2016, along with a significant suburban swing more in favor of the Democrat.<sup>129</sup> It remains to be seen whether this subtle but noticeable shift indicates a broader trend or is due to the unique circumstances of 2020, such as the significant unrest after George Floyd's murder and into the summer of 2020 in some major American cities.<sup>130</sup>

In a multiparty system, there might be a more socially liberal, free-market-oriented party that appeals to wealthier urban and suburban voters (like the Liberal Democrats in the United Kingdom), in addition to a working-class, social democratic party (the traditional role of “Labor” parties in the United Kingdom, Australia, and elsewhere) that appeals to blue-collar voters. Indeed, a working-class, social democratic party that muted its stances on cultural issues might, at least theoretically, regain support from many of the whites who have defected from the Democratic Party in West Virginia and elsewhere.<sup>131</sup> But in the current two-party alignment in the United States, each party tends to cast its lot with its own geographic base, attempting to win elections in marginal areas like the middle- and outer-ring suburbs, and—in presidential elections—in a handful of closely contested swing states.

Because Democratic voters are highly concentrated in densely populated large urban areas, SMD's, even if drawn neutrally, often disadvantage Democrats in many states because of their voters' geographic distribution. When Democrats win their densely populated, urban districts by more overwhelming margins than Republicans win their rural and exurban districts, they in effect “waste” votes by winning certain seats by far more than necessary.<sup>132</sup> Political scientists

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70-75% on much of the upper East Side, and only as much as 60 to 65% along the east side of Central Park, both of which are predominantly white areas, compared to a more consistent 80 to 85% in South Bronx precincts. See *Neighborhood Profiles*, NYU FURMAN CENTER, , <https://perma.cc/MEM2-GCBQ> (archived Jan. 28, 2022) (showing that, as of 2019, the Upper West Side was 69% white, the Upper East Side was 73% white).

128. Park, *supra* note 127. Zooming into these cities reveals some differences. Biden won many precincts in San Francisco with more than 90% of the vote, most in Boston with more than 80%, and had more mixed support across precincts in Cleveland and Buffalo. *Id.*

129. Weiyi Cai & Ford Fessenden, *Immigrant Neighborhoods Shifted Red as the Country Chose Blue*, N.Y. TIMES (Dec. 20, 2020), <https://perma.cc/XQ2J-2UMS> (reviewing shifts in urban voting parties in several major metropolitan areas).

130. Michael Tracey, *Two Months Since the Riots, and Still No “National Conversation,”* MEDIUM.COM (July 26, 2020), <https://perma.cc/N9CG-ZGDG> (noting the “enormous geographic scope” of the riots of 2020 and that they were possibly “unprecedented in U.S. history”).

131. See Guy Molyneux, *Mapping the White Working Class*, AM. PROSPECT (Dec. 20, 2016), <https://perma.cc/UQ33-MCFM>.

132. RODDEN, *supra* note 13, at 181-88.



Jowei Chen and Jonathan Rodden call this wasting of votes “unintentional gerrymandering.”<sup>133</sup> To be sure, this dynamic is not evident in *all* states, but rather those with the more common political geography in which Democrats win by huge margins in large cities and inner-ring suburbs. In these states, Democrats generally perform poorly in rural areas and most small towns—but not as poorly as Republicans perform in big cities and densely populated ring suburbs. Hence, Democrats “waste” proportionally more votes in winning their seats in the legislature.

In states with less common political geography, like Arizona, where Democrats do not outperform Republicans markedly in cities and where there are strong pockets of rural Democratic support, unintentional gerrymandering is less likely to occur because Democrats waste fewer votes.<sup>134</sup> Hence, to the extent that one considers unintentional gerrymandering a problem, it is not a problem equally across states.<sup>135</sup> It is, however, a significant phenomenon in a plurality, if not a solid majority, of states.<sup>136</sup>

On the whole, SMDs (that are usually FPP) benefit Republicans in races for Congress due to the cumulative effects of unintentional gerrymandering.<sup>137</sup> Data over the last two decades show a steadily emerging partisan advantage for Republicans in U.S. House races; this advantage is not entirely attributable to intentional gerrymandering.<sup>138</sup> Hence, sometimes intentional partisan gerrymandering by Democrats merely counteracts the structural pro-Republican bias resulting from FPP SMDs, or at most gives Democrats a slight advantage.<sup>139</sup>

Some commentators attempt to explain unintentional gerrymandering as resulting from the increasing “self-sorting” of persons who share similar political, cultural, culinary, and aesthetic tastes into enclaves that think and vote the same way.<sup>140</sup> Liberals, feeling out of place in Texas, move to the Bay Area and vote

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133. Chen & Rodden, *supra* note 126.

134. See *supra* note 124 and accompanying text; RODDEN, *supra* note 13, at 114-15 (“Arizona . . . [is] quite different from most of the rest of the country in an important respect: even though Democrats cluster in the city center, the correlation between population density and Republican voting is actually positive [due to dense, Republican-leaning retirement communities] “relatively far from the center of Phoenix”).

135. RODDEN, *supra* note 13, at 182-85 (noting that Republicans’ deep structural advantage in state legislatures is less pronounced in “a handful of New England states” and in “very Republican states” like Tennessee, Oklahoma, and Utah, where Democrats enjoy a “silver lining of geographic concentration” by winning “a substantial number of urban seats in spite of their low statewide support”).

136. Chen & Rodden, *supra* note 126, at 262 (concluding that “most states” have a significant pro-Republican bias in their electoral geography).

137. *Id.* at 185 (discussing the “substantial advantage” Republicans enjoy in electing most states’ Congressional delegations).

138. See generally Jowei Chen & David Cottrell, *Evaluating Partisan Gains from Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House*, 44 ELECTORAL STUD. 329 (2016).

139. RODDEN, *supra* note 13, at 183, 185; Chen & Rodden, *supra* note 126, at 256-57.

140. See Alec McGillis, *Breakdown: The Democrats’ Bad Map*, PROPUBLICA (Oct. 22, 2016), <https://perma.cc/4BSQ-2GJ4>; see also BILL BISHOP, THE BIG SORT: WHY THE

for Democrats; conservatives, feeling isolated in Massachusetts, move to Idaho or Texas to live and vote among like-minded neighbors.<sup>141</sup> The narrative has even acquired a bit of a normative force, casting Democrats' decreased political power as a collective choice—a Faustian bargain for a better lifestyle in cosmopolitan urban areas at the cost of political power.<sup>142</sup>

This narrative, however, inaccurately conveys the evidence of in- and out-migration. If anything, the evidence shows Democrats and Republicans departing at equal rates from high-priced urban areas like San Francisco, New York City, Los Angeles, and Boston, and equally moving to Sun Belt states like Texas, Arizona, and Georgia for job opportunities and lower housing prices.<sup>143</sup> Indeed, when they arrive in these places, the former residents of big cities usually bring their politics with them. Hence, the dynamic has actually been a subtle opposite of the Big Sort: Democrats are moving away from places like New York City and making previously “red” states like Arizona and Georgia more purple.<sup>144</sup> Further, there is some evidence that geography influences political choice rather than vice versa. A former Republican who moves to a big city or urban area is likely to drift toward the Democratic party in his preferences for reasons of self-interest and cultural assimilation over time. This dynamic also appears to work the other way. Hence, to the extent that a “sort” has been occurring, it is one that is overwhelmingly nonpolitical, with any change in politics an unintentional by-product of people's moves.<sup>145</sup> At the time of this writing it is too early to say whether the recent migrations since the outbreak of Covid-19 in spring 2020 cohere with these observations about previous in-migration.<sup>146</sup>

### C. Previous Attempts to Remedy Political Gerrymandering

For decades, some states have attempted to draw Congressional and state legislative districts in a seemingly neutral, nonpartisan fashion. At least since Congress banned the use of MMDs for U.S. House seats in 1967 and required SMDs, most states have legislated that map-drawers use criteria like contiguity

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CLUSTERING OF LIKE-MINDED AMERICANS IS TEARING US APART (2004).

141. *Id.*

142. *See, e.g.,* Alec McGillis, *The Self-Segregation of Democrats*, PAC. STD. (June 24, 2017), <https://perma.cc/8V7L-C2TR> (explaining how higher-educated Americans have been more likely to migrate, and that Democrats do better among higher-educated voters).

143. RODDEN, *supra* note 13, at 271.

144. Indeed, it is perhaps for this reason that Democrat Joe Biden won Arizona and Georgia in 2020, each for the first time for a Democrat since 1996 and 1992, respectively. *See* Elena Mejia & Geoffrey Skelley, *How the 2020 Election Changed the Electoral Map*, FIFTYTHREE (Dec. 8, 2020), <https://perma.cc/69E9-9RYF> (archived Jan. 28, 2022).

145. *See also* Greg Martin & Steven Webster, *The Real Culprit Behind Geographic Polarization*, ATLANTIC (Nov. 26, 2018), <https://perma.cc/AW2G-NNM9> (analyzing data and concluding that “Americans move for a complex and varied set of reasons, most of which have nothing to do with political or politically adjacent tastes”).

146. *See* Arian Campos-Flores et al., *The Pandemic Changed Where Americans Lived*, WALL ST. J., Apr. 27, 2021, <https://perma.cc/BPU2-EJZ2>.

and compactness in drawing districts.<sup>147</sup> Likewise, these states also require, at least on paper, respect for municipal and county boundaries as well as natural barriers like rivers and mountain ranges.<sup>148</sup> But, when the power to draw districts rests with the legislature, these “constraints” often prove remarkably flexible, particularly when judicial review of the legislature’s maps is not guaranteed, or where any such review is highly deferential.<sup>149</sup>

Recognizing that vesting district-drawing power in the legislature in the first instance is a potential invitation to gerrymandering, a handful of states pioneered nonpolitical—or at least less political—methods of districting. Before the 2000s, Iowa and New Jersey were often considered the standard-bearers in this regard. In 1980, the Iowa legislature passed a law giving a nonpartisan agency the primary power to draw districts.<sup>150</sup> Iowa law guides the agency to produce districts that are equipopulous, respect political subdivision boundaries, and are contiguous and compact.<sup>151</sup> The law also prohibits considerations like favoring any political party or incumbent, any other person or group, or for the augmentation or dilution of the voting strength of a language or racial minority group.<sup>152</sup> Although the legislature retains ultimate control over districting, the first two plans produced by the agency are subject to an up-or-down vote.<sup>153</sup> Iowa also “nests” state legislative districts within Congressional districts to the extent feasible.<sup>154</sup>

For the districting cycles following the 1990, 2000, and 2010 censuses, the Iowa legislature accepted the agency’s proposed neutral map—on the first try

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147. See *Districting Principles for 2020 and Beyond*, NCSL, <https://perma.cc/ZC4X-TG35> (archived Jan. 28, 2022).

148. See *id.*; see also Yungsieng P. Kim & Jowei Chen, *Gerrymandered by Definition: The Distortion of “Traditional” Districting Principles and a Proposal for an Empirical Re-definition*, WISC. L. REV. (forthcoming) (manuscript at 50-62) (on file with author) (reviewing various districting criteria under state law, and separating into categories of “traditional” and “nontraditional”).

149. See, e.g., Micah Altman, *Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders*, 17 POL. GEO. 989, 1004-06 (1998) (explaining how the criterion of compactness can be manipulated and how it can disadvantage certain parties or communities); see also Aaron Kaufman et al., *How to Measure District Compactness If You Only Know It When You See It*, 65 AM. J. POL. SCI. 533, 534 (2021) (“[T]he lack of precision in the law [regarding “compactness”] has given redistrictors . . . wide latitude . . .”).

150. 1980 Iowa Acts ch. 1021 (codified at IOWA CODE ch. 42 (2020)) (empowering the Legislative Service Bureau, a nonpartisan bill drafting agency of the General Assembly, the primary responsibility for drawing districts). An appointed five-person Temporary Redistricting Advisory Commission assists the Bureau. IOWA CODE § 42.5(1) (2020).

151. IOWA CODE § 42.4(1) (2020); IOWA CODE § 42.4(2) (2020); IOWA CODE § 42.4(4) (2020); see also IOWA CONST. art. III, § 34 (“Each district . . . shall be of compact and contiguous territory.”).

152. IOWA CODE § 42.4(5). Thus far state law’s prohibition on favoring a racial or ethnic group has not created apparent problems under the Voting Rights Act because of the state’s demographics, which do not present “a minority group . . . sufficiently large to constitute a majority in a single-member district.” IOWA LEG. SERVS. AGENCY, LEGIS. GUIDE TO REDISTRICTING IN IOWA 9 (2007), <https://perma.cc/9QY8-TWB5>.

153. IOWA CODE § 42.3(1)(a) (2020).

154. IOWA CODE § 42.4(6) (2020).

twice and on the second once.<sup>155</sup> Due to its reliance on nonpartisan agency staff and the legislature's demonstrated respect (thus far) for agency recommendations, the Iowa system has long been touted as the gold standard for politically neutral redistricting.<sup>156</sup> With respect to performance rather than perception, it appears that Iowa's system has reduced partisan bias reasonably well, although the evidence varies based on which metric is used.<sup>157</sup> Iowa's underlying political geography appears to have changed in recent years, complicating the analysis further. Whereas Democrats were strong in rural areas just two decades ago, the state has steadily moved toward the more typical urban-rural political divide in recent elections.<sup>158</sup>

In addition to Iowa, New Jersey was an early mover in attempting to decrease the influence of politics on districting, with the state amending its constitution in 1966 to establish a bipartisan Apportionment Commission with complete power over state legislative districting.<sup>159</sup> In 1995, voters approved an amendment that created a separate redistricting commission for Congressional seats as well.<sup>160</sup> While initially lauded as an improvement, the system has strained over time, with much criticism in particular focusing on the commission used for redrawing Congressional seats.<sup>161</sup> For state legislative seats, each of the two major parties appoints five members to the Apportionment Commission.<sup>162</sup> Because of this partisan balance, deadlock is routine; under the system, deadlock results in a court-appointed "neutral" member with "unchecked" discretion over

155. Bob Rush, *Iowa's Approach to Redistricting Has Been a Model for Other States*, DES MOINES REG. (Jul. 26, 2019), <https://perma.cc/XL4Q-GW6P>.

156. Robin E. Best et al., *Considering the Prospects for Establishing a Packing Gerrymandering Standard*, 17 ELEC. L.J. 1, 10, 15 (2018).

157. *Id.* at 18 (finding either "no indication of a gerrymander" or "a degree of ambiguity" depending on which metric of partisan gerrymandering is used to measure the drawing of Iowa's state senate districts).

158. See Art Cullen, *Democrats Got a Rude Awakening in Rural America. Just Look at Iowa*, GUARDIAN (Nov. 12, 2020), <https://perma.cc/MJ2D-XKER>; Alan Greenblatt, *The Democrats' Geography Problem*, GOVERNING (Jan. 2017), <https://perma.cc/LB5U-CCY8> (noting that just twenty years ago, half the Democrats in the Iowa State Senate were from rural areas; as of 2016, none).

159. N.J. CONST. art. IV, § 3; see also Donald Scarinci, *Redistricting Leads to Dramatic Shift in New Jersey Congressional Delegation: How We Got Here (Part III)*, OBSERVER (June 28, 2012), <https://perma.cc/JV5T-Z2XB>. The creation of this commission flowed from a constitutional convention that was called in New Jersey in response to *Reynolds v. Sims*, 377 U.S. 533 (1964). See Eagleton Inst. of Pol., prepared by Benjamin Brinkner, *Reading Between the Lines: Congressional and State Legislative Redistricting their Reform in Iowa, Arizona and California and Ideas for Change in New Jersey* (2010), <https://perma.cc/5RQX-QRPP>, at 34-35.

160. See N.J. CONST. art. II, § 2 (creating the New Jersey Redistricting Commission); see also Scarinci, *supra* note 159.

161. David Scarinci, *You Can't Take Politics Out of Redistricting—Especially Not in New Jersey*, OBSERVER (Nov. 27, 2018), <https://perma.cc/JY63-V2ZS> (noting that "the Commission always fails to agree" and "most of [its] work and all of the political maneuvering is done in secret, behind closed doors").

162. N.J. CONST. art. IV, § 3.

the new map.<sup>163</sup> Any map, however, is supposed to abide by contiguity, compactness, and respect-for-municipal-boundary requirements set by state law.<sup>164</sup> Some empirical analysis shows that the system used for Congressional seats has produced some bias at times when the tiebreaking vote has a partisan lean,<sup>165</sup> and there is no evidence measuring how well the system has performed at constraining partisan advantage within the state legislature.<sup>166</sup> Reformers have called for revamping New Jersey's system for a variety of reasons, including improving transparency, and increasing the diversity of decisionmakers.<sup>167</sup>

While Iowa and New Jersey were the two most well-known states to reform districting, others took different steps to neutralize political influence on Congressional, or state legislative districting, or both, with varying degrees of success from the 1950s through 1990s.<sup>168</sup> These plans were generally more tentative than what would come later and varied in the degree to which they allowed the legislature to depart from what a commission recommended.

Arizona voters passed a constitutional initiative in 2000 that established an independent redistricting commission (IRC) for Congressional and state legislative seats, marking a big shift in districting reform.<sup>169</sup> This commission is designed to achieve partisan balance, with no more than two members from each

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163. N.J. CONST. art. IV, § 3, cl. 2 (“If the Apportionment Commission fails [to agree on new maps and] determines that it will be unable so to do, it shall so certify to the Chief Justice of the Supreme Court of New Jersey and he shall appoint an eleventh member of the Commission.”); LEAGUE OF WOMEN VOTERS OF NEW JERSEY, REDISTRICTING REFORM FOR A FAIRER NEW JERSEY 6 (2019), <https://perma.cc/T6T8-PF6V>.

164. *Id.*

165. *E.g.*, Jowei Chen & David Cottrell, *Evaluating Partisan Gains from Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House*, 44 ELEC. STUD. 329, 336, 336 n.6 (2016) (noting pro-Republican bias of New Jersey's post-2010 redistricting plan and that John Farmer, Republican Attorney General, cast the tiebreaking vote on the commission); *see also* Robin E. Best et al., *Do Redistricting Commissions Avoid Partisan Gerrymanders?* (2019) (unpublished manuscript at 11) (on file with author) (noting anti-Democratic bias of New Jersey's post-2010 Congressional redistricting plan).

166. Recent comprehensive analyses of state legislative gerrymandering have omitted New Jersey for different reasons, including its use of multi-member Assembly districts and its off-year elections. *See, e.g.*, Expert Report of Professor Hugh Jackman at 20, *Gill v. Whitford*, 138 S.Ct. 1916 (2018) (noting that he excludes New Jersey, among other states, from his analysis of the efficiency gap in state legislatures over the four previous decades); *Partisan Advantage in the 2016 and 2018 Elections*, PROPUBLICA (Apr. 2019), <https://perma.cc/LFK8-CCX8> (noting that New Jersey is excluded from two most recent comprehensive state legislative gerrymandering analyses performed by the Associated Press).

167. *See* LEAGUE OF WOMEN VOTERS OF NEW JERSEY, *supra* note 163.

168. *See Creation of Redistricting Commissions*, NCSL (Apr. 6, 2018), <https://perma.cc/4TCM-Z883> (citing Alaska, Arkansas, Colorado, Hawaii, Idaho, Missouri, Montana, Pennsylvania, and Washington as establishing some form of a state legislative redistricting committee between 1956 and 2000).

169. *See* ARIZ. CONST. art. IV, § 1; *see also* *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (“In 2000, Arizona voters adopted an initiative, Proposition 106, aimed at ‘ending the practice of gerrymandering and improving voter and candidate participation in elections.’”) (citation omitted).

major political party and an additional, fifth member appointed by the partisan members to serve as chair of the IRC.<sup>170</sup> Unlike other commissions, the amendment establishing the Arizona IRC was unique in mandating that districts not just be compact and contiguous, but also “competitive.”<sup>171</sup> Although it has had a tumultuous existence already, including having its authority to draw Congressional districts challenged and upheld by a one-vote margin at the Supreme Court,<sup>172</sup> the IRC has succeeded thus far at ensuring partisan fairness in drawing districts.<sup>173</sup> It may be helped in this regard by Arizona’s favorable political geography, which is not nearly as divided on rural and urban lines as most other states’.<sup>174</sup>

The success of Arizona’s initiative transferring redistricting authority to an independent commission emboldened reformers in other states. Among the most prominent of reformers, Governor Arnold Schwarzenegger of California in 2005 attempted to “terminate” gerrymandering through a voter initiative that would have placed districting in the hands of retired judges.<sup>175</sup> This proposal was handily defeated, but Schwarzenegger and other reformers persisted and succeeded in 2008 in getting the voters to approve a ballot measure that transferred control of state legislative redistricting from the legislature to an independent commission.<sup>176</sup> Two years later, the voters approved the addition of Congressional districting to the commission’s charge.<sup>177</sup>

The California Citizens Redistricting Commission, as it is known, consists of fourteen citizens selected from thousands of applicants through a complex process of screening, random selection, and then additional picks by the originally selected members.<sup>178</sup> The process is designed to result in commission membership that is balanced between the two major parties and also represents those

170. ARIZ. CONST. art. IV, § 1(3) (“No more than two [of the five] members of the independent redistricting commission shall be members of the same political party.”).

171. ARIZ. CONST. § 1(14)(f) (“To the extent practicable, competitive districts should be favored where to do so would cause no significant detriment to the other goals.”).

172. *Ariz. State Legis.*, 135 S. Ct. at 2652.

173. COLLEEN MATHIS ET AL., *THE ARIZONA INDEPENDENT REDISTRICTING COMMISSION: ONE STATE’S MODEL FOR GERRYMANDERING REFORM 13-14* (Harv. Kennedy School: ASH Ctr. for Democratic Governance and Innovation, Sept. 2019) at 13-14, <https://perma.cc/M46S-MK22> (archived Feb. 1, 2022) (“[T]he evidence from [2014 and 2016] suggests that the most recent redistricting plan has led to a fair translation of votes into seats for both parties.”).

174. *See supra* note 14.

175. *See California Proposition 77, Rules Governing Legislative Redistricting*, BALLOTPEDIA, <https://perma.cc/WPS2-5VN3> (archived Jan. 28, 2022).

176. *See California Proposition 11, Creation of the California Citizens Redistricting Commission (2008)*, BALLOTPEDIA, <https://perma.cc/J7NT-WTCK> (archived Jan. 28, 2022) (codified as amended at CAL. CONST. art. XXI).

177. *See California Proposition 20, Congressional Redistricting (2010)*, BALLOTPEDIA, <https://perma.cc/35BC-XK9K> (archived Jan. 28, 2022) (codified at CAL. CONST. art. XXI).

178. CAL. CONST. art. XXI, § 2(c)(1) (“The selection process is designed to produce a commission that is independent from legislative influence and reasonably representative of this State’s diversity.”);

not affiliated with the two major parties.<sup>179</sup> In contrast to Arizona’s commission, which includes political competitiveness in its charge, California’s commission is designed to put a greater emphasis on keeping communities and geographic areas whole.<sup>180</sup> Because California uses a “jungle primary” in which the top two candidates from that primary—regardless of party—compete in the general election, it is far less necessary for districts to be drawn with a partisan balance in order to achieve a competitive final race; the runoff may be between two Democrats or two Republicans.<sup>181</sup>

California and Arizona may have been the most prominent reformers of the “aughts,” but several other states followed suit and adopted various methods of districting reform, using neutral or bipartisan commissions. Recent movers on this front include Colorado, Michigan, Ohio, and Utah, where voters passed initiatives requiring more neutral methods of districting, such as the use of an independent commission or a nonpartisan demographer.<sup>182</sup> In addition, Florida voters passed two initiatives in 2010 known as the “Fair District Amendments” that made it illegal for the legislature to draw districts for partisan purposes.<sup>183</sup> Unlike the commission model, Florida’s system simply left it up to private litigants to sue to prove illegal partisan influence in a districting plan. Groups like the League of Women Voters have done exactly that, successfully, in the last decade, leading to maps of both Congressional and state senatorial seats redrawn by the Florida judiciary.<sup>184</sup>

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179. CAL. CONST. art. XXI, § 2(c)(2) (“The commission shall consist of 14 members, as follows: five who are registered with the largest political party in California based on registration, five who are registered with the second largest political party in California based on registration, and four who are not registered with either of the two largest political parties in California based on registration.”); *see also* CAL. GOV. CODE §§ 60824-25 (2020) (describing the “random draw” process); *id.* §§ 60840-63 (describing the application process).

180. Kim Soffen, *Independently Drawn Districts Have Proved to be More Competitive*, N.Y. TIMES (July 1, 2015) <https://perma.cc/XR9F-DRLC> (discussing California’s “vastly different approach”: “as opposed to Arizona, where the commission was supposed to use [partisan] data to promote competition,” the California commission “was legally forbidden from considering partisan data when forming districts”); *see also* CAL. CONST. art. XXI, § 2(d)(4) (“The geographic integrity of any city, county, city and county, local neighborhood, or local community of interest shall be respected in a manner that minimizes their division to the extent possible without violating the requirements of any of the preceding subdivisions.”).

181. *Cf.* Emily Schnurr, *Competition and the Top Two Primary in Washington State* (May 2019) (unpublished dissertation, Northern Arizona University), <https://perma.cc/65FR-6BKS> (concluding that top-two primaries are more competitive than other kinds).

182. *Number of States Using Redistricting Commissions Grows*, ASSOCIATED PRESS (Mar. 21, 2019) <https://perma.cc/77Y3-KGU6> (archived Jan. 28, 2022). Missouri voters also passed a redistricting reform measure in 2018, but effectively rescinded it through another initiative in 2020. *See* David A. Leib, *Missouri Voters Dump Never-used Districting Reforms*, ASSOCIATED PRESS (Nov. 5, 2020) <https://perma.cc/CXS2-HEHS>.

183. FLA. CONST. art. III, § 21, *amended by* FLA. CONST. amend. V.

184. *See, e.g., League of Women Voters*, 172 So.3d at 372 (ordering the redrawing of several Congressional districts due to partisan influence that violated the Fair Districts Amendment); *In Re* Senate Joint Resolution of Legis. Apportionment 1176, 83 So. 3d 597, 684-85

While much of this state constitutional and statutory change occurred, a variety of private litigants and organizations attacked intentional partisan gerrymandering in the federal courts as a violation of either the First Amendment's Freedom of Association Clause or the Fourteenth Amendment's Equal Protection Clause. A series of well-known cases reached the United States Supreme Court in consecutive years: 2018 and 2019. The first, *Gill v. Whitford*, challenged the districts in Wisconsin's state assembly.<sup>185</sup> A post-2010 Republican trifecta of the state assembly, senate, and governor had approved the maps, and there was clear indicia of partisan intent.<sup>186</sup> Moreover, the *Gill* plaintiffs presented strong evidence that the alleged pro-Republican gerrymander was extremely *effective*.<sup>187</sup> Focusing on the 2012 and 2014 elections (the litigation started in 2015), the plaintiffs made the argument that because of the plan's design, Republicans won significantly more seats in the assembly than they would have under a more neutral plan. Seeking to provide the Supreme Court with a "neutral," nonpartisan way of determining whether partisan gerrymandering had gone too far, the plaintiffs proposed the efficiency gap as the appropriate metric, and 7% as a suggested threshold, at least when present in combination with other indicia of partisan intent.<sup>188</sup>

Many observers pinned their hopes on the *Gill* litigation as the vehicle for establishing a constitutional rule prohibiting at least extreme partisan gerrymandering. The litigation initially succeeded, with a three-judge trial court, by a vote of two to one, striking down Wisconsin's plan in a manner largely consistent with the plaintiffs' theory.<sup>189</sup> On certiorari review in 2018, the Supreme Court punted, however, dismissing the plaintiffs' claim for lack of standing.<sup>190</sup>

In the wake of *Gill*'s near-miss, two other cases challenging Congressional districts worked their way up to the Supreme Court in 2019 for consolidated consideration: a challenge to Maryland's alleged pro-Democratic gerrymander, and a challenge to North Carolina's alleging a Republican bias.<sup>191</sup> By this point, Justice Anthony Kennedy, long seen as the crucial swing vote on this issue as on so

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(Fla. 2012) (ordering the redrawing of state senate districts due to partisan influence that violated the Fair Districts Amendment).

185. 138 S. Ct. 1916 (2018).

186. *Whitford v. Gill*, 218 F. Supp. 3d 837, 846-53 (W.D. Wis. 2016), rev'd sub nom. *Gill v. Whitford*, 138 S. Ct. 1916 (2017) (discussing the passage of Act 43—Wisconsin's 2011 redistricting legislation); *id.* at 890 ("The evidence at trial establishes that one purpose of Act 43 was to secure the Republican Party's control of the state legislature for the decennial period.").

187. *Id.* at 898-901 (reviewing evidence establishing that "the drafters [of Act 43] got what they intended to get": "even when Republicans are an electoral minority, their legislative power remains secure").

188. *See, e.g., id.* at 884.

189. *Whitford*, 218 F. Supp. 3d at 837.

190. *Gill*, 138 S. Ct. at 1916.

191. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). *Rucho* was the caption of the North Carolina case; the case from Maryland was *Lamone v. Benisek*. *Id.*



many others, had retired and been replaced by Judge Brett Kavanaugh.<sup>192</sup> The Court, in *Rucho v. Common Cause*, by a vote of five to four, rejected political gerrymandering cases as nonjusticiable.<sup>193</sup> For the foreseeable future, therefore, means other than federal constitutional litigation offer the only possibility for reducing or eliminating partisan gerrymandering.

With federal litigation largely foreclosed, one other method of litigation remains available in some states to combat gerrymandering: suing under the state constitution. Unlike the federal Constitution, which is notoriously ambiguous about a “right to vote,”<sup>194</sup> state constitutions are quite explicit in recognizing such a right, as well as in bolstering it through other provisions that govern “free” and “fair” elections.<sup>195</sup> In a handful of states, litigants have successfully relied upon these provisions to invalidate districting plans that were unduly politically gerrymandered. In Pennsylvania, the state supreme court struck down the state’s Congressional maps on the grounds that they violated the state constitution’s Free and Equal Elections clause.<sup>196</sup> In North Carolina, a three-judge panel in Wake County invalidated the state’s entire legislative maps in part because they violated the state constitution’s Free Elections Clause.<sup>197</sup> Florida courts have invalidated Congressional and state legislative districts for violating the state constitution’s more recent anti-political gerrymandering clause, discussed earlier.<sup>198</sup> The remedy in all of these cases, however, is simply that the district maps be

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192. See U.S. Senate Roll Call Vote, Oct. 6, 2018 (115th Cong., 2nd Sess.), <https://perma.cc/A7N3-9UDH> (archived Jan. 28, 2022) (confirming Brett M. Kavanaugh’s appointment as Associate Justice of the Supreme Court of the United States); see also Tessa Berenson, *Inside Brett Kavanaugh’s First Term on the Supreme Court*, TIME (June 28, 2019) <https://perma.cc/9KCL-RATD> (noting that Kavanaugh “replaced Justice Anthony Kennedy, who for decades occupied the swing seat on the bench”). It might be more accurately said that Justice Kennedy became the “swing justice” after Justice Sandra Day O’Connor retired in January 2006. Erwin Chemerinsky, *Will Supreme Court Retirement Bring ‘Kennedy Court’ to an End?*, 2017-18 SUP. CT. REV. 78 (reprinted from SACRAMENTO BEE) (“Since the retirement of Justice Sandra Day O’Connor in January 2006, Kennedy has been the ‘swing’ justice on a Court otherwise evenly divided . . .”).

193. *Rucho*, 139 S. Ct. at 2506-07 (“We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

194. Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1527 (2002) (reviewing ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000)) (“[T]here is no general constitutional right to vote . . .”).

195. Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014).

196. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 801-02 (Pa. 2018) (“[T]he 2011 [Congressional redistricting] Plan clearly, plainly, and palpably violates the Free and Equal Elections Clause of our Constitution.”) (citing PA. CONST. art. I, § 5).

197. See *Common Cause v. Lewis*, No. 18-CVS-014001, slip op. at 299 (N.C. Gen. Ct. Justice, Sup. Ct. Div. Sept. 3, 2019) (invoking Article I, § 10, of the state constitution, which states that “all elections shall be free,” and tracing its history to the 1689 English Bill of Rights).

198. See *supra* notes 183, 184.

redrawn without political motivation, which is unlikely to solve the problems baked into FPP SMD.

## II. THE FRA MODEL FOR MOVING AWAY FROM FPP SMD IN THE STATES

Because FPP SMDs raise serious democratic problems under our current ge-political landscape, the time is ripe for states to consider more drastic changes to the districting system. While FPP SMDs seem hardwired into the American political culture, they became widespread only relatively recently. MMD's were quite common until the 1960s, and survive in a small number of states today, largely in muted form.<sup>199</sup> Because MMD's had their heyday before crucial, pro-democratic changes like universal adoption of one-person, one-vote and the Voting Rights Act, they have a checkered legacy. Nonetheless, the MMD tradition demonstrates that FPP SMDs are not inevitable in the American system and, indeed, MMDs have been used on many occasions in other nations.<sup>200</sup>

Before moving on to how the Fair Representation Act embraces a mix of MMD's and SMD's, it is worth discussing briefly the option of pure proportional representation and why this article favors more modest change. PR gained steam on the European continent in the late 1800s and early 1900s, often at the behest of urban workers' parties who understood the innate disadvantage they suffered under a SMD system.<sup>201</sup> By the early twentieth century, most Continental European democracies had adopted some version of PR for their national governments.<sup>202</sup> In the United States, by contrast, PR never achieved much traction beyond the local level, where several cities adopted it, including New York City in 1936.<sup>203</sup> In such cities, PR increased ethnic and racial diversity on city councils and promoted a diverse array of political parties.<sup>204</sup> The political parties whose grip PR weakened, however, ultimately succeeded in killing it in almost every city. In their efforts to kill PR, they exploited fears of both communism and the increased political power of minority groups that PR offered.<sup>205</sup> PR survives in

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199. See *supra* notes 40-42 and accompanying text.

200. See THE HANDBOOK OF ELECTORAL SYSTEM CHOICE 74-76 (Josep M. Colomer ed., 2004) (listing numerous countries that have used some sort of MMDs); interestingly, many of the countries that once used MMDs have since transitioned to PR (*e.g.*, Brazil, Colombia, Greece, Japan). *Id.* at 74-75.

201. RODDEN, *supra* note 13, at 17-18.

202. *Id.*

203. Douglas J. Amy, *A Brief History of Proportional Representation in the United States*, FAIRVOTE, <https://perma.cc/4JMZ-K9Y8> (archived Jan. 28, 2022); see also George H. McCaffrey, *Municipal Affairs: Proportional Representation in New York City*, 33 AM. POL. SCI. REV. 841, 843-45 (1939) (discussing the history of proposals for PR in New York City). New York City repealed PR in 1947, in part due to anti-Communist fears of Communist candidates winning seats under the system. See Belle Zeller & Hugh A. Bone, *The Repeal of P.R. in New York City—Ten Years in Retrospect*, 42 AM. POL. SCI. REV. 1127, 1128-29 (1948).

204. Amy, *supra* note 203.

205. *Id.* ("In New York City, fear of communism proved the undoing of proportional representation."). See also Zeller & Bone *supra* note 203.

only one jurisdiction in the United States—Cambridge, Mass.—which uses it to elect both its city council and school board.<sup>206</sup>

Around the world, PR earns a mixed reputation. Political scientists credit PR with broadening political choice and participation, but also criticize it for leading to instability and amplifying the influence of minority parties.<sup>207</sup> Beyond fostering political instability, there is another, more fundamental critique of PR: It does not rely on geography as the basis for representation. Because voters vote for parties only, there is no guarantee that a representative will emerge from any particular space-based community.<sup>208</sup> To the extent that geography is important to representation, as it has long been considered in the United States, this is a potentially damning critique.<sup>209</sup> To assuage this concern, in part, some countries like Germany and New Zealand, as noted earlier, have adopted a system that seeks to have the best of both worlds: MMP.<sup>210</sup> Indeed, New Zealand moved from FPP SMD to MMP in the mid-1990s, and some observers have hailed the change as a reason for the nation’s apparent success in addressing recent crises like gun violence and COVID-19.<sup>211</sup>

For a handful of reasons, this paper proposes using the proposed FRA as a guide to revamping state democracy instead of MMP despite MMP’s emerging track record and global appeal. First, the FRA has already garnered some—albeit limited—momentum on Capitol Hill.<sup>212</sup> Second, FairVote, the group pushing for the FRA’s adoption, is already engaged in a voter education campaign regarding the benefits of its proposal. No such momentum or engagement currently exists for an MMP proposal at the federal or state levels. Finally, due to its “mixed” nature, MMP would divorce some elected leaders from any geographical subset of the nation or state they represent. If adopted at the state level, for instance,

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206. *Id.*

207. *See supra* Introduction; *see also* Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won’t it Go Away?*, 33 UCLA L. REV. 257, 272 (1985) (discussing this critique of PR).

208. *See supra* note 21 and accompanying text.

209. For more on the value of a geographical conception of representation and the history behind it, see James Thomas Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of “Representation”?*, 7 MICH. J. RACE & L. 357, 366-71 (2002); ROSEMARIE ZAGARRI, *THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776-1850*, 37-38 (1987) (“Each geographic unit was thought to be an organic, cohesive community, whose residents knew one another, held common values, and shared compatible economic interests.”).

210. *See supra* note 21 at 714 and accompanying text.

211. *E.g.*, Amy Gunia, *New Zealand’s Election Offers a Glimpse of a Calmer Democracy in the Time of Covid-19*, TIME (Oct. 12, 2020) <https://perma.cc/6QUX-QR6W> (quoting one political scientist as saying that New Zealand’s MMP system “tends to squeeze out populists” like U.S. President Donald Trump and Brazilian President Jair Bolsonaro). Others, however, have strongly criticized New Zealand’s extra-ordinarily restrictive approach to COVID, which included a long-term border closure and strict lockdowns of several weeks. *E.g.*, Tom Chodor, *Will New Zealand Ever Escape Zero Covid?*, UNHERD (Dec. 1, 2021), <https://perma.cc/T5PU-Y36B>.

212. *See infra* note 213.

half of a state's assembly members might be elected by a statewide vote, whereas the other half would be elected by district. While such a system offers certain benefits, it would constitute a starker break from the current SMD and limited MMD in operation around the nation than the kind of move toward MMD contemplated by the FRA. Hence, as less of a jolt to the system, an FRA-type proposal would perhaps be more politically palatable and feasible than an MMP model.

#### A. The (Federal) Fair Representation Act

Several Congressmen proposed the FRA at the federal level, most recently in 2019.<sup>213</sup> It would do the following:

- Require ranked-choice voting (RCV) for all House members;
- Establish districts that would elect three to five members (for states with six or more House members), with those districts drawn either by an independent commission or a panel of federal judges; and
- Elect all House members on an at-large basis in those states with fewer than six representatives.<sup>214</sup>

The bill aims to ensure compliance with the Voting Rights Act (VRA) by using a safe harbor whereby a state reverts to SMDs if the proposed MMD plan would diminish the ability of particular racial or ethnic communities to elect candidates of their choice as protected by the VRA.<sup>215</sup>

As indicated by a 2017 analysis by Fairvote, the nonprofit organization promoting the FRA, a state like California, with fifty-three congressional districts (at the time), would instead divide into eleven MMDs that elect between three and five members.<sup>216</sup> Fairvote expects this system to lead to a Congressional delegation that better reflects the overall political composition of California in terms of racial and ethnic composition as well as ideological diversity.<sup>217</sup> Fairvote sees Hispanic voters as having a chance to elect a candidate of their choice in each of the eleven proposed MMDs, and Asian voters would have the ability to elect a candidate of their choice in six of the eleven MMDs.<sup>218</sup> States with three to five

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213. The most recent sponsors in the 116th Congress were all Democrats: Don Beyer (Va.), Jamie Raskin (Md.), Ro Khanna (Cal.), Jim Cooper (Tenn.), Jim McGovern (Mass.), Scott Peters (Cal.), and Joe Neguse (Colo.). *Endorsers of the Fair Representation Act (June 2017)*, FAIRVOTE, <https://perma.cc/8LRL-XPSE> (archived Jan. 28, 2022).

214. *See* H.R. 4000, 116th Cong. (2019).

215. *Id.* § 205.

216. *See Fair Representation in California*, FAIRVOTE, (Sept. 2017) <https://perma.cc/YP4J-P8YM>. As a result of the 2020 census, California will have fifty-two representatives as of 2022. Press Release, U.S. Census Bureau, 2020 Census Apportionment Results Delivered to the President (Apr. 26, 2021), <https://perma.cc/G4AT-YU8P>.

217. FAIRVOTE, *supra* note 216.

218. *Id.* The FairVote site is silent on African-Americans in California, which obviously

Congressional districts, such as Connecticut, and Oklahoma, would elect all of their representatives at-large based on RCV.<sup>219</sup> Fairvote posits that the FRA would result in a more representative partisan split of each state's Congressional delegation.<sup>220</sup>

Certainly, one critique of the FRA is that it would eliminate sub-state geographical representation in states with six or fewer districts.<sup>221</sup> In a state like Connecticut, for instance, it would be possible for all five members of the state's delegation to reside in the far southwest corner of the state, near New York City. Such a delegation would hardly reflect the diversity of Connecticut's landscape.<sup>222</sup> If a state adopted a version of the FRA for its own legislature, however, this critique would not pertain if states keep the same current number of elected members of their houses. The fewest senators any state has is twenty, and the fewest members of any lower house is forty; the fifty-state mean for each is thirty-nine and one-hundred-eight, respectively.<sup>223</sup> Hence, working within these numbers, there is generally plenty of cushion to divide a state into sub-districts that are nonetheless larger geographically than current SMDs.

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begs more analysis, particularly given that California has three African-American representatives—Maxine Waters, Karen Bass, and Barbara Lee (all Democrats)—although none of their districts have a black majority or even plurality. See Wikipedia, *United States Congressional Delegation from California*, <https://perma.cc/98G9-DVEK> (archived Jan. 28, 2022.) (click through to 13th, 37th, and 43rd Congressional district demographic data).

219. See *The Fair Representation Act in Your State*, FAIRVOTE, <https://perma.cc/9AK5-RUAL> (archived Jan. 28, 2022).

220. *Id.* (noting that the FRA would “create more fair opportunities for women, people of color, urban Republicans, rural Democrats, and independents”).

221. Another related, conceptually distinct critique can be attributed to Joey Fishkin's argument that SMDs provide greater “virtual representation” by virtue of their increased homogeneity. Joseph Fishkin, *Taking Virtual Representation Seriously*, 59 WM. & MARY L. REV. 1681, 1721-22 (2018). Even Fishkin, however, recognizes that relatively small SMDs can provide the same benefit he identifies. *Id.* (“A[n] MMD] with a relatively small number of members per district could retain some of the virtual representation properties of a single-member district.”).

222. One way to address this concern would be to require that candidates for specific seats live within certain districts, but nonetheless have them be elected statewide, *Cf.* *Dusch v. Davis*, 387 U.S. 112 (1967) (election plan that used boroughs with unequal population as a basis for candidate residency, but not for voting or representation, did not violate one-person, one-vote under Fourteenth Amendment), but it would be difficult to mesh such a residency requirement with multi-member RCV.

223. Data regarding the size of state legislatures are available on the National Conference of State Legislatures's website. See *Number of Legislators and Length in Terms in Years*, NCSL, <https://perma.cc/RR5S-JDJR> (archived Jan. 28, 2022). Alaska has the fewest members in either the lower or upper houses, with forty and twenty, respectively, and Nevada is close behind at twenty-one and forty-two. Nebraska, as the only state with a unicameral legislature, has the fewest total legislators with forty-nine members of its sole chamber.

## B. Adapting the FRA to the state level

Adapting the FRA to the state level would necessitate a number of threshold choices, which might vary by state, as well as significant legal changes. The first threshold choice would be deciding the number of representatives for each MMD, which dovetails with the question of how many members a state should have in each legislative chamber. The federal FRA takes the 435 members of the U.S. House of Representatives as a given, perhaps to avoid tinkering too much with that longstanding number (even though many have recently argued that the number, which is set by statute rather than the Constitution, is too low).<sup>224</sup> In states where constitutional change would be required to enact a “mini-FRA,” the process could include reevaluating the number of members of each house, since state constitutions usually establish those numbers.

For continuity’s sake, however, states might maintain their current numbers of legislative seats. These numbers vary considerably across the country, resulting in widely disparate ratios between representatives and those represented. New Hampshire, with a relatively low population of approximately 1.38 million, has four-hundred members in its House of Delegates, or one member for every 3,291 residents.<sup>225</sup> California, with a population of approximately 39.54 million, by contrast, has eighty Assembly members, for a ratio of 465,674 residents per assemblyperson. The landscape is similarly varied for senators, with California again having the most populous districts (931,349) for its eighty senators, and North Dakota’s forty-seven senators representing the fewest number (14,310). Needless to say, given the wide variation among ratios, these numbers may be more a matter of happenstance and convenience than democratic design; nonetheless, this paper will treat them as a given for the purpose of what a state-level FRA might look like.

Another issue that needs to be considered is that in many states the lower house districts “nest” within state senate districts. Of the states that use SMD, ten use nesting, with seven nesting two house districts within one senate district and three nesting three.<sup>226</sup> Four other states encourage, but do not require, the nesting of districts.<sup>227</sup> For states that nest doubly, therefore, a senate MMD would need to be twice as populous as a state lower house MMD. For those that nest triply, thrice as populous. Hence, if it takes a minimum of three members in a

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224. See, e.g., BRIAN FREDERICK, CONGRESSIONAL REPRESENTATION & CONSTITUENTS: THE CASE FOR INCREASING THE U.S. HOUSE OF REPRESENTATIVES (2009).

225. Comparisons here are made using 2010 census data.

226. States nesting two lower house districts within a senate district are Alaska, Illinois, Iowa, Minnesota, Montana, Oregon, and South Dakota; States nesting three are Maryland, Ohio, and Wisconsin. See BRENNAN CTR., 50 STATE GUIDE TO REDISTRICTING (2019), <https://perma.cc/MF7Q-5ZES>.

227. These states are California, Hawaii, New York, and Wyoming. California and Wyoming have double the number of lower house districts as senate; Hawaii has double plus 1; New York’s multiple—2.38—is not an integer, so it would be impossible to nest all assembly districts co-terminously within senate districts consistent with one-person, one-vote. *Id.*

senate MMD to make a state-level FRA produce a more representative sample, that would require a lower-house MMD with nine representatives. In the handful of states that use triple-nesting (Maryland, Ohio, and Wisconsin), therefore, this might be problematic insofar as it could lead to house MMD's with too many representatives, and those states might need to reconsider nesting or the number of their members in each house as part of a switch to FRA.

In order to switch from SMDs to MMDs, many, but not all, states would need to change their constitutions. Table 2 below offers an estimated summary of which states would require constitutional (fourteen) as opposed to merely statutory change (twenty-eight) for this switch. (Table 2 also addresses other factors relevant to adopting a state-level FRA that will be referred to in Part III.) Eight states likely allow MMD's in one house under their constitution.

**Table 2.**

State	MMD's permitted under state const.	"Highest vote" or similar state const'l provision	Direct democracy (stat, const, or both) <sup>228</sup>	Significant indicia of intentional partisan gerrymandering between 2010-18 <sup>229</sup>
AL	Y			
AK	Y		Stat (I*)	
AZ	N		Both	
AR	Y		Both	
CA	N	X	Both	
CO	Y		Both	
CT	N	X		

228. "I" refers to indirect, where the proposal has to first go to the legislature; if they don't act within a certain time frame, it goes on the ballot. "I\*" refers to indirect where the initiative need not be submitted to the legislature for action; rather, it just has to wait for the legislative session to end before it goes on ballot. *Initiative and Referendum States*, NCSL, <https://perma.cc/CE29-S3J4> (archived Jan. 28, 2022).

229. For this metric, see the discussion in I.A, *supra*.

DE	N			
FL	N	X	Const	X
GA	Senate N, House Y			
HI	N			
ID	Y		Stat	
IL	N		Const <sup>230</sup>	
IN	Y			X
IA	Y			
KS	N			
KY	N			
LA	N			
ME	N	X	Stat (I)	
MD	N (except 3- member MMD's already exist in House)			
MA	N	X	Both (I)	
MI	N		Stat (I), Const	X
MN	N for senate, maybe for House			
MS	Y		Const (I)	
MO	N		Both	X
MT	N	X	Both	
NE	N		Both	
NV	Y to senate, N to House	X	Stat (I), Const	X (D)
NH	N to senate, Y to house	X		
NJ	N to senate, 2- member MMD's already in Assembly			
NM	N	X		
NY	N in Senate, Y in Assembly			X
NC	N			X (but less recently)

230. Illinois's constitutional initiative provision is limited in subject matter, and applies only to "structural and procedural subjects contained in Article IV." ILL. CONST. art. XIV, § 3. For the purposes of this paper, Illinois's constitution would allow a direct initiative to change the makeup and districting of the legislature because the current provisions governing those are in Article IV. Stephanie Rae Williams, *Voter Initiatives in Illinois: Where Are We After Chicago Bar Association v. State Board of Elections?*, 22 LOY. U. CHI. L.J. 1119, 1123 (1991) (noting that the 1970 Illinois constitution's initiative provision "permits proposals regarding the structure and procedure of the legislature").



ND	N; 2-member MMD's in House	X	Both	
OH	N		Stat Const (I),	X
OK	N		Both	
OR	N	X	Both	
PA	N			X
RI	N	X		X (D)
SC	N			
SD	N in Senate, 2-member permitted in House		Both	X
TN	N			
TX	N			
UT	Y		Stat	
VT	Y			
VA	Y			X
WA	Y		Stat	
WV	Y			
WI	N			X
WY	Y		Stat (I*)	

Another key component of the FRA is the use of ranked-choice voting (“RCV”), also sometimes referred to as Single Transferable Vote (“STV”) in the MMD context.<sup>231</sup> Under this system, voters would rank their preferred candidates for seats within an MMD. A voter would select her first choice as “1,” second choice as “2,” on down to at least “6.”<sup>232</sup> The votes are then tabulated in a series of rounds whereby voter preferences are sequentially considered until the number of candidates equal to the positions available reach the required thresholds for victory.<sup>233</sup> RCV systems vary slightly in how they distribute “excess” votes for a MMD candidate, the details of which are discussed in the margin, and any state adopting something like the FRA for its state legislature would have to choose one of these approaches.<sup>234</sup> Another issue that needs to be decided in any

231. Erin Carman & Vanessa Glusheski, *Ranked Choice Voting Now: A Shift Toward a Better Democracy*, 3 WILLAMETTE SOC. JUST. & EQUITY J. 36, 39 (2020). Instant runoff voting, or IRV, is usually used to describe RCV elections for one position, or in SMDs. *Id.*

232. See H.R. Res. 4000, 116th Cong. § 321(b)(2) (2019) (“If feasible, the ballot shall permit voters to rank every candidate in the election. If it is not feasible for the ballot to permit voters to rank every candidate, the State may limit the number of candidates who may be ranked on the ballot to not fewer than six.”).

233. See H.R. Res. 4000, 116th Cong. § 332(a)(4) (2019). For a primer on how RCV works in multi-seat elections, see *Ranked Choice Voting 101*, FAIRVOTE, <https://perma.cc/3TT3-NMXX> (archived Jan. 28, 2022).

234. The two main methods are the Weighted Inclusive Gregory Method, used in Minneapolis, see *STV PR in Practice*, PROPORTIONAL REPRESENTATION FOUND., <https://perma.cc/5Z5U-L9SS> (archived Jan. 28, 2022), and the Andrae or Cincinnati method,

particular application of RCV is how many candidates can be listed on the ballot, a decision which would likely tie into a state's pre-existing ballot access rules. A related issue is the extent to which a party's slate would be whittled down before the general election through a primary or other means. If there are three seats up for election in a MMD, presumably each major party would prefer not to nominate more than three candidates, and in some instances a party may prefer—strategically—to nominate only one or two, depending on its expected vote share.<sup>235</sup>

It is not necessary to resolve here some of the above issues regarding RCV implementation. Rather, the key point is that a multi-seat RCV system is likely to lead to representation that is *more* proportional than FPP SMD and provides greater diversity of viewpoints in the state legislative system. If a third of a district's electorate supports the views of Party A, and two-thirds prefer Party B, Party B can expect to win an SMD or all MMD seats in an election under a system in which votes are not ranked nor transferable. Under RCV, however, the third of the residents who prefer Party A would be able to peel off at least one of three MMD seats if almost all Party A voters rank one of the Party A candidates as their first choice, again assuming some coordination among Party A officials to minimize vote-splitting. The net result is that it is far more likely for Party A to get one of three representatives in a ranked-choice MMD than in a plurality, one-vote-per-seat system. As discussed above, this would lead to much more regional-party variation in state legislatures. In a state like Oregon, for instance, you might see Democrats from rural Eastern Oregon and Republicans from the urbanized Willamette Valley each win some elections. This could help legislators bridge partisan and geographical lines in forming consensus.

In addition to broadening the geographical realms represented by each party and broadening choices for voters, RCV offers numerous other advantages. By minimizing “wasted votes,” RCV reduces tactical voting and produces a more diverse array of winners than FPP SMD.<sup>236</sup> RCV promotes diversity of candidate viewpoints, backgrounds, and demographics.<sup>237</sup> Evidence shows that RCV discourages negative campaigning and reduces polarization since candidates compete for second choice votes from their opponents' supporters.<sup>238</sup> For all of these reasons and more, RCV could help improve not just the representativeness, but also the health of state democracy.<sup>239</sup>

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now used by Cambridge, Mass., to redistribute excess votes in its PR scheme. *See* MASS GEN. LAWS § 54A (2020); *see also* CLARENCE HOAG & GEORGE HALLETT, PROPORTIONAL REPRESENTATION 121 (1926).

235. *See, e.g.*, Jack Santucci, *Evidence of a Winning-Cohesion Tradeoff Under Multi-Winner Ranked-choice Voting*, 52 ELEC. STUD. 128, 130 (2019) (discussing tools of nomination control parties can use in other STV systems, such as Malta, Australia, and Ireland).

236. *See* FAIRVOTE, *supra* note 231.

237. *Id.*

238. *Id.*

239. *See also* Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CAL. L. REV. 1773, 1785 (2021) (“RCV reduces the dangers of vote-splitting and

### C. Potential Legal Obstacles to RCV

However attractive one considers RCV normatively, opponents in the United States question its legality, attacking it as a violation of both the federal and state constitutions. With respect to the former, although the U.S. Supreme Court has yet to weigh in, the federal and state courts that have considered federal constitutional challenges to RCV—most commonly Fourteenth Amendment “equal protection” and First Amendment association—uniformly rejected them.<sup>240</sup>

Challengers to RCV have achieved more success in claiming that they violate state constitutions. Specifically, many states have provisions in their constitutions requiring the winner of an election to win a “majority” or a “plurality” of votes.<sup>241</sup> This was the type of provision the Maine Supreme Court invoked when holding that the state’s RCV Act as applied to state legislators and the governor would be unconstitutional.<sup>242</sup>

In their recent article that thoroughly addresses the issue, Professors Richard Pildes and G. Michael Parsons examine the state constitutional provisions similar to Maine’s that might imperil RCV in other states and explain why these provisions should not be read so as to invalidate RCV.<sup>243</sup> Pildes and Parsons helpfully compile every jurisdiction’s relevant constitutional provision in their appendix.<sup>244</sup> The data show that while many states have “highest number” or “majority” vote requirements in their constitutions for governor and other statewide executive or judicial officials, far fewer—only twelve—have provisions that even arguably apply to state legislators; those states are listed in the margin below and also noted in Table 2.<sup>245</sup> In those twelve states, despite Pildes and Parsons’ strong argument that RCV is constitutional, reformers could err on the safe side by including an express affirmation of RCV as part of a constitutional amendment that adopted a FRA-type scheme.

### III. EVALUATING TEST STATES FOR FRA-LIKE REFORM

Table 2 includes four columns of factors that help determine the legal ground and normative justification for a state-level FRA. The ideal state to adopt the FRA under this framework would: 1) already allow MMD’s under its state constitution; 2) not have a provision in its constitution that potentially prohibits

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the impact of spoilers [and] increases the ability of voters to honestly convey their preferences . . .”).

240. *Id.* at 1778 n.9 (citing cases considering and rejecting these challenges).

241. *See id.* at Appx. (reviewing state constitutional provisions).

242. Opinion of the Justices, 162 A.3d 188 (Me. 2017) (advisory opinion) (interpreting ME. CONST. art. IV, pt. 1 § 5 & pt. 2 §4).

243. Pildes & Parsons, *supra* note 238.

244. *Id.* Appx.

245. States that have “majority,” “greatest number,” “highest number” or similar provisions in their state constitutions for state legislative elections are Cal., Conn., Fla., Me., Mass., Mont., Nev., N.H., N.M., N. Dak., Ore., and R.I. *See id.*

RCV; 3) allow for statutory voter initiatives (because they are usually easier to get on the ballot than constitutional); 4) and have a greater need for MMD reform due to a recent history of political gerrymandering and demonstrated unwillingness or inability to reform its districting process. As Table 2 indicates, however, no state checks all these boxes.

Since no state meets all four of the proposed criteria for the best circumstances under which to adopt a state-level FRA, I will instead consider four states that meet *some* of the criteria:

*Wisconsin.* Wisconsin, as illustrated by the litigation in *Gill v. Whitford*, and as further discussed above, is a poster child for gerrymandering.<sup>246</sup> It does not, however, have direct democracy, either for statutes or constitutional changes. Moreover, its constitution does not currently allow for MMDs for either the assembly or the senate. Thus, a constitutional amendment emanating from the legislature or through a constitutional convention that potentially revised the entire state constitution are the only ways to put something like the FRA into effect. The hurdles are high for pushing forward through either of these paths. The Republicans in firm control of the state legislature through gerrymandering have no partisan incentive to loosen their grip. Moreover, Wisconsin has not had a constitutional convention since joining the union in 1848.<sup>247</sup>

*Michigan.* Like Wisconsin, Michigan has experienced the effects of an apparent post-2010 pro-Republican gerrymander for the last decade. Despite Democrats occasionally winning the statewide cumulative vote for certain houses of the legislature, the Republicans have kept their grip on both the state house and senate. In November 2020, for instance, Democrats won 49.86% of the statewide cumulative vote for house seats, compared to 49.60% for Republicans, yet Republicans held on to a fifty-eight to fifty-two majority of seats.<sup>248</sup> In 2018, the results were even starker: Democrats won the statewide cumulative vote for house seats by 52.1 to 47.4%, but Republicans still won a fifty-eight to fifty-two seat advantage.<sup>249</sup>

Due to both intentional and unintentional gerrymandering—i.e., the concentration of Democratic voters in Detroit (and some of its suburbs), Ann Arbor, and

246. See *supra* note 85 and accompanying text.

247. *Wisconsin*, WIS. HIST. SOC'Y, <https://perma.cc/8N7K-V5KH> (archived Jan. 28, 2022). Interestingly, the procedure for calling a new constitutional convention is easier to pursue than that for amending the constitution. The former requires only “a majority of the senate and assembly” followed by majority voter approval, whereas the latter requires a majority vote of both houses of the legislature in two separate, consecutive sessions, followed by a majority vote of the electorate in the next election. Compare WIS. CONST. art. XII, § 1 (constitutional amendments), with *id.* § 2 (constitutional conventions). Indeed, section 2 is vague as to whether the legislative majority in favor of a convention need be of both houses combined, or a majority of each house. *Id.*

248. 2020 *Michigan House of Representatives Election*, WIKIPEDIA, <https://perma.cc/35ZB-CFA6>.

249. *Id.* Republicans' majority thus declined from 63-47 before the election, which they had won based on a mere .07% win in the statewide cumulative vote in 2016. See *id.* (showing Republicans won the statewide cumulative popular vote for house seats 49.20 to 49.13%).

Lansing—Michigan is a ripe state for legislative districting reform.<sup>250</sup> The zeal for reform, however, has likely already been tapped to some degree by a successful effort to reform districting enacted by voter initiative in 2018. This initiative—Proposal 2—amended the constitution to create an independent redistricting commission that will be in charge of redistricting after the 2020 census.<sup>251</sup> Presumably, legislators, voters, and reform-minded interest groups would like to give Proposal 2 a shot at working before considering more fundamental reforms, in no small part because they have had to fend off efforts to weaken or overturn it since its passage.<sup>252</sup> If implemented properly, Proposal 2 should substantially reduce or eliminate intentional partisan gerrymandering, thus revealing the extent to which unintentional gerrymandering continues to affect the Michigan landscape. Early reports indicate that Proposal 2 is achieving its intended goal of creating competitive districts.<sup>253</sup>

*Massachusetts.* Massachusetts is one of the most Democratic-leaning states in the union. In 2020, for instance Joe Biden defeated Donald Trump in the state by 65.6% to 32.1%, Biden’s second-highest margin among the fifty states.<sup>254</sup> The state house has a 129-30-1 Democratic majority, while the state senate’s is 37-3.<sup>255</sup> Despite these overwhelming majorities, the efficiency gap analysis does not demonstrate that the state house, at least, is highly gerrymandered. Indeed, an independent analysis of the state house races in 2016, which Democrats won 125-35, demonstrated a pro-Republican efficiency gap!<sup>256</sup> This finding is likely due in part to the relative evenness with which Democrats are distributed around Massachusetts. In other words, a high percentage of districts have a Democratic majority or plurality in the first place. As further indicia of a lack of intentional partisan gerrymandering, although Democrats controlled both houses of the state

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250. See Ted Roelofs, *Gerrymandering in Michigan Is Among the Nation’s Worst, New Test Claims*, BRIDGEMICHIGAN (Apr. 13, 2017), <https://perma.cc/U5CA-GHGE> (quoting a political consultant who attributes Republicans’ success in state legislative races to “Democrats [being] clustered in urban areas like Detroit, Lansing and Grand Rapids”).

251. See *Michigan Proposal 2, Independent Redistricting Commission Initiative (2018)*, BALLOTPEDIA, <https://perma.cc/GM2T-4WT5>, amending MICH. CONST. arts. IV, V, and VI.

252. See, e.g., *Daunt v. Benson*, 956 F.3d 396 (6th Cir. 2020) (denying preliminary injunction to plaintiffs who challenged the constitutionality of the commission’s creation and organization).

253. See Nick Corasaniti, *Ungerrymandered: Michigan’s Maps, Independently Drawn, Set Up Fair Fight*, N.Y. TIMES (Dec. 29, 2021), <https://perma.cc/R7BW-JW2R>.

254. See David Leip, *Atlas of U.S. Presidential Elections, 2020 Election Results*, <https://perma.cc/99ZN-6K38> (archived Jan. 29, 2022) (showing that Massachusetts’ margin for Biden was second only to Vermont among states).

255. *Massachusetts House of Representatives*, BALLOTPEDIA, <https://perma.cc/4BQT-YAQW> (the “1” indicated in the text represents one Independent legislator) (archived Jan. 28, 2022); *Massachusetts State Senate*, BALLOTPEDIA, <https://perma.cc/A465-LJ4R>, (archived Jan. 28, 2022).

256. AP Data Set (2016), *supra* note 72. The 2018 study demonstrated a barely perceptible .2 pro-Democratic efficiency gap. *Id.*

legislature and the governor's mansion in 2011, some good-government groups gave the legislature high marks for its post-2010 district-drawing.<sup>257</sup>

Nonetheless, despite Democratic dominance of Massachusetts, party legislative control does not reflect the kinds of party leanings that would likely emerge in a more proportional regime. Republican candidates for president usually garner around a third of the statewide vote, and moderate Republicans often win statewide elections for governor.<sup>258</sup> One might expect, therefore, in a proportional regime that Republicans would hold around a third of legislative seats, which would translate into around fifty-two seats in the house and thirteen seats in the senate, far more than the thirty-five and three, respectively, that they currently occupy.

In addition to the relatively efficient distribution of Democratic voters throughout the state, another cause of Massachusetts's Democratic dominance may be that an unusually large percentage of state legislative races are uncontested. In 2020, for instance, of the state's one-hundred-sixty house seats, one-hundred-eighteen (74%) were uncontested. In the senate, thirty-two (80%) were uncontested.<sup>259</sup> This is an astonishingly high rate of non-contestation, and terrible for those who think giving voters a choice leads to better outcomes.<sup>260</sup> The high rate of uncontested races appears to result from widespread party imbalance across districts (almost always in favor of Democrats) and the hesitance of "state parties . . . to spend scarce campaign funds on what is likely to be a lost cause."<sup>261</sup>

An FRA in Massachusetts would create an entirely different system and promote competition. With RCV and larger districts, there would be far more districts in which Republicans would have a strong shot of picking up at least one

257. Nik DeClosa-Kipa, *How Gerrymandered Is Massachusetts?*, BOSTON.COM, Apr. 8, 2018, <https://perma.cc/3HDJ-HZEM> ("[T]he [2011] redistricting bill . . . earned plaudits from voting-rights and government-reform activists. For all of Beacon Hill's entrenched flaws, the Center of Public Integrity said the process was a bright spot, giving the state an A grade for redistricting.").

258. See, e.g., *supra* note 255 and accompanying text; the current governor of Massachusetts is a Republican Charlie Baker, who was first elected in 2014 and re-elected overwhelmingly in 2018. *Massachusetts Gubernatorial and Lieutenant Gubernatorial Election, 2018*, BALLOTPEdia, <https://perma.cc/G6RC-2DGW>, (archived Jan. 28, 2022) (demonstrating that Baker defeated his Republican opponent 65-32% in 2018). See also Thrush, *supra* note 25 (discussing the governorship of Republican Mitt Romney, who was elected in 2002).

259. Steve Brown, *Here Are the Contested Legislative Races in Massachusetts*, WBUR, Oct. 29, 2020, <https://perma.cc/F8VT-L2UL>. 2020 was hardly a blip; 2016 and 2018 data show that rates of noncontestation were exceedingly high. See AP Data Sets (2016 and 2018), *supra* note 72 (showing that 108 of 125 (86%) winning Democrats in the state house, and 18 of 35 (51%) in the senate, ran uncontested in 2016; for 2018, the numbers were 101 of 127 (80%) and 12 of 32 (38%)).

260. See Thomas L. Brunell & Justin Buchler, *Ideological Representation and Competitive Congressional Elections*, 28 ELEC. STUD. 448, 448 (2009) ("[T]he overwhelming consensus among political observers is that competitive elections are healthy for democracy . . ."); but see *id.* at 456 ("Competitive elections do not have the representational benefits that many assume.").

261. *Id.*

seat. Assuming Massachusetts kept the same number of house and senate members, senate districts would elect three, while house districts could elect between three and twelve.<sup>262</sup> Outside of heavily Democratic areas like Boston, where Democrats might win all such seats even under RCV, these new districts would likely result in significantly more Republican representation in the state legislature.

The process of adoption for a mini-FRA in Massachusetts would likely need to be constitutional. The Massachusetts constitution does not allow MMDs, and the constitution also contains the kind of provision that could jeopardize RCV.<sup>263</sup> Indeed, Massachusetts voters in November 2020 rejected by a vote of fifty-five to 45% a statutory initiative that would have allowed RCV in primary and general elections for state executive officials and state legislators, among others.<sup>264</sup> One of the concerns voters may have had about the proposal was that it would violate the state constitution and therefore subsequently be struck down if it passed.<sup>265</sup> Hence, to assuage that concern, any FRA-type amendment would likely need to be constitutional rather than statutory. In Massachusetts, however, the process for a constitutional initiative is long and not entirely “direct”: in addition to requiring approximately 80,000 signatures, it must garner approval from 25% of state legislators two (two-year) sessions in a row before going to the voters for approval, so the process takes at least four years to complete.<sup>266</sup>

*Nevada.* Nevada is an example of a state that demonstrates some, but not all, indicia of pro-Democratic gerrymandering in its state legislature in the last decade.<sup>267</sup> An FRA-type system for Nevada would need to be implemented constitutionally in order to affect both houses of the legislature because the Nevada constitution does not permit MMD’s for the state house.<sup>268</sup> A hypothetical FRA constitutional initiative might also, therefore, clarify that the provision of the state constitution that potentially invalidates RCV is no longer in effect, at least for state legislative races.<sup>269</sup> In order to accomplish all of this, the proponents of

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262. Massachusetts does not currently nest house within senate districts, thus giving the state maximum flexibility in redrawing the state based on MMD’s.

263. See MASS. CONST. Amend. art. XIV (“In all elections of civil officers . . . the person having the highest number of votes shall be deemed and declared to be elected.”); Table 2, *supra*.

264. *Massachusetts Question 2, Ranked-Choice Voting Initiative (2020)*, BALLOTPEDIA, <https://perma.cc/BW65-B9N4> (archived Jan. 28, 2022).

265. Katie Lannan, *Report: Question 2 Could Draw Constitutional Challenge*, PATRIOT-LEDGER (Sept. 29, 2020), <https://perma.cc/G3WC-59P5> (discussing Tufts study that noted “risk[.]” that Question would violate “the Massachusetts Constitution, which says that in general elections for state offices, ‘the person having the highest number of votes shall be deemed and declared to be elected.’”).

266. MASS. CONST. art. 48.

267. See *supra* note 80.

268. See *supra* Table 2.

269. NEV. CONST. art. V, § 4 (“The persons having the highest number of votes for the respective offices shall be declared elected.”).

an FRA could get such a measure directly on the ballot as a constitutional amendment. Interestingly, in Nevada, the signature requirements for a constitutional initiative petition are no greater than for a statutory initiative: 10% of the total number of votes cast in previous general election.<sup>270</sup> A directly initiated petition, however, must be approved at two consecutive elections, thus creating a more difficult campaign for FRA proponents than in those states where initiative approval is a one-shot deal.<sup>271</sup>

#### IV. VOTING RIGHTS ACT CONCERNS

Congress required SMDs for the U.S. House in 1967 primarily to enable the election of more black candidates in the South.<sup>272</sup> With respect to state legislatures, several Southern states switched from MMD's to SMD's in the 1970s and 1980s in response to preclearance requirements under the Voting Rights Act.<sup>273</sup> The resultant creation of more SMDs led to substantial gains for black candidates in state legislatures.<sup>274</sup> It is understandable, therefore, that a return to MMDs might be viewed suspiciously by anyone concerned about equality in representation, but particularly by civil rights advocates who have fought vigorously for voting rights enforcement.

While an initial suspicion of MMDs is understandable, a crucial difference between the MMD's of the past and those proposed by the FRA is that the former did not use RCV. Hence, it was entirely possible—and, indeed, quite common—for an all-white slate to win all seats within a district using winner-take-all, particularly where whites were a majority of the population and there was racially polarized voting.<sup>275</sup> With RCV, however, a minority community of a sufficient size should be able to elect a member or members of its choice. For instance, if a third of the voting population in a three-member MMD is of a particular racial group, and prefers one particular candidate, they should be able to elect him or her to one of the three seats by ranking him or her first on their ballots.

In implementing a state-level FRA, the independent districting commission in charge of redrawing the districts would need to be especially careful not to dilute minority voting strength. Consider a hypothetical “majority-minority”

270. *See id.* art. XIX, § 2.

271. *Id.* cl. 4.

272. *See* Austin Plier, *Challenging Congress's Single-Member District Mandate for U.S. House Elections on Political Association Grounds*, 61 WM. & MARY L. REV. 1719, 1720 (2020).

273. Bernard Grofman & Lisa Handley, *The Impact of the Voting Rights Act On Black Representation In Southern State Legislatures*, 16 LEG. STUD. Q. 111, 119-20 (1991) (noting that 1970s preclearance denials under Section 5 “reduced or eliminated the use of [MMDs] . . . in Georgia, Louisiana, Mississippi, and South Carolina”); *id.* (“[I]n 1981-82 a series of Justice Department objections also eliminated [MMDs] in the covered area of North Carolina.”).

274. *Id.*

275. *Cf. Shelby Cnty. v. Holder*, 570 U.S. 529, 578-79 (2013) (Ginsburg, J., dissenting) (discussing racially polarized voting).



state assembly SMD in which African-Americans constitute 60% of the population—or, more importantly, 60% of the eligible-voter population (EVP). If the district were combined with two others of the same EVP that had 20% African-American EVP, it would then be one-third African-American. This one-third African-American community (again, assuming racially polarized voting) would be in a good position to elect one of the three representatives from this district. The benefit of the new scheme is that the African-Americans from the two districts that were previously 20% will now play a role in electing their representative in a way that they may not have before, especially in areas with racially polarized voting. An FRA-type system, therefore, is likely to create fewer “majority-minority districts” outside of highly populous and segregated cities, or perhaps a few large swaths of territory that are dominated by particular ethnic groups—like, say, Hispanics in south Texas. On the other hand, a state-level FRA would lead to more districts with a minority presence significant enough to elect at least one representative of their choosing. Anecdotal evidence from MMD, RCV systems of the past reveals that they led to *increased* racial minority representation; in Cincinnati in the 1950s, for instance, RCV facilitated the election of two African-Americans to the city council of nine (for 22% of the members), in a city with a 15% African-American population.<sup>276</sup>

An added benefit of the shift to larger MMDs would be that more representatives would represent more diverse constituencies. More white elected officials would likely represent more Asian, African-American, and Hispanic voters, and more Asian, African-American, and Hispanic officials would likely represent more whites, than is the case now. This could lead to less racial polarization among elected representatives.

Of course, the numbers could work out drastically differently than in the above hypothetical. Consider three state legislative districts in which the EVP is 51%, 2%, and 3% African-American. Combining the three into one would create a district that is only 18.6% African-American. If such a district elected three representatives, it is possible that African-American voters would be unable to elect a representative of their choice with less than a third of the EVP. For this reason, the proposed federal FRA includes a safe harbor whereby any MMD plan that might violate the VRA would automatically be nullified and a state would revert to SMDs.<sup>277</sup> To be sure, the devil with this VRA safe-harbor provision is certainly in the details. FRA calls for a “written evaluation” of all proposed MMD plans against external metrics, including “ability of communities of color to elect candidates of choice.”<sup>278</sup> At the margins, there would undoubtedly be

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276. Alex Ault, *The forgotten results & future promise of ranked choice voting in Ohio*, FAIRVOTE (July 24, 2018), <https://perma.cc/M63M-HVJ6>. Other Ohio cities, such as Ashtabula, Hamilton, and Toledo, experienced similar increases in representation among ethnic groups previously un- or under-represented on city councils, such as Irish-, Polish-, and Italian-Americans. *Id.*

277. See H.R. Res. 4000, 116th Cong. (2019), § 205.

278. *Id.*

some disagreement as to whether a particular MMD plan did that, but of course that is *currently* the case with any SMD plan.

#### CONCLUSION

An FRA at the state level may have salutary effects beyond breaking the grip of intentional and unintentional gerrymandering. One intriguing possibility that is beyond the scope of this paper, but worthy of further research, is that a move from FPP SMD to larger MMD's with RCV could weaken the grip of the United States's two major political parties—which are also, to varying degrees of strength, the most powerful parties in each state—and allow room for more third-party candidates to succeed in state politics. This seems particularly likely in areas of states that are tilted toward one political party. An MMD, for instance, that is located entirely in a heavily left-leaning large, populous city might still have an overwhelming Democratic edge. Knowing that they are not risking giving the seat to a Republican, however, a sufficient number of these voters might be willing to cast at least one of their votes for a Green or Progressive or Working Families candidate. Similarly, in some overwhelmingly right-leaning stretches of rural territory, a substantial number of usual Republican voters might instead cast at least one of their votes for a Libertarian, Constitution, or another independent party candidate.<sup>279</sup> Indeed, states might also or instead see more regional variation as third parties develop that focus on issues of importance to their particular states, a process that has happened on only a limited basis in recent decades.<sup>280</sup> More regional or state-specific third parties might help reverse the trend of state legislative elections becoming more and more “second-order” in which the candidates compete based on national party brands and positions.<sup>281</sup>

It is impossible to predict at the moment how well the two-party duopoly on legislative seats would hold up, since a switch to MMD's might affect which candidates affiliate with which parties. Someone with views akin to Alexandria Ocasio-Cortez, Democratic representative in Congress from the Bronx and Queens, for instance, might run as a Socialist or Green Party candidate in a system in which those parties wielded some real power.<sup>282</sup> Ballot access laws, which

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279. There is recent murmuring of a new center-right party that could accommodate political “conservatives” disgusted by “Trumpism.” Tim Reid, *Exclusive: Dozens of Former Republican Officials in Talks to Form Anti-Trump Third Party*, REUTERS (Feb. 10, 2021), <https://perma.cc/P7AR-4TLT> (archived Jan. 29, 2022). Former Democratic presidential (and New York City mayoral) candidate Andrew Yang recently formed the Forward Party as another third party. See *Forward Party*, <https://perma.cc/SUY3-6URA> (archived Jan. 28, 2022).

280. The Alaskan Independence Party is one such example. *E.g.*, James Brooks, *Promoting ‘God, family, and country,’ Alaskan Independence Party reorganizes ahead of election*, ANCHORAGE DAILY NEWS (Oct. 18, 2020), <https://perma.cc/N6NX-VH2F>.

281. See David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 772–80 (2017) (explaining the dynamic of state legislative elections becoming increasingly “second-order” due to less local media coverage, *inter alia*).

282. Indeed, “AOC” effectively said as much in an interview. See David Freedlander, *One Year in Washington*, N.Y. MAG. (Jan. 6, 2020), <https://perma.cc/DMS8-PBDY> (quoting

this paper has not addressed, would also be key to determining how robustly “third-party” candidates could compete. But the destabilization of many states’ two-party systems would not necessarily be a bad thing given how broad and uneasy each parties’ coalitions currently are. This might also create more competition in some of the essentially one-party states, like Massachusetts, Idaho, and Wyoming, by allowing third-party candidates more palatable to voters than the disfavored party.<sup>283</sup>

A state-level FRA is not a perfect solution to the problems discussed in Part I. Some might argue that different tactics could be used. Chris Elmendorf and David Schleicher, for instance, have proposed retaining SMDs, but reserving a share of the state legislature’s seats for the party that wins the cumulative statewide vote.<sup>284</sup> Others might prefer PR outright. While I am open to other ideas, the FRA provides as good a path forward as any of these others and has gained at least some momentum at the federal level.

The possibility of enacting an FRA at the state level may be slim at the moment, but it is hoped that the proposal in and of itself can spur a broader discussion about the inherent limitations and distortive effects of FPP SMD under the current geopolitical divide in many states. In order for state democracy to become not only more workable, but also more representative, moving beyond SMD is likely essential in many states.

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AOC as saying, “In any other country, Joe Biden and I would not be in the same party, but in America, we are.”).

283. *Idaho State Legislature*, BALLOTPEDIA, <https://perma.cc/ZAU9-QFJG> (archived Jan. 29, 2022) (Idaho’s state house is currently 58-12 Republican and the senate is 28-7 Republican). *Wyoming State Legislature*, BALLOTPEDIA, <https://perma.cc/RP4Z-8RKM> (In Wyoming the numbers are 51-7-2 and 28-2, both Republican). For Massachusetts’s partisan imbalance, see *supra* notes 255 to 257 and accompanying text.

284. Christopher S. Elmendorf & David Schleicher, *Districting for a Low-Information Electorate*, 121 *YALE L.J.* 1846, 1884 (2012) (suggesting that between 20 and 25% of seats could be reserved for members of the party that won the statewide vote).