COMMENTS

C.P.R. (CHANGE THROUGH PROPORTIONAL REPRESENTATION): RESUSCITATING A FEDERAL ELECTORAL SYSTEM

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Electoral mechanisms are strange devices—simultaneously cameras and projectors. They register images which they have partly created themselves.¹

Nothing is more certain than that the virtual blotting-out of the minority is no necessary or natural consequence of freedom; that, far from having any connection with democracy, it is diametrically opposed to the first principle of democracy—representation in proportion to numbers.²

INTRODUCTION

Although this country was founded on the belief that government is a “science of experiment,”³ the congressional electoral system has changed only inconsequentially since its inception over 200 years ago. Congress and the courts have made no real attempts to refine the extreme form of majority rule adopted by the Founding Fathers following the Revolutionary War.⁴ As a result,

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I dedicate this Comment to my grandmother, Elissa Nasuta, whose strength and independence continue to inspire me.

¹ Maurice Duverger, *Which Is the Best Electoral System?*, in CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES 31, 34 (Arend Lijphart & Bernard Grofman eds., 1984) [hereinafter CHOOSING AN ELECTORAL SYSTEM].

² JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 107 (Currin V. Shields ed., 1958) (1865).

³ Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 226 (1821).

⁴ This is true despite the fact that there are many possible alternative electoral systems, see *infra* note 31 and accompanying text, several of which have been used

congressional electoral procedures have failed to keep pace with our

with great success in other democracies. Although the United States's continued adherence to a system of immoderate majority rule is difficult to explain, its status as one of the first modern democracies suggests a reason for its original attachment to the system: the nation's leaders did not have other models from which to learn. See Interview with Lani Guinier, Professor of Law, University of Pennsylvania Law School, in Philadelphia, Pa. (Oct. 16, 1992). Notably, although following the United States's lead in many respects, most other democracies have not assimilated its extreme form of majority rule but have instead adopted some form of proportional representation. See John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 185 n.99 (1984) (noting that "[s]ome form of [proportional representation] is used in every continental European democracy except France"); Lewis Beale, *A Vote for Change*, L.A. TIMES, Nov. 8, 1992, at E2 (stating that the majority of the democracies emerging from the former Soviet Union are adopting proportional representation and that "[t]hroughout most of the democratic world, the two-party, winner-take-all system is viewed as some sort of relic, used only by a handful of former British colonies—such as Canada and the United States").

American arrogance provides one possible explanation for the United States's reluctance to stray from its original course. Because they view their country as the quintessential democracy, Americans are unlikely to move away from their monopolistic form of majority rule and learn from other "more evolved" democracies. See FRANCIS F. PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE 3-4* (1988) (arguing that American leaders claim that "other nations should measure their progress toward democracy by the extent to which they develop electoral institutions that match our own" and criticizing this self-congratulation given the fact that "the United States is the only major democratic nation in which the less well off are substantially underrepresented in the electorate"); Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257, 258 (1985) (noting American indifference to the proportional representation schemes used in many continental democracies).

Finally, one of the most obvious possible reasons for the failure of Americans to explore alternative electoral systems is the typical reluctance of those in power to "share the wealth." See MILL, *supra* note 2, at 119 (predicting America's unflinching adherence to immoderate majority rule on the grounds that "[i]n the United States, where the numerical majority have long been in full possession of collective despotism, they would probably be as unwilling to part with it as a single despot or an aristocracy"); see also *infra* note 160 (arguing that Congress would not vote to diminish its incumbency).

Recent stirrings in the area of alternate electoral systems and voting system reform present hope, however, that this tendency not to pursue electoral change can be overcome. In Washington, the state legislature has a bill before it that would allow cities and counties to adopt proportional representation for elections to their governing councils. See Letter from Matthew Cossolotto, President & Board Chair, CPR!, to CPR! Members 2 (Feb. 1993) (on file with author) [hereinafter Membership Letter]. The Cincinnati City Council has voted to put a proportional representation system on its ballot this May, and proportional representation may also be on the ballot this year in Worcester, Massachusetts. See *id.* at 2-3. The recent formation and successes of CPR! (Citizens for Proportional Representation), a national organization with several local chapters dedicated to raising public awareness about proportional representation voting systems, also suggests an increased willingness on the part of some Americans to re-examine our electoral system. See *id.*

country's expanding concept of political equality, adhering instead to the narrow, eighteenth-century interpretation of that right.

The United States's congressional electoral system includes a "winner-take-all" method of distributing electoral victory and a statutory requirement of single-member districts as the arena for individual election contests.⁵ A system characterized by these two elements is aptly labelled "extreme majority rule" because the votes of members of any group constituting a minority in a given district are essentially wasted. In an election for a seat in the House of Representatives, for example, a candidate receiving 51% of the vote in her single-member district becomes the representative of 100% of the district despite the disagreement of 49% of those voting.⁶ The votes of the 49% minority may be described as "wasted" because they are insufficient to elect a representative in the single-member district.⁷ Conversely, votes are also wasted when a candidate in a single-member race garners more than the necessary 51% of the vote.⁸ As 51% is sufficient to win the election, any vote beyond that amount is "wasted" in that it is not necessary to elect the candidate.

Proponents of the current system claim that these votes are not wasted because they serve the function of communicating voters' preferences.⁹ According to this viewpoint, an individual's vote is

⁵ In 1842, Congress passed a statute requiring single-member districts for congressional elections. See Act of June 25, 1842, § 2, 5 Stat. 491. Though repealed in 1929, this requirement was reinstated in 1967 and is still in effect today. See 2 U.S.C. § 2c (1988); see also *Whitcomb v. Chavis*, 403 U.S. 124, 158 n.39 (1971) (describing the evolution of the requirement).

⁶ See Low-Beer, *supra* note 4, at 164 n.4 (noting that the winner-take-all electoral system is heavily biased toward overrepresentation of the majority).

⁷ See WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 165 (1963) (claiming that the votes of minorities in single-member districts are "thrown away"); Edward Still, *Alternatives to Single-Member Districts*, in *MINORITY VOTE DILUTION* 249, 252 (Chandler Davidson ed., 1984) (criticizing the current majoritarian system for its potential to "leave 49 percent of the people in a district . . . with nothing to show for having gone to the polls except a patriotic feeling").

⁸ For brevity's sake, this Comment will use 51% when describing the threshold required for election under the current system. The 51% figure is not completely accurate, however, since only one vote more than 50% is truly required to establish a majority. The 51% majority is also a generalization because a lower plurality threshold may be required in the case of an election with three or more strong candidates. See *infra* note 11 and accompanying text.

⁹ See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (White, J., plurality opinion) (suggesting that people who vote for the losing candidate are not left unrepresented because all constituents, whether they voted for the winning candidate or not, have the same opportunity to influence that candidate once she is in office).

never wasted; the nature of an election contest simply demands that some expressions of preference must lose in accommodating the will of the majority.¹⁰ This argument fails to mention, however, that the supposed "will of the majority" may in fact be determined by *less* than a majority of those voting, in which case the majority of votes cast would actually be wasted. Imagine, for example, an election contest between three strong candidates, A, B, and C, who receive 32%, 33%, and 35% of the vote, respectively. Although she has earned only 35% of the vote, C wins, and will represent 100% of the district. Those who voted for A or B, composing 65% of the vote (the true "majority"), will not be represented by the candidate of their choice. The results could be even more extreme in an election with more than three candidates.¹¹ Thus, arguments that wasted votes are a necessary evil in determining the will of the majority are deceiving—the current electoral system often leads not to majority rule, but to plurality rule, with the majority of voters not "ruling" at all.

The above example shows how the winner-take-all nature of our electoral system creates the possibility that a majority will be ruled by the will of a mere plurality. Coupled with the winner-take-all rule, the single-member-district requirement, however, is also responsible for the wasting of a significant number of votes. In an election for a state's four representatives to the House of Representatives, for instance, a minority that constitutes 32% of the popular vote statewide, but whose members are distributed among all four districts in equal numbers will probably receive no representation.¹² Under a proportional system, 20.01% of the total popular vote would always be sufficient to elect one of the four represen-

¹⁰ See ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 38 (1968) (claiming that "[t]he essence of all government is the creation of a set of power relationships whereby a part may conclude the whole"); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 719 (1985) (pointing out that the principle of minority acquiescence, i.e., that minorities are supposed to lose in a democratic system, is entirely consistent with democratic theory).

¹¹ See Still, *supra* note 7, at 250 (noting the inverse relationship between the number of candidates and the percentage of votes required to win).

¹² Assuming several strong candidates divide the vote, it is conceivable that a minority could win an election under the current system with less than 33% of the vote. For purposes of brevity, however, this Comment will use 33% as shorthand for the minimum amount capable of winning under plurality rule.

tatives in a statewide contest.¹³ Under the current system, the 32% minority is unable to elect a single candidate. Moreover, the other 68% of the voters elect all four of the representatives. Aggregating the wasted votes from all of the single-member-district contests statewide reveals significant potential voting strength which is unusable under the current electoral system.

While it is true that some voters must lose in every election, it does not follow that votes have to be wasted to this extent.¹⁴ The Constitution does not require this result.¹⁵ Sections 2 and 3 of Article I of the Constitution outline how the House of Representatives and Senate shall be composed, but do not provide a specific type of electoral system for the election of representatives and senators.¹⁶ Although no electoral system guarantees complete representation for every voter,¹⁷ several systems are capable of distributing electoral success far more proportionately than our own. Despite its potential for variability, however, the congressional electoral system has historically been treated as an unalterable method and has evaded any serious revisionist attention.¹⁸

¹³ The figure of 20.01% was calculated using the Droop formula. See *infra* note 38 and accompanying text.

¹⁴ See MILL, *supra* note 2, at 103 (accepting the assumption that the majority should prevail over the minority, but questioning the necessity of the majority receiving all the votes and the minority none).

¹⁵ See Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1349 n.97 (1987) (noting that legislative districting in Congress is not constitutionally mandated).

¹⁶ See U.S. CONST. art. I, §§ 2, 3.

¹⁷ The only electoral system that guarantees complete representation is direct democracy, in which each citizen represents herself. Although direct democracy guarantees each citizen her own representative, i.e., herself, it does not escape the problem of wasted votes. In a nationwide vote to determine the fate of a particular bill, for instance, a citizen's vote will be wasted if she is not part of the 51% majority. See *infra* note 147 (discussing the impossibility of eliminating wasted votes at the legislative level). Even if direct democracy was feasible in the United States today, which it is not, the Guarantee Clause of the Constitution requires a republican form of government whereby individuals are represented by elected officials. See U.S. CONST. art. IV, § 4 (stating "[t]he United States shall guarantee to every State in this Union a Republican Form of Government").

¹⁸ See Arend Lijphart & Bernard Grofman, *Choosing An Electoral System, in CHOOSING AN ELECTORAL SYSTEM*, *supra* note 1, at 3, 12 (noting the United States's reluctance to abandon even minor aspects of its national electoral system, much less switch from winner-take-all, plurality rule to proportional representation).

In contrast, our country's electoral college system has been subjected to numerous attacks throughout its 206-year history. See Albert J. Millus, *The Electoral College—Should Anything Be Done About It?*, 54 N.Y. ST. B.J. 84, 84 (1982); see also LAWRENCE D. LONGLEY & ALAN G. BRAUN, *THE POLITICS OF ELECTORAL COLLEGE REFORM* 42 (1972) (noting that "[t]he road to reform in the method of choosing the

This Comment proposes the abandonment of the electoral system currently employed for election of members of the House of Representatives.¹⁹ It argues that an electoral system based on

Presidents and Vice Presidents of the United States is littered with the wrecks of previous attempts" (quoting Arthur Krock)). In fact, Congress currently has before it three proposed constitutional amendments concerning electoral college changes. See S.J. Res. 312, 102d Cong., 2d Sess. (1992); S.J. Res. 302, 102d Cong., 2d Sess. (1992); S.J. Res. 297, 102d Cong., 2d Sess. (1992).

¹⁹ The method of election to the Senate is not challenged here because of the following significant differences between that body and the House. Unlike members of the House, the two senators from each state usually do not come up for election at the same time because their six-year terms are staggered. Therefore, each Senate position is a single-member office, like the Presidency, and a senatorial election is a winner-take-all election. Unlike an election for multiple members of the House of Representatives, in which it is possible under certain electoral systems for several groups to receive a number of representatives in proportion to their strength in the electorate, a single senator cannot be divided proportionately. The successful majority or plurality must take "all of" the senator, and thus there is no alternative but to deny the remaining voters a representative of their choice.

In allotting each state two senators regardless of the size of its population, the Founding Fathers rejected the ideal of proportionate strength in the Senate. See CONGRESSIONAL QUARTERLY, CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 75 (4th ed. 1991) [hereinafter GUIDE TO CONGRESS] (noting that the very nature of the Senate—where Wyoming has as much power as California with more than 50 times the population—clearly violates the principle of one person, one vote and would be struck down by the Supreme Court as unconstitutional if it were not part of the Constitution itself). The Senate's winner-take-all, plurality system is similarly antithetical to proportionality. The House of Representatives, however, was envisioned as an institution which would reflect each state's relative population strength. See *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964) (noting that "equal representation in the House for equal numbers of people" was the principle solemnly embodied in the "Great Compromise"). An electoral system that distributes representatives proportionately would most accurately achieve this goal. Thus, the principles behind the "Great Compromise" support requiring an electoral system based on proportional representation for the House of Representatives, while allowing the current winner-take-all, plurality system for senatorial elections. See GUIDE TO CONGRESS, *supra*, at 692 (explaining the "Great Compromise" as the concession reached by large states, which wanted congressional representation to be based on population, and small states, which wanted equal representation in Congress, to allow for equal representation of the states in the Senate and proportional representation in the House).

Although senatorial elections are impervious to electoral reform via proportional representation for the reasons mentioned above, they may still be revised by other methods. For instance, the current single-member-district plurality system may be replaced by a single-member-district preferential system. Presently used by the Australian House of Representatives and for the Irish presidency, the single-member-district preferential system requires a candidate to receive an absolute majority of the district vote and requires a voter to rank the candidates in order of preference. See THOMAS T. MACKIE & RICHARD ROSE, THE INTERNATIONAL ALMANAC OF ELECTORAL HISTORY 226, 503 (1991). However, an absolute majority frequently is not obtained on the first count—given the presence of three or more strong candidates—in which

proportional representation should be adopted instead.²⁰ While ideally electoral mechanisms should be cameras objectively registering the contours of public opinion, in actuality they are also projectors actively shaping the physiognomy of public opinion.²¹ This Comment will argue that, compared to our current majoritarian system, a proportional representation system would more accurately reflect this country's current concept of political equality and more equitably shape our developing ideas on the meaning of that right.

case the candidate with the least votes is eliminated and her ballots are transferred to the second preferences expressed by those voters. If no candidate receives majority support after such transfer, the process continues until a majority is achieved and a winner is thereby declared. *See id.*

This type of preferential voting can also be used in the single-transferable-vote form of proportional representation advocated in this Comment for elections in the House of Representatives. *See infra* part I.A. Many of the benefits described therein also extend to a single-member-district preferential system for the Senate. *See infra* part I.B. However, the single-member-district aspect of single-member-district preferential systems poses its own unique challenges. For instance, because it is often difficult for a candidate to receive 51% of the vote with three or more strong candidates present, a single-member-district preferential system would require candidates to appeal to smaller parties for support, perhaps nominating coalitional candidates. *See* J.F.H. Wright, *Australian Experience With Majority-Preferential and Quota-Preferential Systems*, in *ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES* 124, 131 (Bernard Grofman & Arend Lijphart eds., 1986). As opposed to the current plurality system which allows candidates to win with 33% of the vote and without incorporating other groups, winners under the preferential system need broader support (51%) before they can "take all" of the representation. Although a maximum of 49% of the voters in senatorial elections may still go unrepresented, the single-member-district preferential system is incapable of wasting 67% of the vote, a clear possibility under the present plurality system. Adopting a preferential voting system in both the Senate and the House would provide comprehensive electoral reform.

²⁰ In so doing, it strikes out in a direction different from that of most current attempts at voting rights reform. *Cf.* Bruce E. Cain, *Voting Rights and Democratic Theory: Toward a Color-Blind Society?*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 261, 276-77 (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter *CONTROVERSIES IN MINORITY VOTING*] (advocating that more emphasis be placed on broader political challenges and structural changes, rather than voting rights per se). Three of the last four constitutional amendments, for instance, have expanded the right of suffrage to embrace a larger cross-section of the population. *See* U.S. CONST. amend. XXIII (giving residents of Washington, D.C. a vote in presidential elections in 1961); U.S. CONST. amend. XXIV (abolishing the poll tax in 1964); U.S. CONST. amend. XXVI (lowering the voting age to 18 in 1971). Expanding the right to vote has little significance, however, when the system within which the vote is counted accords it no weight. *See* PIVEN & CLOWARD, *supra* note 4, at 3 (noting that "the vote itself is meaningless . . . unless diverse interest groups can also compete for influence").

²¹ *See supra* text accompanying note 1.

The Supreme Court and American society have expanded the concept of political equality since the Founders created our congressional electoral system. From their initial holding in 1964 that individuals have a right to "fair and effective representation,"²² the Supreme Court has broadened its interpretation to include a group right to an undiluted vote for political²³ and racial²⁴ minorities. American society has also become "increasingly sensitive to the political claims of racial and other minorities."²⁵ The evolution of the concept of equal representation has not yet reached its apex in our society, however, because of the extreme majoritarian bias of our electoral mechanisms.²⁶ Proportional representation, on the other hand, would advance this progression.

A switch to proportional representation would involve the adoption of an electoral system characterized by at-large elections²⁷ in which seats are divided among groups and/or individuals in proportion to the number of votes each receives.²⁸ While a majority of the electors would still elect a majority of the representatives, a minority of the electors would be permitted a minority of the representatives (instead of none, as in the current system). Proportional representation thus ameliorates the extreme majoritarianism of the current system, allowing more comprehensive representation of the diverse tendencies and nuances of American public opinion.²⁹ Because it expands political equality to incorpo-

²² *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964) (concluding that "the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators").

²³ *See Davis v. Bandemer*, 478 U.S. 109, 124 (1986) (holding that political gerrymandering claims are justiciable under the Equal Protection Clause).

²⁴ *See White v. Regester*, 412 U.S. 755, 765 (1973) (sustaining the invalidation of "multimember districts [that were] being used invidiously to cancel out or minimize the voting strength of racial groups").

²⁵ Schuck, *supra* note 15, at 1363; *see also* Letter from Rob Richie, National Director, CPRI, to author 2 (Mar. 10, 1993) (on file with author) ("The surge of grassroots support and votes for independent presidential candidate H. Ross Perot, the call for more women and racial minorities in elected office and government's failure to respond adequately to many of the new challenges of the 1990s speak powerfully to the need for a fairer voting system.").

²⁶ *See Cain, supra* note 20, at 273 (acknowledging "the majoritarian predisposition of American political culture" and arguing that its predominance will outweigh minority gains under the Voting Rights Act, thus dooming minorities to continued political marginalization).

²⁷ In an at-large election, "elected officials [are] chosen by the voters of the State as a whole rather than from separate congressional . . . districts." BLACK'S LAW DICTIONARY 125 (6th ed. 1990).

²⁸ *See Low-Beer, supra* note 4, at 164 n.4.

²⁹ Although proportional representation does not require that a candidate receive

rate the right of all groups to have an equal opportunity to win elections, a proportional representation system reflects a broader vision of equality than that achieved by simply ensuring an individual the right to vote.

Because electoral systems in this country are accepted as constants, the narrow view of political equality implicit in the present system has been largely overlooked. In creating an overrepresentation of the majority, the present system permits the votes of the minorities in single-member districts—although significant statewide—to be less effective in influencing the election result than the votes of the majority. Thus far, the courts have provided no remedy for this ineffectiveness. Instead, their definition of equal representation appears to be satisfied simply by ensuring each individual formal access to the ballot; the effect that the system has on the impact and strength of that vote as combined with other votes is not considered.³⁰ This Comment argues that courts err in not considering such systemic factors. Furthermore, it proposes that the courts are the ideal mechanism for implementing the solution to the problem—proportional representation.

I. PREFERRING PROPORTIONAL REPRESENTATION TO THE CURRENT SYSTEM: APPLICATIONS, BENEFITS, AND CRITICISMS

A. *Proportional Representation in Practice: The Single Transferable Vote*

Although proportional representation can be implemented in a variety of forms,³¹ the single-transferable-vote ("STV") variant should be employed for election of the House of Representatives.³² Because the Supreme Court has interpreted "fair and

a majority of the votes cast in order to win the election, it does not eschew all manifestations of majoritarianism. For instance, the body to which the representatives are elected—Congress—would still be governed by majority rule. Also, as mentioned above, a group constituting a majority of the state would continue to elect a majority of the representatives.

³⁰ See *infra* notes 244-49 and accompanying text.

³¹ See Low-Beer, *supra* note 4, at 164 n.4. (listing the best-known types of proportional and semiproportional electoral systems as the Hare system of single transferable votes, the several kinds of list proportional representation, and cumulative voting).

³² Single-transferable voting is not new to the United States. It has been used in local government for the election of city councils and school boards in approximately two dozen cities. See Leon Weaver, *The Rise, Decline, and Resurrection of Proportional Representation in Local Governments in the United States*, in *ELECTORAL LAWS AND THEIR*

effective representation" to include the right to an equally powerful vote,³³ the electoral system that best achieves proportionality while wasting the fewest votes should thus be mandated.³⁴ It is beyond the scope of this Comment to measure and compare the different varieties of proportional representation on the issue of minimizing wasted votes.³⁵ For reasons that will be discussed below, it is widely accepted that STV proportional representation is unparalleled in this regard.³⁶

Under an STV system, voters throughout a state vote for any of the candidates running for representative statewide, and they may number all or some of those candidates in the order of their preference from favorite to least favorite. In an election in North Carolina, for instance, with twenty-four candidates running for its

POLITICAL CONSEQUENCES, *supra* note 19, at 139, 140, 150-51 (noting that "local controversies over [proportional representation] in the United States have been dominated more by considerations of who gets or keeps power than by abstract considerations of what is the best polity"). Presently, STV is used to elect the Cambridge City Council and School Committee and 32 community school boards in New York City. See Joseph F. Zimmerman, *Fair Representation for Minorities and Women*, in UNITED STATES ELECTORAL SYSTEMS: THEIR IMPACT ON WOMEN AND MINORITIES 3, 4 (Wilma Rule & Joseph F. Zimmerman eds., 1992) [hereinafter UNITED STATES ELECTORAL SYSTEMS]. At the national level, STV is used for election to the Irish Parliament and the Australian Senate. See MACKIE & ROSE, *supra* note 19, at 2, 224.

³³ See discussion *infra* part III.B.

³⁴ See Alexander A. Yanos, Note, *Reconciling the Right to Vote with the Voting Rights Act*, 92 COLUM. L. REV. 1810, 1864-65 (1992) (noting that multiple scholars "have praised STV's ability to implement the *Reynolds* ideal [of 'fair and effective representation'] better than any other system"); see also discussion *infra* part III.B.3.a.ii.

³⁵ Cumulative voting, to give one counterexample, has a high probability of wasting votes in a semiproportional system. In a cumulative voting system, a voter has as many votes as there are seats to be filled and may cumulate them among a smaller number of candidates. See Still, *supra* note 7, at 255-56. Such a system requires considerable use of strategy. A party must be careful to nominate only those candidates it is confident of electing and to strictly instruct its supporters how to spread their votes. See *id.* at 256. If a party nominates more candidates than it has strength to elect, it risks splitting its vote among a number of candidates, thereby depriving all of them the amount necessary for election. See *id.*

³⁶ See Yanos, *supra* note 34, at 1861 (noting that in an STV system "'wasted' votes are kept at a minimum" and "each individual's vote is as 'effective' as possible" (footnote omitted)); see also Enid Lakeman, *The Case for Proportional Representation*, in CHOOSING AN ELECTORAL SYSTEM, *supra* note 1, at 41, 44-45 (claiming that STV actually achieves proportionality and facilitates recognition of more complex voter preferences); Still, *supra* note 7, at 264 (describing STV proportional representation as "the most attractive of the four" in an analysis of limited voting, cumulative voting, add-on voting, and STV proportional representation).

twelve seats to the House of Representatives,³⁷ a voter would rank the candidates from one to twenty-four, with number one signifying her first-choice candidate. Like the current system, voters are allowed to vote for only one seat (that is, their vote will count only once in any case). After all votes are cast, the victors are determined using the Droop formula, which calculates the total number of votes a candidate needs for election.³⁸ Borrowing the numbers from the 1990 election for the House of Representatives in North Carolina, in which 2,009,217 people voted,³⁹ the threshold for election for each of the twelve seats would be 7.7% of the popular vote.⁴⁰ If candidate A surpasses the threshold required for election, in this case 7.7%, any surplus votes for candidate A do not count toward her election but are transferred to the voter's second choice, candidate B, or the next sequential choice who is not already elected.⁴¹ After all such surpluses are transferred, candidates

³⁷ See GUIDE TO CONGRESS, *supra* note 19, at 741.

³⁸ The general formula for the Droop quota ($p\%$) requires dividing the total number of valid ballots (v) by the number of seats to which candidates may be elected (s) plus one, adding one to the result, dividing by v , and converting to a percentage of v . Thus:

$$p\% = \frac{\frac{v}{s+1} + 1}{v} \times 100$$

See George H. Hallett, Jr., *Proportional Representation with the Single Transferable Vote: A Basic Requirement for Legislative Elections*, in CHOOSING AN ELECTORAL SYSTEM, *supra* note 1, at 113, 118. The crucial variable in the Droop formula is the number of seats, as the larger s is, the more proportional the system. See REIN TAAGEPERA & MATTHEW S. SHUGART, SEATS AND VOTES 112 (1989) (noting that "the number of seats allocated in an electoral district has a stronger impact on proportionality than almost any other factor"). With one vote for each voter in a nine-member district, for example, any candidate who receives at least one vote more than one-tenth of the votes cast is sure of election. This outcome results because it is impossible for ten candidates to receive more than one-tenth of the vote each; thus, only nine winners will be chosen. See Hallett, *supra*, at 118.

³⁹ See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1992, at 272. According to the census, in 1990 the voting age population of North Carolina was 5,061,000, and 39.7% of those people voted in the election for the House of Representatives.

⁴⁰ The following application of the Droop formula produces the 7.7% figure:

$$\frac{\frac{2,009,217}{12+1} + 1}{2,009,217} \times 100 = 7.69\%$$

⁴¹ See Hallett, *supra* note 38, at 118. Deciding which votes will remain with the winner and which votes will be surplus is an arbitrary choice involving an element of

unable to reach the minimum of votes required are eliminated; the eliminated candidate's ballots are transferred in the same manner as the surplus ballots.⁴² This process of successive defeats and transfers continues until the desired number of candidates have completed their quotas and been declared elected.⁴³ Because votes ordinarily wasted on candidates who do not need them or who cannot be elected by them are transferred to a voter's next preference,⁴⁴ this system of election minimizes the number of wasted votes⁴⁵ and, as will be shown, thereby increases its legitimacy.

*B. The Benefits of Proportional Representation Generally
and the Single Transferable Vote in Particular*

Although no electoral system is a panacea, the STV form of proportional representation offers considerable benefits as well as redresses many of the shortcomings of the present system. Several of the benefits inhere in the proliferation of third parties and minority representation expected under proportional representation. As minorities and alternative parties are able to receive representation in proportion to their numbers in the population, the current Democratic-Republican duopoly in the House of Representatives will be dismantled, thereby expanding debate in campaigns and in the House of Representatives itself. Creating a

chance. See Daniel R. Ortiz, Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144, 150-51 n.30 (1982). Therefore, rather than transferring any particular surplus votes, a process known as the Gregory procedure reduces all of the winner's votes in value to the ratio of her surplus to her total votes. For example, if a candidate received 40 votes more than the quota to be elected of 80, all 120 votes would receive a new value of 40/120, or 1/3, and then be redistributed according to each voter's next preference. The only exception to this principle is that ballots that do not indicate a second choice will not be transferred and must remain with the winner. See *id.*; see also J.F.H. Wright, *An Electoral Basis for Responsible Government: The Australian Experience*, in CHOOSING AN ELECTORAL SYSTEM, *supra* note 1, at 127, 131 (crediting the Gregory procedure with removing the element of chance from the transfer of surplus votes of elected candidates).

⁴² See Hallett, *supra* note 38, at 118.

⁴³ See *id.* at 119.

⁴⁴ See *id.* at 119-20 (claiming that voters in an STV system can feel safe in voting in their order of preference, even if their favorite candidate has a small chance of election, because no later choice is ever counted unless and until all earlier choices are elected or defeated).

⁴⁵ Some wasted votes are inevitable as the Droop formula provides the quota necessary to win each available seat. This quota is the smallest number that cannot be beaten by another candidate, see *id.* at 118; therefore, once each of the candidates has attained her quota, there will be some extraneous votes.

heterogeneous legislature in a heterogeneous society, STV proportional representation will increase the legitimacy of the electoral system,⁴⁶ which, in turn, could renew faith and a desire to participate in the presently disenchanted.⁴⁷ Though many of the benefits discussed in this section are also benefits that apply to proportional representation systems generally, the benefits accruing from the structure of STV are peculiar to the STV form of proportional representation.

1. Inhibiting the Entrenchment of the Two Major Parties and Facilitating the Proliferation of Third Parties

"The House of Representatives would become representative in fact as in name."⁴⁸

The current electoral system for the House of Representatives perpetuates the dominance of the two-party system and thereby restricts the presence of third parties in that body.⁴⁹ The 51% threshold presumes a two-party contest.⁵⁰ This presumption is justified because "out of an unlimited number of parties, only two can expect either to win a majority of the seats, or to be the strongest opposition, with a chance to win an absolute majority in the next election."⁵¹ Similarly, surpassing the 51% threshold is difficult to achieve without the established infrastructure that the two major parties possess. Unless a minority party is cohesive, well-organized, and concentrated in large numbers in a single-member district, it has little chance of electing a representative.⁵² People

⁴⁶ See Lani Guinier, *Second Proms and Second Primaries: The Limits of Majority Rule*, BOSTON REV., Sept./Oct. 1992, at 32, 34 (criticizing the presence of a homogeneous legislature in a heterogeneous society).

⁴⁷ See RUY A. TEIXEIRA, THE DISAPPEARING AMERICAN VOTER 5, 59, 101-02 (1992) (describing the vicious cycle that low and steadily declining voter turnout among the poor, minorities, and the young over the past three decades contributes to a policy agenda unrepresentative of their interests which, in turn, contributes to their alienation from politics).

⁴⁸ Ferdinand A. Hermens, *Representation and Proportional Representation, in CHOOSING AN ELECTORAL SYSTEM*, *supra* note 1, at 15, 20 (quoting CLARENCE G. HOAG & GEORGE H. HALLETT, JR., PROPORTIONAL REPRESENTATION 433-34 (1926)).

⁴⁹ See generally NORMAN J. ORNSTEIN ET AL., AMERICAN ENTER. INST., VITAL STATISTICS ON CONGRESS 1991-1992, at 42 (1992) (finding that in 1992 only one of the 435 members of the House of Representatives was a member of a third party).

⁵⁰ See SAMUEL MERRILL, III, MAKING MULTICANDIDATE ELECTIONS MORE DEMOCRATIC 8 (1988) (describing the principle that plurality voting favors a two-party system as Duverger's law).

⁵¹ Hermens, *supra* note 48, at 22.

⁵² See Bernard Grofman & Lisa Handley, *Preconditions for Black and Hispanic*

lucky enough to reside in an area where people with similar political inclinations constitute a plurality get representation; people who are geographically isolated from those with similar values do not.⁵³ Therefore, contrary to the Supreme Court's mandate, the "weight of a citizen's vote" is made to "depend on where he lives."⁵⁴

The duopoly created by the present electoral system, however, is counterintuitive to traditional American notions of capitalism and would be considered restrictive and anticompetitive if subjected to antitrust laws.⁵⁵ In the same way "Americans would not accept an economic system that allowed them to buy cars from only two companies,"⁵⁶ Americans should not be forced to choose between only two parties. Just as a free-market economy results in products more suited to consumers' tastes, competition between the two major parties and third and minority parties would bring options to voters and improve the political process.⁵⁷

By conducting at-large elections and allowing representation of groups in proportion to their strength in the electorate, a proportional representation system would provide representation to many minority groups and third parties whose voices are currently drowned out by those of the group constituting a majority in their geographical district. Under proportional representation, a small minority dispersed throughout the state and currently segregated by single-member districts, for example, could unite and vote as a unit. Because proportional representation lowers considerably the threshold required for election from the present 51%, the minority's opportunity for electing a representative is dramatically increased.

Congressional Success, in UNITED STATES ELECTORAL SYSTEMS, *supra* note 32, at 31, 37 (noting the difficulty of politically cohesive Hispanics to achieve representation due to their typically small, dispersed population concentrations).

⁵³ One response to this predicament is to suggest that voters move to areas in which they are members of the majority. This suggestion, however, relies on the unrealistic presumption that every citizen possesses the means and marketable skills enabling such mobility.

⁵⁴ *Reynolds v. Sims*, 377 U.S. 533, 567 (1964) (holding as the basic principle of representative government that "the weight of a citizen's vote cannot be made to depend on where he lives").

⁵⁵ See Matthew Cossolotto, *A Competitive Politics*, CHRISTIAN SCI. MONITOR, Nov. 21, 1991, at 18; see also Beale, *supra* note 4, at E2 (noting Cossolotto's observation that the two-party system "seems to go against every other instinct in the American lifestyle" as Americans in a supermarket are not overwhelmed by the many different kinds of cereal but rather are "happy to have choices").

⁵⁶ Cossolotto, *supra* note 55, at 18.

⁵⁷ See John B. Anderson, *Break the Political Stranglehold*, N.Y. TIMES, July 24, 1992, at A25.

The greater the number of representatives a state has, the lower the threshold percentage required for election.⁵⁸ In California, the nation's most populous state with fifty-two representatives, only 1.9% of the popular vote would be required for election.⁵⁹ In the six states with only two representatives, 33.4% would be the threshold for election.⁶⁰ Although 33.4% is closer to the percentage required currently in a plurality contest,⁶¹ it is considerably lower than the 51% threshold generally required under the present system. In Western European parliaments, for instance, the lower threshold of proportional representation has facilitated the presence of the Green parties, which have been able to influence both socialist and conservative governments' policies on environmental protection.⁶² Given the increased potential to elect representatives, geographically diffuse groups like women and the poor and frequently anonymous groups like gays and lesbians would have incentive to organize and vote as a group.

Advocating an electoral system that allows separate and distinct representation of minority and alternative parties presumes that these groups cannot be adequately represented within the existing two parties. While the two major parties have intermittently espoused the alternative ideas of outlying groups,⁶³ they generally

⁵⁸ See Peter Mair, *Districting Choices under the Single-Transferable Vote*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES, *supra* note 19, at 289, 301 (noting that "the potentiality for providing proportional outcomes with STV increases as the size of the constituency—in terms of seats—is expanded").

⁵⁹ This percentage is calculated using the Droop formula. See *supra* note 38 and accompanying text; see also GUIDE TO CONGRESS, *supra* note 19, at 741.

Because even very small groups will be capable of achieving representation in proportion to their voting population, California's low threshold would lead to almost perfect proportional representation. Although such proportionality is clearly desirable for reasons of representativeness, diversity and inclusion, competing concerns exist. A ballot to elect California's 52 representatives, for instance, conservatively could contain more than 200 candidates. Such a ballot would be overwhelming to even the most sophisticated and well-informed of voters. Therefore, in states like California, New York, and Texas, it may be necessary to adopt multimember rather than at-large districts and thereby endure decreased proportionality for the purposes of manageability.

⁶⁰ See GUIDE TO CONGRESS, *supra* note 19, at 741. The six states with only one representative would continue to use the 51% or plurality threshold of the current winner-take-all system. See *id.* However, these states could also adopt the single-member-district preferential system recommended for senatorial elections. See *supra* generally note 19.

⁶¹ See *supra* note 11 and accompanying text.

⁶² See Matthew Cossolotto, *A Jump Start for American Democracy*, UTNE READER, Nov./Dec. 1992, at 22, 22.

⁶³ See Keith D. Eisner, Comment, *Non-Major-Party Candidates and Televised*

direct their efforts toward the political center because that is where the votes for electoral victory are to be found. Following the 1992 presidential election, for instance, commentators credited Bill Clinton's victory to his departure from the Democratic party's traditional emphasis on the left. The success of Clinton's strategy was attributed to its focus on courting the voters of the center.⁶⁴ At the same time, the Republican party, with its far-right platform, conceded the middle imprudently and has been accused of thereby conceding the election.⁶⁵

In a two-party system where bipolarization of alliances directs the political struggle to the center, groups traditionally on the fringe, such as minority and third parties, are neglected.⁶⁶ African-Americans, for example, have been characterized as "stifled by the traditional two-party approach to black political participation," with Democrats taking them for granted and Republicans ignoring them.⁶⁷ Although African-Americans "have been the most loyal of Democratic voting groups,"⁶⁸ Democrats in Congress have not reciprocated by actively promoting interests central to the African-American community.⁶⁹ Under a proportional representation system, however, politically cohesive African-Americans could elect representatives with a mandate to represent their chosen interests.

Presidential Debates: The Merits of Legislative Inclusion, 141 U. PA. L. REV. 973, 983 (1993) (noting that many of the innovative policy stances which the two major parties have adopted, such as women's suffrage and the encouragement of labor unions, have actually been formed due to third-party pressure).

⁶⁴ See *Crossfire: Transcript #637* (CNN television broadcast, Aug. 12, 1992), available in LEXIS, Nexis Library, CNN File (citing Bill Clinton's support of the death penalty as an illustration of his intent to ally himself with the political center).

⁶⁵ See *id.* (noting Republican Representative Bill Green's statement that "[f]or every vote we pick up on the right because we have this far right platform and someone comes out who might stay home, we lose two votes in the center because the guy who switches to Clinton is one vote less for Bush and one vote more for Clinton").

⁶⁶ See Duverger, *supra* note 1, at 36 (claiming that the two major parties are "mere receptacles containing too haphazard a mixture of different elected members to properly represent the diverse tendencies of public opinion").

⁶⁷ See Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 394 (1989) (noting that mainstream Democrats have refused to accept black Democrats, such as Jesse Jackson, as legitimate party spokespersons, thus distancing themselves from black interests, and also noting Republicans' refusal to court the black vote at all).

⁶⁸ *Id.* at 415 n.98 (quoting Rhodes Cook, *Despite Gains in Some Groups, Democrats Still Have Far to Go*, 48 CONG. Q. 3442 (Dec. 3, 1988)).

⁶⁹ See *id.* at 416.

2. Expanding Debate in Election Contests and the House of Representatives

[T]he primary values protected by the First Amendment—"a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[]"—are served when election campaigns are not monopolized by the existing political parties.⁷⁰

By allowing more expression of the diverse components of American society, a proportional representation system could lead to a significant renewal of political life within both election contests and the House of Representatives itself.⁷¹ Regardless of the ultimate legislative successes of minorities and third parties, their increased presence in election campaigns would create diversity in the political marketplace of ideas,⁷² thus expanding the limited political debate inherent in the two-party system⁷³ and contributing to a robust exchange of ideas.

Within the current system, third parties serve as policy innovators and catalysts by raising controversial issues that are later adopted by the major parties.⁷⁴ The third-party candidacy of H. Ross Perot in the 1992 presidential election, for example, has forced the Clinton Administration to confront the issue of the budget deficit. Despite the importance of influencing the political dialogue and keeping the major parties accountable, this role is still no substitute for electoral success. Nevertheless, the improbability of attaining electoral success under the current system means that third parties must content themselves with the role of vicarious policy innovators.⁷⁵

⁷⁰ *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (holding that Ohio's early filing deadline for independent candidates unconstitutionally burdened the voting and associational rights of independent presidential candidate John Anderson's supporters).

⁷¹ See Duverger, *supra* note 1, at 36-37.

⁷² See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1461 (1991) (asserting that diversity contributes to the robust exchange of ideas and that "everyone stands to benefit from the infusion of alternative viewpoints and from consensus solutions" (citing *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 579 (1990))).

⁷³ See GERALD J. FRESIA, *THERE COMES A TIME: A CHALLENGE TO THE TWO PARTY SYSTEM* 124 (1986).

⁷⁴ See Eisner, *supra* note 63, at 983.

⁷⁵ See *id.* at 983 n.40 (noting that "[m]any third-party and independent candidates run not to win, but to draw attention to the single issue for which their candidacies stand"). Under a proportional representation system, minority and third parties that are too small to surpass the threshold of representation will also be relegated to the limited, though important, role of inducing major-party responsiveness to critical,

Under a proportional representation system, with its lowered threshold for election, minority and alternative parties would be able to attain representation and advocate their innovative policies in the House of Representatives themselves. Speaking directly through their representatives, third parties would avoid the dilution of their ideas that inevitably occurs when policies are filtered into major-party programs.⁷⁶ Although the representatives elected by minority and third parties would still be too few in number to constitute a majority and to enact their policies unilaterally, they may form coalitions with other parties and thereby determine policy. Although some dilution of the purity of third-party policies may still occur, at least the third party would be privy to political decisionmaking and could condition its compromises in one area on some form of political concession in another.

While it is not possible for every third party to be a part of the majority coalition on every issue, the variability of coalitions assures that there will not be any permanent policymaking winners or losers. Unlike the current system in which the majority party controls most decisionmaking, parties under proportional representation must rule by consensus.⁷⁷ Large parties will be forced to consider the perspective of smaller parties if they wish to garner the support necessary to construct a majority. Because every issue carries with it the opportunity for a new coalition, competition among parties will be constant, exchange vigorous, and debate robust—the essential ingredients of a vital representative government.⁷⁸

3. Increasing Legitimacy

An electoral system is legitimate in a republican form of government when the decisions of its legislative body derive solidly from the consent of the governed.⁷⁹ Because its decisions involve

neglected issues.

⁷⁶ See *id.* at 986 (noting that the majority party often adopts the third party's policy "not out of an altruistic desire to represent minority viewpoints," but rather as a means of preventing deterioration of the majority party's support).

⁷⁷ This proposition presumes that the expected proliferation of third-party representation under proportional representation will make it difficult for any one party to attain a majority in the legislative body.

⁷⁸ See DIXON, *supra* note 10, at 35-57 (arguing that pluralism is the catalyst for true democracy).

⁷⁹ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating that governments derive "their just powers from the consent of the governed").

the distribution of public benefits—the goods, services, and opportunities at the disposal of government—the policymaking body should contain representation from as many of the diverse segments of the population as possible.⁸⁰ The current system, however, underrepresents the minority in the legislative body.⁸¹ Instead of reflecting the population as a whole, the legislature mirrors only part of it. Its decisions, therefore, are made by “a majority of the majority, who may be, and often are, but a minority of the whole.”⁸²

A system based on proportional representation awards representation in relation to a group's share of the total vote, thereby minimizing underrepresentation of minorities. The resulting diversity of representation will signal to constituents that the system is legitimate and will promote a “greater readiness to acquiesce in governmental decisions.”⁸³ Because individuals and groups are better able to elect representatives of their choice under a proportional representation system, the incentive to vote will be increased,⁸⁴ legislative actions will derive more solidly from consent, and the House of Representatives will command voter confidence.⁸⁵

⁸⁰ See generally Milton D. Morris, *Black Electoral Participation and the Distribution of Public Benefits*, in MINORITY VOTE DILUTION, *supra* note 7, at 271, 271 (claiming that groups incapable of influencing government have been neglected and noting the historical experience of African-Americans in being served “last and least” in the area of benefit distribution).

⁸¹ See Cain, *supra* note 20, at 263 (noting the majoritarian bias inherent in the current system which exaggerates the majority's share of seats and increases the wasted votes of the minority).

⁸² MILL, *supra* note 2, at 104; see also Lani Guinier, *Voting Rights and Democratic Theory: Where Do We Go From Here?*, in CONTROVERSIES IN MINORITY VOTING, *supra* note 20, at 283, 288 (criticizing the hegemony of a legislative majority “that derives its legitimacy from the consent of a simple, racially homogenous majority” of the electorate). But see Schuck, *supra* note 15, at 1341 (arguing that the constitutional institutional arrangements of separation of powers, checks and balances, executive veto, and judicial review would sufficiently frustrate such a monopoly of the majority, without recognizing that although these structures might check the growth of congressional majority influence vis-à-vis the other branches, they fail to provide minority influence in Congress).

⁸³ Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 180 (1989).

⁸⁴ Low-Beer notes that the “introduction of [proportional representation] in Switzerland in 1919 led to a doubling of voter turnout in previously ‘safe’ cantons.” Low-Beer, *supra* note 4, at 183 n.91 (quoting SEYMOUR M. LIPSET, *THE FIRST NEW NATION* 310 (1963)).

⁸⁵ See Wright, *supra* note 41, at 127.

4. Liberating Forced Constituencies

*Forcing "persons who are not associated by any pervading harmony of mind or feeling, but are gathered together by the mere accident of living in the same district or town . . . always to agree in the choice of their representatives [is] inconsistent with the free exercise of individual will."*⁸⁶

Under the current system, a significant number of individuals can be caught in a constituency with a representative whom they do not support.⁸⁷ This is true because constituencies are currently formed by law⁸⁸ based on the geography of single-member districts rather than by the electorate themselves based on shared interests. Because membership in a constituency is prescribed by residence, Republicans in an industrial city, for example, will consistently be represented by Democrats, despite their opposing values; this is a weak representational right. The Supreme Court, however, recently defended "compulsory constituencies"⁸⁹ on two grounds: first, voters for both the losing and winning candidates have an equal opportunity to influence the elected representatives; and second, voters for the losing candidate can be represented by representatives from other districts who share their views.⁹⁰

These justifications are unconvincing. It is unrealistic to assume that a minority within a district will receive any significant representation of its interests from a representative elected with an antithetical mandate.⁹¹ Similarly, virtual representation, where the minority must be represented by another district's representative, is not an adequate substitute for the actual representation of one's chosen representative.⁹² In some cases, the difficulty a given minority

⁸⁶ Low-Beer, *supra* note 4, at 176 n.63 (quoting THOMAS HARE, A TREATISE ON THE ELECTION OF REPRESENTATIVES, PARLIAMENTARY AND MUNICIPAL 19 (4th rev. ed. 1873)).

⁸⁷ See *supra* note 53 (criticizing mobility as a solution to the problem of fixed constituencies).

⁸⁸ See 2 U.S.C. § 2c (1988) (requiring single-member districts for congressional elections).

⁸⁹ BAGEHOT, *supra* note 7, at 164 (defining "compulsory constituencies" as constituencies created by the law).

⁹⁰ See *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (White, J., plurality opinion) (noting that "[a]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district").

⁹¹ See *id.* at 170 (Powell, J., concurring in part and dissenting in part) (arguing that "it defies political reality to suppose that members of a losing party have as much political influence over state government as do members of the victorious party").

⁹² See, e.g., *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977) (justifying an

faces in electing representatives may be so extreme that there is no representative available in any district, thus precluding even the lessened input of virtual representation.

Liberated from fixed territorial constituencies, voters in a proportional representation system may define their own constituencies based on self-identified communities of interest. With the new freedom of "voluntary constituencies,"⁹³ however, comes a new responsibility. For example, Republicans in an industrial city would have to exhibit the initiative and organization necessary to identify people with similar interests outside of the city, form a group, design a platform, and nominate a candidate representative of their views. These new tasks will be well worth the effort, however: freed from the constraints of the former compulsory constituency, the voluntary constituency would be capable of returning a representative.⁹⁴

5. Changing the Face of Candidates and Campaigning

*[Proportional representation] with the single transferable vote . . . can transform our legislative elections from contests to win all the spoils of victory for one group and keep other people out to invitations to all citizens to come in and take part in a great cooperative democracy.*⁹⁵

One result of an STV proportional representation system would be the nomination and election of more minority and female candidates to the House of Representatives.⁹⁶ Under the current

affirmative racial gerrymander which consequently deprived the Hasidim of their ability to elect a representative by suggesting that the distinctive interests of the Hasidim may be "virtually represented" by white representatives in other districts); see also Guinier, *supra* note 67, at 428-29 (criticizing the virtual representation of African-Americans by sympathetic white officials and noting that because "blacks, as a poor and historically oppressed group, are in greater need of government sponsored programs and solicitude which whites often resent . . . [a] white official will not dependably consider black interests if [she] must also accommodate the more dominant views of white constituents").

⁹³ BAGEHOT, *supra* note 7, at 164-65 (defining "voluntary constituencies" as constituencies that the law allows electors to create themselves).

⁹⁴ See *id.* at 165 (claiming that although London was represented exclusively by Whigs, under the voluntary system Tories can combine, create a constituency, and return a member); see also Wright, *supra* note 41, at 127, 134 (claiming that proportional representation permits representation for all voters, while single-member district, plurality rule allows representation only of the majority).

⁹⁵ Hallett, *supra* note 38, at 125.

⁹⁶ See Membership Letter, *supra* note 4, at 4 (noting that in 1989 the New York City Community School Boards using STV proportional representation consisted of 54% women and 47% racial and ethnic minorities). See also AUSTRALIA AT THE POLLS 128-29 (Howard R. Penniman ed., 1983) (noting that women's representation in the

system, one seat is available for election per geographic district. With only one seat available, parties limit the nomination of candidates to an individual who is most assured of winning. Minorities and women are risky nominees in comparison to the history of electoral success demonstrated by white males.⁹⁷ In 1991, of the 535 members of Congress, white males numbered 465; only thirty were women, twenty-five African-American, ten Hispanic, and five Asian-American.⁹⁸

STV proportional representation systems, however, present at-large contests in which several seats are available to which parties may nominate multiple candidates. In Massachusetts, for instance, with ten representatives,⁹⁹ a party may nominate ten or more candidates.¹⁰⁰ With several candidates to select, it is in a party's best interest to choose women and minorities in order to appeal broadly to voters throughout the state.¹⁰¹ Scholars have found, for instance, that the presence of minority candidates increases minority voter turnout.¹⁰² No longer presented with the impossible task of finding a single candidate within each district who means

Australian Senate, which uses STV proportional representation, is significantly greater than women's representation in the Australian House of Representatives, which uses a single-member-district preferential system).

⁹⁷ See GUIDE TO CONGRESS, *supra* note 19, at 699 (noting that "Congress has been dominated since its inception by middle-aged white men with backgrounds in law or business").

⁹⁸ See *id.* (noting that the number of Hispanic representatives in Congress would be four times greater if it was in proportion to the Hispanic population, which totalled 9% of the national population according to the 1990 census).

⁹⁹ See *id.* at 741.

¹⁰⁰ Unlike cumulative voting, a party need not worry about nominating too many candidates and thereby splitting its vote among them. As long as party members make their sequential votes for candidates within the party, the votes of a party candidate who is unable to surpass the threshold amount needed for election will be transferred to help elect another candidate within the party. In this respect, party candidates will be competing amongst themselves. See *infra* notes 109-10 and accompanying text.

¹⁰¹ See Lakeman, *supra* note 36, at 50 (claiming that the difference between proportional representation and single-member district, plurality rule systems explains why countries with the latter system, such as Great Britain and the United States, usually have a much smaller percentage of female representatives than countries with the former); see also Wilma Rule & Pippa Norris, *Anglo and Minority Women's Underrepresentation in Congress: Is the Electoral System the Culprit?*, in UNITED STATES ELECTORAL SYSTEMS, *supra* note 32, at 41, 44 (explaining that "[g]enerally, the more representatives per district, the more women are nominated and elected" and noting that parliaments in Denmark, Norway, Finland, and Sweden, with seven to 13 members per district, are about one-third women).

¹⁰² See Guinier, *supra* note 67, at 423 n.134 (citing Bill Montague, *The Voting Rights Act Today*, A.B.A. J., Aug. 1988, at 52, 56).

all things to all people, a party under STV will nominate a diverse group of candidates who together can represent something for everyone.

Voters, in turn, may find expression of their true preferences in the wide array of candidates possible under STV.¹⁰³ Unlike single-member-district systems in which voters have at most two to three viable candidates and policies from which to choose, STV presents an opportunity for discrimination among a range of parties and within each party's group of candidates; given the predicted increase in the number and diversity of candidates in STV's at-large election format, voters "may choose among tendencies, approaches, or emphases within [a] party."¹⁰⁴ To give one example, a fiscally conservative, anti-abortion, female, Republican voter located in New York's Fourteenth Congressional district during the 1992 election only had one candidate from which to choose: Bill Green, a pro-choice, pro-environment liberal Republican.¹⁰⁵ Under STV, however, she would be likely to find a Republican candidate who possesses the specific qualifications reflected in her political profile. Out of more than thirty-one Republican candidates running for the thirty-one House of Representatives seats in New York,¹⁰⁶ it would be highly probable that a fiscally conservative, anti-abortion, female, Republican candidate would exist.

Whereas plurality rule systems tend to divide people, STV proportional representation is viewed as "a healing and unifying force."¹⁰⁷ The winner-take-all, single-member-district aspects of the current system lead to extremely adversarial politics. In each district, where only one seat is available, a candidate must endeavor to "kill" her opponents. Rather than a constructive debate of the issues, campaigning becomes personal, often deteriorating into name-calling contests.

While it makes sense to try to eliminate the opposition in a single-member-district contest where the competition is easily definable and limited to one or two rivals, personal disparagement

¹⁰³ See Richard S. Katz, *The Single Transferable Vote and Proportional Representation*, in CHOOSING AN ELECTORAL SYSTEM, *supra* note 1, at 135, 144.

¹⁰⁴ *Id.* at 142.

¹⁰⁵ See Joe Calderone, *Green: How Green?*, NEWSDAY, Oct. 21, 1992, at 25; *Pro-Choice Republicans Announce Plans for Republican Convention*, FEDERAL NEWS SERV., July 28, 1992, available in LEXIS, Nexis Library, FedNew file.

¹⁰⁶ See GUIDE TO CONGRESS, *supra* note 19, at 741.

¹⁰⁷ Lakeman, *supra* note 36, at 51 (quoting a member of the religious minority in Ireland).

in a multiple-seat contest is ineffective. In STV proportional representation, every candidate running for one of a state's several seats is an opponent of every other candidate. In an election in Pennsylvania with its twenty-one seats in the House of Representatives,¹⁰⁸ an individual candidate would have sixty-two opponents, assuming conservatively that each of the two major parties and one third party would nominate one candidate per seat. This constitutes too great a number to research for blemishes in personal histories. With so many adversaries, a candidate's energies and resources would be better spent strengthening and advancing her platform than attacking others.

The structure of STV may also serve to change incentives.¹⁰⁹ Because second and third choice votes may be crucial to a candidate's election, a candidate will be wary not to alienate voters who rank her second or third by disparaging their first choice. If a voter prefers candidate X first and candidate Y second, candidate Y may jeopardize her position with such a voter by disparaging candidate X, the voter's first choice. Because voters' preferred candidates will vary, it is in a candidate's best interest not to disparage anyone, allowing positive campaigning to prevail.¹¹⁰

6. Eliminating "Divide and Conquer" Strategies and the Need for Primaries

Single-transferable-vote proportional representation also avoids the "divide and conquer" problem inherent in the current system.¹¹¹ In a largely minority district, two strong minority candidates can divide the ethnic vote, permitting a non-minority to win with much less than the combined minority vote.¹¹² Under STV proportional representation, a minority is not deprived of its proportional voting strength when more candidates than are capable

¹⁰⁸ See GUIDE TO CONGRESS, *supra* note 19, at 741.

¹⁰⁹ See Lakeman, *supra* note 36, at 49 (noting that where a candidate only strives to take her fair share of several seats, hostility is likely to be greatly diminished).

¹¹⁰ See Anderson, *supra* note 57, at 25 (surmising that in preferential voting systems, "[b]ecause candidates may need votes transferred from eliminated candidates, they will not want to alienate other candidates' supporters").

¹¹¹ See Hallett, *supra* note 38, at 123-24 (describing the "divide and conquer" problem as "the defeat of candidates who seem logical winners because of competition for their constituencies").

¹¹² See *id.* at 124 (claiming that well-qualified candidates often refrain from running to avoid becoming "spoilers").

of being elected divide the minority vote.¹¹³ As long as minority voters designate other minority candidates as their second and third choices, votes not needed to elect their preferred first choice are transferred to other sequential minority choices. This process minimizes the risk to a party or minority of splitting its vote among a number of candidates.

Because the transferable vote will select the candidates to represent each party, party primaries themselves become unnecessary.¹¹⁴ Individuals of a certain party seeking a place on the ballot would instead be nominated by public petition. While party organizations could still indicate which candidates they favor by placing the party emblem next to that candidate's name on the ballot, they would no longer be able to screen candidates and present only those perceived to be the safest.¹¹⁵ Eliminating primaries would give voters effective control over the nomination of candidates,¹¹⁶ and elections would truly exist for the electors.

C. Common Criticisms of Proportional Representation

Of the common criticisms of the STV form of proportional representation, many are either tangential or easily dismissed. Some opponents, for instance, fear that political campaigns will become more expensive under STV as candidates must pursue votes throughout the state as opposed to being restricted to a single-member district.¹¹⁷ The at-large format, however, would present a larger area for fundraising and more voters with which to spread the costs. Minorities—valuing the increased opportunity to receive representation that an STV system presents—may be willing to contribute more. Campaign finance reform could also be sought as

¹¹³ See *id.* at 123-24.

¹¹⁴ See *id.* at 121-22 (referring to the elimination of primaries as a "great advantage[']"). Party primaries serve two main purposes: to prevent a party from splitting its vote among several candidates in the general election and to allow the membership of a party to choose its representative. The transferable vote would address only the first of these concerns. Parties may still want to hold primaries to permit their members—and not the general electorate, as would be the case under STV—to choose their candidates.

¹¹⁵ See Larry Rockefeller, *Primaries are a Protection Racket*, N.Y. TIMES, Sept. 15, 1992, at A27 (claiming that party primaries in New York are a "[p]rotection [r]acket . . . rigged to protect incumbents and prevent choice").

¹¹⁶ Moreover, voters would no longer be excluded from choosing a party's candidate by virtue of registration as an independent or a member of the opposite party.

¹¹⁷ See Richard H. Pildes, *Gimme Five*, NEW REPUBLIC, Mar. 1, 1993, at 16, 17.

a possible solution. Similarly, there is a fear of the unwieldiness of too many candidates or parties.¹¹⁸ Yet, this argument "betrays a serious lack of faith in democracy itself," as the voters, and not the electoral system, should determine how many choices are too unwieldy.¹¹⁹ The two criticisms traditionally aimed at proportional systems, however, are not so easily dismissed and require thorough examination.

1. Lack of a Clear Benchmark Defining Constituencies and Unresponsiveness to Local Claims

In allowing representation based on interest, proportional representation eliminates the use of geographic districts as a nexus between representative and constituency.¹²⁰ Some claim that the absence of such a bright-line demarcation deprives representatives in a proportional representation system of any readily ascertainable constituency.¹²¹ Critics argue that because representatives are unable to identify easily their constituencies, they will only have a mandate for what is outlined in their platforms; in deciding issues outside the platforms, representatives will be unable to consult their constituents for support.¹²²

A closer look, however, reveals that these arguments must fail. If minorities espousing distinctive views organize statewide to form a party and elect a representative, that party would assuredly have the incentive to monitor its representative's activities and keep her apprised of its views. Although a proportional representation system contains no outward, physical determinant of constituency, it may provide something equally as clear—cohesive constituents motivated by their collectively identified interests to enforce

¹¹⁸ See Cossolotto, *supra* note 62, at 22.

¹¹⁹ *Id.* But see *supra* note 59 (discussing the unmanageability of at-large elections in states such as Texas, New York, and California with more than 30 representatives).

¹²⁰ See Arend Lijphart, *Comparative Perspectives on Fair Representation: The Plurality-Majority Rule, Geographical Districting, and Alternative Electoral Arrangements*, 9 POL'Y STUD. J. 899, 912 (1981) (distinguishing the "clear link" between politician and polity in the plurality rule, single-member-district system from the comparatively weak link in the proportional representation system, especially where its electoral districts are large).

¹²¹ See Schuck, *supra* note 15, at 1371. The geographically based district is also a blunt instrument, however, creating constituencies which contain individuals who voted for the representative as well as those who did not.

¹²² See *id.* at 1371-72 (claiming that representatives in a proportional representation system would be relatively unresponsive to local constituents, individual voters' needs, and geographically localized claims).

representational accountability.¹²³ As an additional response to this criticism, lack of distinct geographic boundaries will encourage constituency groups to endow their candidates with a thorough and comprehensive platform to avoid future questions of an uncertain mandate.¹²⁴ This criticism also relies on a narrow and misguided view of the role of representatives as simply proxy holders for constituents' interests. Representatives, however, are also elected to make decisions using their independent judgment. Whether or not a candidate is re-elected determines the accuracy or error of her decisionmaking.

Because representatives are not tied to a specific district, it is also suggested that local interests will be neglected.¹²⁵ While it is true that certain localities have very distinctive interests requiring individual representation,¹²⁶ voters in these areas may still form their own local party to elect a representative who will protect those interests. Voters may also look to their senators for the satisfaction of local interests, since the Senate's role, in contrast to the House of Representatives, is that of representing the states.¹²⁷ The only

¹²³ See Guinier, *supra* note 72, at 1473 ("[I]nterest representation generates incentives for community-based organizations to play a more active role in mobilizing the electorate and monitoring the legislature . . .").

¹²⁴ A concern related to that of the uncertain mandate is the question of the practicalities of constituency service under proportional representation. Absent the geographic boundaries of single-member districts, how will a representative know if the individual requesting help is her constituent? What is to prevent certain representatives from being overloaded by nonconstituents?

One response is that a representative can generally presume that a constituent will approach the candidate for whom she voted for service. Whereas currently up to 49% or more of a constituency may be forced to seek assistance from a representative for whom it did not vote, under proportional representation constituents can elect representatives in proportion to their numbers. Therefore, given this opportunity, a constituent most likely will approach the representative she supported for assistance rather than another representative whom she did not support.

The problem of some representatives receiving more of the constituency service burden than others already exists under the current system. See GUIDE TO CONGRESS, *supra* note 19, at 489 (noting that senior legislators "receive proportionately more [constituent] casework than do junior members"). If under proportional representation certain representatives receive a disproportionate amount of the constituency service requests, the representatives of a state could set up a lottery system in which every other phone call gets routed to a different representative.

¹²⁵ See Schuck, *supra* note 15, at 1371-72.

¹²⁶ See *id.*

¹²⁷ See GUIDE TO CONGRESS, *supra* note 19, at 18, 738 (distinguishing between senators and representatives by noting that "[r]epresentatives are not the property of the states, as are the senators, but rather belong to the people who happen to reside within the boundaries of those states"); *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964) (explaining that the Constitutional Convention agreed that the House of Representa-

difference under proportional representation is that in those areas where geography is *not* a proxy for interest and voter interest is characterized instead by voluntary associations such as political affiliations and alliances, voters may form constituencies around those shared interests. These voters are thus also empowered to elect a representative, rather than being prevented from doing so by residence in a district where the majority does not share their views.

2. Proportionality Leads to Instability

Proportionality and stability are often viewed as competing values which are mutually exclusive.¹²⁸ many commentators claim that an electoral system is capable of either representing a wide cross-section of the population or promoting effective government, but not both.¹²⁹ Critics acknowledge that proportional representation can create "a consultative assembly which expresses all of a country's nuances," but claim that the presence of so many parties makes such a system inherently less stable.¹³⁰ The absence of one party large enough to constitute a permanent governing majority creates a need for coalitions, which critics view as tenuous groupings of disparate and uncomfortably allied parties. Multi-party Congresses rely on coalitions to constitute the majority necessary to pass resolutions and in a parliamentary system to determine who will be the executive. Plurality rule, some argue, forms a stable and strong government through its two-party system, even if the two parties do limit the representation of more diverse views.¹³¹ An examination of these arguments reveals that they are unjustified in both cases, as the stability of plurality rule is questionable and a proportional representation system is capable of achieving both stability and proportionality.¹³²

tives "was to represent the people as individuals"); *see also* Kent Jenkins Jr., *CIA Cancels its Decisive W. Va. Move*, WASH. POST, Apr. 1, 1992, at A1 (noting the unsuccessful effort by Senator Robert Byrd of West Virginia to move two CIA facilities to his home state, which would have created thousands of jobs).

¹²⁸ *See* Lijphart & Grofman, *supra* note 18, at 4; *see also* Cain, *supra* note 20, at 276 (claiming that the choice between more or less proportional systems represents a tradeoff between the competing democratic concerns of legitimacy, stability, and efficiency).

¹²⁹ *See, e.g.*, CHARLES E. MERRIAM, *SYSTEMATIC POLITICS* 149 (1945) (arguing that representative governments are imperfect but still constitute the most effective balance between the need for unified state policies and the existence of multiple voices in a community).

¹³⁰ Lijphart & Grofman, *supra* note 18, at 36.

¹³¹ *See id.*

¹³² *See* Beale, *supra* note 4, at E2 (noting that the governments of Germany and

Proponents credit the stability of the current plurality rule system to its preservation and facilitation of two-party politics.¹³³ Because there are only two significant parties, one will always be capable of establishing a clear governing majority in the legislative body. This leads to stability because the majority party is in consistent control of, and may be held accountable for, all issues that break down along party lines. "A two-party system operates to produce such coordinate goals as a clear governing majority, governmental stability, and pin-pointing of governing responsibility."¹³⁴

This stability may be a false one, however, as it is achieved and maintained at the expense of "major losses of voting power for significant numbers of the electorate."¹³⁵ Consistently submerged in a single-member district and unable to voice its grievances through the traditional channels of the political process, a cohesive minority may resort to less desirable forms of expression.¹³⁶ Finding the majority unfairly constituted, minority and alternative groups may not defer to its commands, resorting to civil disobedience and other means of expressing discontent.

In his dissent in *City of Mobile v. Bolden*, Justice Marshall warned that the Court "cannot expect the victims of discrimination to respect political channels of seeking redress" if they are unable to receive adequate representation due to the Court's stringent discriminatory intent standard of proof for a claim of minority vote dilution.¹³⁷ Justice Marshall also predicted that the "superficial tranquility" created by the *Bolden* decision would be "short-lived."¹³⁸ The recent and historical rioting in underrepresented American communities may confirm Justice Marshall's suspicions

Scandinavia, using proportional representation systems, are considered "the most stable in the world").

¹³³ See *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring) ("The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change.").

¹³⁴ *Congressional Anti-Gerrymandering Act of 1979: Hearings Before the Senate Committee on Governmental Affairs on S.596*, 96th Cong., 1st Sess. 223 (1979) (statement of Professor Robert G. Dixon, Jr., Washington University School of Law).

¹³⁵ DIXON, *supra* note 10, at 49.

¹³⁶ See Eisner, *supra* note 63, at 986-87 (noting the integral role of third parties in encouraging the electoral participation of alienated voters, and thereby helping to insure against "less acceptable forms of protest, such as civil disobedience or withdrawal from the political process").

¹³⁷ 446 U.S. 55, 141 (1980).

¹³⁸ *Id.*

and challenge the notion that the current electoral system is conducive to true stability.

The Kerner Commission, created by President Johnson to study the perceptions and attitudes of African-Americans and whites in fifteen major American cities following the racial disorder in Newark, Detroit, Cincinnati, Boston, and Milwaukee during the summer of 1967, reported a lack of political power in the African-American community as a primary cause of the riots.¹³⁹ The riots, however diffuse and ill-focused, were described as acts of political will by African-Americans "confronted with a political system unresponsive to their demands [and] controlled by white people."¹⁴⁰ As a possible remedial measure to deter future rioting, the Commission advised that if African-Americans are given a reason to participate in routine politics, "and if the system makes it worthwhile for them to direct their energies into legitimate channels, there is no reason to think that they will reject the opportunity."¹⁴¹ On the twenty-fifth anniversary of the 1968 Kerner Commission study, however, a recent report by the Milton S. Eisenhower Foundation finds that the conclusions of the Kerner Commission are even more relevant today as many of the social ills underlying the riots in the 1960s are those that motivated the riots that reverberated throughout major American cities in April of 1992.¹⁴²

Although proportional representation encourages the representation of minority and third parties in proportion to their vote share and thereby provides a channel for discontent, critics argue it is unstable because no one party will hold enough seats to comprise a legislative majority, and coalitions will have to be formed.¹⁴³ Coalition government, by virtue of its tenuous composition of many uncomfortably allied parties, is considered inherently unstable. Coalitions, however, pose a significant threat to government stability only in parliamentary systems, "where the executive is dependent on

¹³⁹ NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, SUPPLEMENTAL STUDIES FOR THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 5, 149 (1968).

¹⁴⁰ *Id.* at 149.

¹⁴¹ *Id.*

¹⁴² See Ronald J. Ostrow, *New Report Echoes "Two Societies" Warning of 1968 Kerner Commission*, L.A. TIMES, Feb. 28, 1993, at A23; see also Steve Waldman, *Support This Plan*, HOUSTON CHRON., Feb. 24, 1993, at C11 (describing the riots in response to the Rodney King verdict as "violent eruptions rooted in frustration and despair" by people with no hope or opportunity, and arguing such scenes will become commonplace unless society responds in a meaningful way).

¹⁴³ See Levinson, *supra* note 4, at 272.

a legislative vote of confidence to act."¹⁴⁴ In the United States, where the executive and legislative branches of government are independent, the executive does not rely on the support of a stable legislative coalition for its power. "Legislative coalitions can shift as the legislature votes on different bills, while the executive remains unchanged."¹⁴⁵ Furthermore, because the Senate will continue to utilize the current electoral system which encourages two-party politics, only the House of Representatives under proportional representation with its proliferation of third parties can be expected to be a hotbed of coalitions.

Critics also claim that though proportional representation provides small and large parties with a proportionate share of legislative seats, it fails to provide a proportionate share of governmental power. A small party capable of providing the key votes necessary to form a majority coalition may exercise power far out of proportion to its number of seats.¹⁴⁶ On the opposite extreme, unpopular minority parties, with whom no one will ally, are divested of practical power completely.¹⁴⁷ However, because legislative

¹⁴⁴ Lijphart & Grofman, *supra* note 18, at 6 (citing Maurice Duverger); *see also* Peter J. Taylor, *The Case for Proportional Tenure: A Defense of the British Electoral System*, in CHOOSING AN ELECTORAL SYSTEM, *supra* note 1, at 53, 57 (noting that in Holland, Belgium, and Ireland, the government is shaped less by the election than by post-election party maneuvering, deal-making, and coalition-building, all of which take place independent of voter control).

¹⁴⁵ Low-Beer, *supra* note 4, at 185 n.100. In parliamentary systems, however, a shift in the legislative coalition also causes a shift in the executive. *See also* Dave Barry, *Dave Barry's Year-End Review: A Humorous Slice of '92*, DALLAS MORNING NEWS, Jan. 1, 1993, at 1C (noting the rapidity with which control can be overturned in parliamentary systems: "April 9—Great Britain elects an entire new government after a campaign that took less time, total, than U.S. politicians will need, later in the year, to agree on a debate format").

¹⁴⁶ *See* Levinson, *supra* note 4, at 272 (noting that in Israel small religious parties exercise a de facto veto over the national government because they can provide "the key one or two votes necessary to give one voting bloc a majority of the 120 Knesset seats").

¹⁴⁷ *See id.* Characterizing the votes of supporters of parties excluded from the governing coalition as essentially wasted votes, one commentator claims that proportional representation does not eliminate vote wasting, it just alters the time and form; although the number of wasted votes at the level of electing a representative is minimized, these same votes at the legislative level, as embodied by their representative, are effectively wasted if the representative is unable to become part of the governing majority. *See* Schuck, *supra* note 15, at 1371.

It is impossible, however, to eliminate wasted votes at the legislative level. Except on limited issues requiring a supermajority, the House votes by majority rule. *See* GUIDE TO CONGRESS, *supra* note 19, at 428. The issues which are decided pose yes/no resolutions, and the results are incapable of being apportioned proportionately. Whether or not a particular bill should be passed is a dichotomous decision, and 49%

coalitions are constantly shifting depending upon the issue, a party excluded from one coalition is likely to be included as part of another. The flexibility of coalitions can thus counterbalance disproportional power and prevent "potentially destabilizing situations in which there are permanent policymaking winners and losers."¹⁴⁸ It is unlikely, for instance, that the parties aligned to form a majority coalition on the pro-choice issue will be the same parties constituting a coalition to pass the President's budget proposal.

Furthermore, the possibility that smaller groups may be able to wield disproportionate legislative influence is not limited to proportional representation systems but is endemic of any system utilizing coalitions, including our present system. Although Congress is composed primarily of the two major parties, these parties often divide into coalitions depending on the issue under consideration.¹⁴⁹ The conservative coalition, a group of Republicans and Southern Democrats founded in the 1930s to weaken President Roosevelt's New Deal proposals, continues to function on major economic or social issues to block liberal legislation.¹⁵⁰ Similarly, a small group of pro-choice Republicans may be crucial in providing Democrats with the majority necessary to pass the Freedom of Choice Act and may thereby exert influence beyond their percentage in Congress. The current system frequently relies on coalition building to enact legislation; the House of Representatives under proportional representation would do so as well, while incorporating more voices and expanding the debate.

II. IMPLEMENTING THE CHANGE TO PROPORTIONAL REPRESENTATION

A. *The Court as a Countermajoritarian Institution*

Two of the major constitutional roles of the Supreme Court are to protect minorities against majorities and to facilitate minority representation.¹⁵¹ Footnote four of *United States v. Carolene*

of the representatives' votes necessarily will be wasted.

¹⁴⁸ Cain, *supra* note 20, at 270.

¹⁴⁹ See *id.* at 272 (claiming that unless one group is so dominant that it does not require coalitional partners, the structure of politics creates pressure for coalitional strategies).

¹⁵⁰ See GUIDE TO CONGRESS, *supra* note 19, at 535-36.

¹⁵¹ See JOHN H. ELY, DEMOCRACY AND DISTRUST 135-79 (1980).

*Products Co.*¹⁵² suggests the use of "searching judicial inquiry" when there has been prejudice against discrete and insular minorities, curtailing the operation of "those political processes ordinarily to be relied upon to protect minorities."¹⁵³ Fearing the abuse of such a broad mandate, constitutional scholar John Ely devised a representation-reinforcing theory of judicial review. Ely insists that the Court "can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack."¹⁵⁴ He argues that the judiciary may intervene only to unblock stoppages in the political process that threaten the legitimacy of the political process itself.¹⁵⁵

Even under Ely's narrower standard of review, the Supreme Court should review the majoritarian bias of the current electoral system with strict scrutiny. The consistent underrepresentation of the minority in single-member districts due to the winner-take-all system is a quintessential stoppage in the political process.¹⁵⁶ Because the minority in every district is unrepresented, the Court can no longer presume that the legislature fairly represents all the people, and it may intervene.¹⁵⁷ Though challenging an electoral system that has existed for over 200 years may seem extraordinary, the Court's voting rights jurisprudence arguably provides a basis for this Comment's claim that the current electoral system for the House of Representatives must be discarded.

The Supreme Court traditionally limits its review of voting rights challenges to issues of formal equality and declines to create substantive conceptions of political equality.¹⁵⁸ In its decisions in gerrymandering and minority vote-dilution cases, however, the Court has held that political and racial minorities have an equal protection right to an undiluted, equally powerful vote.¹⁵⁹ Be-

¹⁵² 304 U.S. 144 (1938).

¹⁵³ *Id.* at 153 n.4.

¹⁵⁴ ELY, *supra* note 151, at 181.

¹⁵⁵ *See id.* at 117.

¹⁵⁶ *See id.*; DIXON, *supra* note 10, at 56 (noting the tendency of the current system "to produce nonproportional and irrational relationships between the degree of party support in the electorate and the degree of actual party strength in the legislature").

¹⁵⁷ *Cf. Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 (1969) (stating that when a challenge to a statute is in effect a challenge to the basic assumption that the institutions of state government are structured so as to represent fairly all the people, "the assumption can no longer serve as the basis for presuming constitutionality").

¹⁵⁸ *See infra* notes 244-49 and accompanying text.

¹⁵⁹ *See Davis v. Bandemer*, 478 U.S. 109, 118-27 (1986) (holding that political gerrymandering is justiciable under the Equal Protection Clause); *White v. Regester*,

cause the majoritarian bias of the underlying electoral system makes it difficult for the Court to guarantee fully such a right, a change to an electoral system based on STV proportional representation, which allows the most effective use of the most votes, would seem to be required.

B. Addressing Claims of Judicial Activism

Critics claim that a proportional representation requirement would transform the Court into a "super-legislature."¹⁶⁰ Little "super-legislation" beyond the initial establishment of proportional representation, however, would be necessary.¹⁶¹ The one-time intrusion of a court-imposed requirement of proportional representation would be no more unmanageable than was the imposition of the one person, one vote standard twenty-nine years ago.¹⁶² Mak-

412 U.S. 755, 765-67 (1973) (holding that multimember district voting systems that deny racial minorities equal opportunity to participate in the political process violate the Equal Protection Clause and are therefore invalid); *see also* discussion *infra* part III.B.

¹⁶⁰ *See, e.g.,* City of Mobile v. Bolden, 446 U.S. 55, 123 (Marshall, J., dissenting); Low-Beer, *supra* note 4, at 184 (noting that proportional representation as a court-imposed remedy has been criticized as "too radical an intrusion into the province of the legislature"); Schuck, *supra* note 15, at 1377 (arguing that a change to proportional representation should not be made by the Court because it is neither a representative nor conventionally accountable institution).

Critics of judicial activism in the realm of electoral systems claim that reform should be sought through the legislature rather than the courts. Indeed, Article I, § 4 of the Constitution gives Congress the authority to prescribe the manner of elections. *See* U.S. CONST. art. I, § 4. It is unlikely, however, that members of Congress, who are overwhelmingly members of the two major parties, *see supra* note 49, would adopt a system of proportional representation that facilitates third party and minority representation and would therefore jeopardize their two-party monopoly. Obviously, congressional representatives would prefer to maintain an electoral system which preserves their incumbency. *See* ELY, *supra* note 151, at 117 (noting that "voting cases . . . involve rights . . . whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo").

¹⁶¹ *See* Levinson, *supra* note 4, at 270-71.

¹⁶² *See* Wesberry v. Sanders, 376 U.S. 1, 7-8 (1962) (holding that "the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's" (footnote omitted)); *see also* Reynolds v. Sims, 377 U.S. 533, 568 (1964) (holding that the Equal Protection Clause requires state legislatures to apportion themselves by population).

The Court adopted the one person, one vote standard to correct the injustices created by the prevalence of legislative districts of grossly divergent population size. If, for example, each district in a state elected one representative, and district A contained 700,000 people while district B contained only 100,000 people, the votes of district B residents would have seven times the weight of those in district A in

ing districts of equal population size a constitutional requirement, the Court's one person, one vote standard was perceived as revolutionary upon its pronouncement in 1964, "requir[ing] most states to amend their constitutions and virtually every state to reapportion."¹⁶³ By 1965, however, all states at a minimum had achieved partial compliance.¹⁶⁴ Today, the population equality principle is a publicly accepted part of the political system.¹⁶⁵ In time, proportional representation could also achieve such acceptance. Unlike the one person, one vote standard, however, which must be revisited decennially in the wake of a census, proportional representation need be implemented only once, as voters "redistrict" themselves at every election.¹⁶⁶

*C. Structural Electoral Change Under the Current Supreme Court:
An Unlikely Prospect*

Given the current composition of the Supreme Court, the prospects of a decision requiring the implementation of an STV proportional representation system are bleak. A tension in the voting rights jurisprudence of Justice White, the author of many of the Court's opinions in this area, provides some insight into the Court's apparent hostility to structural electoral change. In the area of minority vote dilution, Justice White's opinions suggest a strong commitment to ensuring minority voters an equal probability of influencing election decisions. Writing for the Court in *Whitcomb v. Chavis*,¹⁶⁷ for instance, Justice White limited the devaluation of minority groups' votes in multimember districts by holding that the validity of such districts is justiciable.¹⁶⁸

determining who will be the representative. Similarly, citizens of district A do not have a share of their representative equal to that of citizens of district B because district A residents would have seven times as many constituents with whom to compete for their representative's attention as residents in district B. Therefore, the one person, one vote standard requires that state legislative districting provide districts as equal in population size to other districts as is possible in order to promote equal legislative representation of all citizens of all places within the state.

¹⁶³ Low-Beer, *supra* note 4, at 184 n.96; see *Capital Is Split On Apportioning*, N.Y. TIMES, Mar. 28, 1962, at A1 (reporting that Senator Richard Russell of Georgia termed the one person, one vote standard "another major assault on our constitutional system").

¹⁶⁴ See Low-Beer, *supra* note 4, at 184 n.96 (citing DIXON, *supra* note 10, at 589-633).

¹⁶⁵ See Schuck, *supra* note 15, at 1327 n.19.

¹⁶⁶ See Pildes, *supra* note 117, at 16.

¹⁶⁷ 403 U.S. 124 (1971).

¹⁶⁸ See *id.* at 141-44. Although Justice White has been a strong advocate of

In the area of third-party ballot access, however, Justice White applied minimum scrutiny to restrictions to ballot access for minor parties, revealing his proclivity for the two-party system. In *Munro v. Socialist Workers Party*,¹⁶⁹ for example, Justice White upheld a Washington statute requiring minor-party candidates to garner one percent of all votes cast in the state's primary election as a prerequisite to having their name placed on the general election ballot.¹⁷⁰ The effect of this law was to exclude many minor-party candidates from appearing on the general election ballot. Although the state asserted that its interest was to avoid voter confusion, ballot overcrowding, and the presence of frivolous candidacies,¹⁷¹ the patronizing nature of these interests, which derive from the premise that voters are unable to comprehend multi-party contests, suggests that the self-interest of the state was the true motivation behind the measure. In his dissent, Justice Marshall opined that the purpose advanced by the state was "the impermissible one of protecting the major political parties from competition precisely when that competition would be most meaningful."¹⁷²

By providing strong protection for minorities in the minority vote dilution context but not in the area of third-party ballot access, Justice White's opinions manifest an incongruity that pervades the Court's voting rights jurisprudence: minorities have the right to an equally weighted vote, but only to the extent that result can be achieved within the confines of the current two-party electoral system. While acknowledging that the minority vote needs protection, the Court fails to recognize the impediments posed by the system itself.

The Supreme Court is thus unlikely to hold that STV proportional representation is constitutionally required. This does not, however, preclude the Court from finding that STV proportional representation is constitutionally permissible. During the 1992 elections, fourteen states approved voter-initiated ballot measures to limit the number of terms that senators and representatives can serve in Congress.¹⁷³ By petition, voters may also place ballot

justiciability of vote-dilution claims, he has been extremely parsimonious when it comes to finding such measures invalid. *See id.* at 144-63; *White v. Regester*, 412 U.S. 755, 761-64 (1973).

¹⁶⁹ 479 U.S. 189 (1986).

¹⁷⁰ *See id.* at 199.

¹⁷¹ *See id.* at 194-95.

¹⁷² *Id.* at 205 (Marshall, J., dissenting).

¹⁷³ *See Congress Would Be Wise to Listen to Perot Supporters, Says U.S. Term Limits*

measures directly before the electorate concerning the adoption of STV proportional representation within their respective states. The Cincinnati City Council, for instance, voted to put a proportional representation system on the ballot in May of 1993.¹⁷⁴ Should such initiatives be passed, the Court would be faced with the question of whether the Constitution permits (not requires) the states to establish their own electoral systems based on proportional representation. According to Article 1, Section 4 of the Constitution, allowing states to determine "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," the answer would appear to be yes.¹⁷⁵

Given the success of term limit initiatives during the 1992 elections, which enacted finite tenures for a quarter of the Senate and almost a third of the House of Representatives,¹⁷⁶ ballot measures may be a more realistic and practical way to initiate structural electoral change to proportional representation.¹⁷⁷ A constitutional requirement of proportional representation, however, would still be the ideal. Ballot measures are piecemeal reforms that may be overturned at every subsequent election. A constitutional right applies throughout the fifty states¹⁷⁸ and is reversible only by constitutional amendment or Supreme Court action defying stare decisis.

Executive Director, PR NEWswire, Mar. 2, 1993, available in LEXIS, Nexis Library, Omni File.

¹⁷⁴ See *Cincinnati to Vote on New Elections Method*, PLAIN DEALER, Feb. 23, 1993, at 5B.

¹⁷⁵ U.S. CONST. art. I, § 4; see *supra* note 15 and accompanying text (noting that the Constitution does not mandate any particular electoral system).

¹⁷⁶ See Robert Reinhold, *The 1992 Elections: The States—The Ballot Issues*, N.Y. TIMES, Nov. 4, 1992, at B7.

¹⁷⁷ The only foreseeable impediment to voter-initiated proportional representation is the congressional statute requiring single-member districts for congressional elections. See 2 U.S.C. § 2c (1988). This impediment could be substantial, however, given the presumption that congressional representatives are predisposed to the current electoral system which preserves their incumbency. See *supra* note 160.

¹⁷⁸ Although proportional representation is infeasible in the six states with only one representative, the Court could require a single-member-district preferential system of those states. See *supra* note 19.

III. FINDING A REQUIREMENT OF PROPORTIONAL REPRESENTATION IN THE SUPREME COURT JURISPRUDENCE: A LESSON IN READING BETWEEN THE LINES

Supreme Court jurisprudence in the voting rights area has been described by one scholar as "the present muddle in our legal theory of representation."¹⁷⁹ The majority of the doctrinal disarray stems, however, from the Court's bestowal of a substantive right to an undiluted vote on political and racial minorities without appreciating the constraints of the winner-take-all, plurality rule system. Despite the Court's efforts to achieve rough proportionality within single-member districts, only a constitutional requirement of an electoral system based on proportional representation could resolve the inconsistencies underlying the present case law.

The Supreme Court's reliance on a two-tiered standard in the apportionment and gerrymandering cases is based on an artificial distinction between individual and group rights. The Court's need for an artificial distinction reveals its inability to find judicially manageable standards for defining the parameters of the substantive political equality required by the Constitution. Moreover, the Court's misinterpretation of the concept has led it to overlook proportional representation as a potential standard. Ironically, however, the Court in the gerrymandering cases appears to suggest that the constitutional violation is the lack of a proportional election result. Although it does not specifically provide a baseline against which to measure whether the votes of the political minority have been unconstitutionally diluted, the Court seems to compare the group's current representation in the legislature to what it could have achieved under a proportional plan. Yet the Court tries to achieve this proportionality within the confines of the current system, without recognizing its limitations. The underlying proportionality the Court seeks is impeded by the current system and can only be achieved fully through a change to an electoral system based on the STV form of proportional representation.

¹⁷⁹ Levinson, *supra* note 4, at 261.

A. *The Artificial Distinction Between Individual and Group Rights:
Justifying Different Levels of Protection*

Contrasting the reapportionment cases with the gerrymandering and minority vote dilution cases reveals the Court's preference for majority rule at the expense of minority representation. Such almost binary opposition of the two values mirrors the characteristics of the winner-take-all electoral system itself, which places majority rule supremely over the minority who receives no representation. Because majority rule and minority representation cannot both be fulfilled within a winner-take-all, plurality system, the Court created a false distinction to establish a priority between the two.¹⁸⁰ The Court has held that the reapportionment cases involved an individual right, whereas the gerrymandering and racial vote dilution cases involved a group right. This two-tiered standard allowed the Court to justify its stronger protection of the majoritarian value underlying the reapportionment cases as compared to the minority representation value underlying the gerrymandering and minority vote dilution cases.

1. The Reapportionment Cases Involve an "Individual" Right:
Preserving Majority Rule by Imposing
a Minimal Burden of Proof

The most noted reapportionment case, *Reynolds v. Sims*,¹⁸¹ established the right to an equally weighted vote as an individual right.¹⁸² But *Reynolds* also contained broad language suggesting that the right to fair and effective representation extended to everyone, including groups such as minorities.¹⁸³ Because of the

¹⁸⁰ See Low-Beer, *supra* note 4, at 175.

¹⁸¹ 377 U.S. 533 (1964).

¹⁸² See *id.* at 561 (describing the right to an equally weighted vote as "individual and personal in nature").

¹⁸³ For example, the Court stated that

each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. . . . Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature

[T]he achieving of fair and effective representation for all citizens is . . . the basic aim of legislative apportionment

Id. at 565-66. An individual can be claimed to have "an equally effective voice" in determining election outcomes only to the extent that the group to which she belongs is afforded the same opportunity to elect as other groups. See *infra* note 191 and

uncomfortable coexistence of the principle of majority rule and fair and effective representation for minorities, *Reynolds'* progeny ignored the language implicating a group right to minority representation and focused instead only on the individual right to majoritarian rule.¹⁸⁴

a. *Kirkpatrick v. Preisler*

In *Kirkpatrick v. Preisler*,¹⁸⁵ Justice Brennan interpreted the requirement of *Wesberry v. Sanders*, that districts be "as nearly as practicable"¹⁸⁶ of equal population, to mean that districts must achieve virtually exact "mathematical equality."¹⁸⁷ Such strict application of the equal population principle illustrates that the only right sought to be protected by the Court was an individual one. The personal value of the right to an equally weighted vote is diminished by permitting any deviations from equal population; a voter in an overpopulated district will have a "smaller share" of her representative than a voter in an underpopulated district, in which fewer constituents will compete for the representative's attention. This standard is effective only if, as Justice Brennan seems to suggest,¹⁸⁸ the sole purpose of representation is the servicing of individual constituents.¹⁸⁹

The reality, however, is that in addition to servicing individual constituent's needs, a representative has a corollary function as a

accompanying text. Under the current system, however, a geographically concentrated group has a more effective voice in the election of representatives than a geographically dispersed group. See also Low-Beer, *supra* note 4, at 179 (noting that the Court in *Reynolds* "pointed beyond the equally weighted vote toward a conception of equality that embraces . . . protection for groups as well as for individuals").

¹⁸⁴ By requiring that districts be equal in population, the one person, one vote standard developed in the reapportionment cases promotes majority rule. The standard is intended to ensure that "a majority in the legislature will be elected from districts comprising a majority of the population." See Low-Beer, *supra* note 4, at 166.

¹⁸⁵ 394 U.S. 526 (1969).

¹⁸⁶ 376 U.S. 1, 7-8 (1964) (noting that "as nearly as practicable one man's vote in a congressional election is to be worth as much as another's").

¹⁸⁷ *Kirkpatrick*, 394 U.S. at 530-31.

¹⁸⁸ See *id.* at 531 (stating that "[e]qual representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives," and noting that "[t]oleration of even small deviations detracts from these purposes").

¹⁸⁹ See Low-Beer, *supra* note 4, at 177-78 n.68 (tracing to Benjamin Franklin, Thomas Paine, and Thomas Jefferson the origins of the peculiarly American tendency to view representation as a personal relationship between constituent and representative).

delegate in advocating her constituents' views before the House of Representatives.¹⁹⁰ Yet a representative may only serve as a delegate insofar as individual constituents share certain interests with other individuals and form groups based on these shared concerns.¹⁹¹ Because it is impossible to advocate the individual interests of each constituent, a representative inevitably votes on behalf of the collective interests of her constituents as embodied by groups.¹⁹²

This group right to fair and effective representation is ignored under the standard of one person, one vote. Because the *Reynolds* majority intended the newly established individual constitutional right to equal population to be primary to other considerations,¹⁹³ historical, economic, and other group interests were largely disregarded. In the cases surrounding application of the one person, one vote standard to *state* legislative districts, the Court upheld plans with reasonable variances from strict population equality among districts, acknowledging the value of preserving district lines which often represent the parameters defining certain groups.¹⁹⁴ The cases addressing application of the one person,

¹⁹⁰ See GUIDE TO CONGRESS, *supra* note 19, at 505.

¹⁹¹ See Low-Beer, *supra* note 4, at 177 (noting that "[n]o meaningful voting right can be defined exclusively in individual terms"); see also Guinier, *supra* note 72, at 1460 ("The group is an appropriate unit for political participation because the 'right to elect' is valueless at the level of the single individual." (footnote omitted)). An individual cannot single-handedly elect a representative, but must collaborate with other individuals around mutual interests and concerns to garner the support necessary to achieve representation.

¹⁹² See Guinier, *supra* note 67, at 426 (noting that "[t]he franchise gives status to the individual voter but derives its vitality from its exercise by a 'politically cohesive' group of citizens who elect representatives to promote consideration of group interests in public policy" (citation omitted)).

¹⁹³ See *Reynolds v. Sims*, 377 U.S. 533, 567 (1964) ("Population is . . . the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." (footnote omitted)).

¹⁹⁴ In *Mahan v. Howell*, 410 U.S. 315 (1973), the Court allowed a 16.4% maximum deviation from population equality, relying upon *Reynolds*'s suggestion that "more flexibility was constitutionally permissible with respect to state legislative reapportionment than in congressional redistricting." *Id.* at 321 (citing *Reynolds*, 377 U.S. at 578). Rather than relying upon population as the sole factor in state legislative districting, the Court considered the effective functioning of local government by recognizing the representation of local subdivisions qua subdivisions. See *id.* at 325-28. Because local subdivisions are functional polities at the state, but not the national level, the Court pointed out that "[a]pplication of the 'absolute equality' test of *Kirkpatrick* and *Wells* to state legislative redistricting may impair the normal functioning of state and local governments." *Id.* at 323. Thus, while the rule of *Kirkpatrick v. Preisler* often requires sacrificing existing boundaries in order to achieve "absolute equality" in congressional

one vote standard to *congressional* districts, however, permit no such flexibility; strict population equality is to be achieved regardless of competing interests. In *Kirkpatrick*, Justice Brennan did not give effect to Missouri's claim that variances from the requirement of exact population equality "were necessary to avoid fragmenting areas with distinct economic and social interests."¹⁹⁵ Because the Court has interpreted the one person, one vote standard as the "basic premise of the constitutional command,"¹⁹⁶ population variances of any sort, even those that relieve dilution of the effective representation of groups, cannot be tolerated.

b. *Karcher v. Daggett*

In his dissent in *Karcher v. Daggett*,¹⁹⁷ Justice White recognized that the Court's fixation with the equal population principle as the ultimate object not only ignored group interests, but in this case actively encouraged the division of groups in the form of gerrymandering.¹⁹⁸ Applying the *Kirkpatrick* test in *Karcher*, the Court struck down New Jersey's 1982 reapportionment¹⁹⁹ of districts for the House of Representatives. The reapportionment plan was invalidated because the Republican plaintiffs proved that the Democrats' plan was not the product of a good faith effort to achieve population equality, and the defendant Democrats could not prove that their plan's 0.6984% deviation from population equality²⁰⁰ was necessary to achieve some legitimate state objective.²⁰¹

districts, *Mahan* allows states to respect these boundaries when creating state legislative districts.

¹⁹⁵ 394 U.S. at 533.

¹⁹⁶ *Id.*

¹⁹⁷ 462 U.S. 725 (1983).

¹⁹⁸ See *id.* at 776 n.12. (White, J., dissenting) ("The emphasis on one-man, one-vote not only permits gerrymandering, it encourages it." (quoting CONGRESSIONAL QUARTERLY, STATE POLITICS AND REDISTRICTING 1-2 (1982))). Gerrymandering is "the practice of drawing district lines so as to maximize the advantage of a political party or interest group." GUIDE TO CONGRESS, *supra* note 19, at 746.

¹⁹⁹ Reapportionment is the redistribution of the 435 House of Representatives seats among the states after every decennial census to reflect shifts in population. For instance, after the 1990 census, California gained seven new seats due to its population expansion, seats that were taken from states like New York, Pennsylvania, and Ohio, which experienced a relative population loss. See GUIDE TO CONGRESS, *supra* note 19, at 745. Reapportionment is accomplished by redistricting, the redrawing of congressional district boundaries within the states to achieve equal population among districts after a population shift. See *id.* at 737.

²⁰⁰ See *Karcher*, 462 U.S. at 727. To calculate the deviation, the Court used the 1980 census figure for New Jersey's population of 7,364,158. Assuming that each

Nevertheless, that the plan was a blatant and egregious gerrymander by the Democrat-controlled state legislature²⁰² did not enter into the majority's analysis.

Because the achievement of strict population equality was the exclusive focus of the Court's inquiry, traditional boundaries and political subdivisions could be subordinated to satisfy the Court's essentially mathematical criterion. Justice White noted that apportionment plans will have to divide "community boundaries and the grouping of constituencies with similar concerns"²⁰³ because it is often impossible to attain population equality without crossing city, county, and township lines.²⁰⁴ In his concurrence, Justice Stevens acknowledged that the broad origins of the one person, one vote principle, which created high expectations for those desiring an expansive view of political equality, had evolved into a narrow conception of political equality, guaranteeing an individual right to representation at the expense of a similar group right:

[M]ere numerical equality is not a sufficient guarantee of equal representation. Although it directly protects individuals, it protects groups only indirectly at best. A voter may challenge an apportionment scheme on the ground that it gives his vote less weight than that of other voters; for that purpose it does not matter whether the plaintiff is combined with or separated from others who might share his group affiliation. It is plainly unrealistic to assume that a smaller numerical disparity will always produce a fairer districting plan. . . . The major shortcoming of the numerical standard is its failure to take account of . . . criteria

reapportionment plan would contain 14 congressional districts, the average population per district is 526,059. The largest district of the Democrats' plan, however, contained 527,472 people and the smallest contained 523,798. "The difference between them was 3,674 people, or 0.6984% of the average district." *See id.*

²⁰¹ *See id.* at 728, 738, 740, 744.

²⁰² *See id.* at 763-64 (Stevens, J., concurring) (noting that the challenged plan "was designed to increase the number of Democrats, and to decrease the number of Republicans, that New Jersey's voters would send to Congress in future years").

²⁰³ *Id.* at 776 (White, J., dissenting).

²⁰⁴ With the help of sophisticated computer programs, the party in power can create an apportionment plan that achieves population equality and at the same time maximizes its power by dividing clusters of the opposition. *See id.* (White, J., dissenting) (noting that "[w]ith ever more sophisticated computers, legislators can draw countless plans for absolute population equality, but each having its own political ramifications"); *see also* Wells v. Rockefeller, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting) (noting that "[a] computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues").

relating to the fairness of group participation in the political process. To that extent it may indeed be counterproductive.²⁰⁵

2. The Gerrymandering and Minority Vote Dilution Cases Involve a "Group" Right: Devaluing the Right to Minority Representation with a Heavy Burden of Proof

a. *Bandemer and Partisan Gerrymandering*

Realizing that marginal deviations from equality of district size are not the only threat to equality of representation, the Court in *Davis v. Bandemer*²⁰⁶ found claims of partisan gerrymandering to be justiciable.²⁰⁷ Rather than acknowledging that both individual and group rights are affected when a partisan gerrymander advantages the majority party at the expense of the minority,²⁰⁸ the Court continued its formulated disjunction between individual and group rights. As compared to the individual right asserted in the apportionment cases, the Court in *Bandemer* construed the right at stake as a group right to minority representation.²⁰⁹ To hold justiciable the claim "that each political group in a State should have the same chance to elect representatives of its choice as any other political group,"²¹⁰ the Court cited *Reynolds's* broad promise of fair and effective representation for all citizens.²¹¹ It is ironic that the Court relied upon *Reynolds's* broad language to support its vindication of group rights when it had strongly resisted such an

²⁰⁵ *Karcher*, 462 U.S. at 752-53 (Stevens, J., concurring) (citation omitted).

²⁰⁶ 478 U.S. 109 (1986).

²⁰⁷ *See id.* at 124. The Court had indicated its awareness of the existence of political concerns in districting prior to 1986. In *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Court suggested that requiring redistricters to ignore political data "may produce, whether intended or not, the most grossly gerrymandered results; and . . . it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known, and, if not changed, intended." *Id.* at 753. The Court also mentioned that gerrymanders might be invalid if groups were invidiously fenced out of the political process. *See id.* at 754.

²⁰⁸ *See Low-Beer, supra* note 4, at 163 n.1 (defining gerrymandering as the "dilution of votes through the denial of a meaningful vote to some voters and of fair and effective representation to some groups").

²⁰⁹ *See id.* at 175.

²¹⁰ *Bandemer*, 478 U.S. at 124.

²¹¹ *See id.* ("Reynolds surely indicates the justiciability of claims going to the adequacy of representation in state legislatures.").

interpretation in the apportionment cases and restricted such language to support only a narrow individual right to equal population.

This seemingly unusual renewal of interest in the protection of group rights to representation becomes less extraordinary upon closer examination of the degree of protection actually afforded them. As compared to the minimal burden of proof in the apportionment cases, in which a plaintiff need only provide statistical evidence that the plan at issue does not achieve population equality and that a workable alternative plan exists,²¹² a minority asserting the group right to minority representation encounters a far more onerous burden.

Under *Bandemer*, a plaintiff must prove intentional discrimination against an identifiable group as well as actual discriminatory effect.²¹³ Although Justice White conceded that in the case of partisan gerrymandering intentional discrimination "most likely" can be inferred from the mere fact of redistricting,²¹⁴ proving discriminatory effect becomes a virtually insurmountable challenge. The majority found the Equal Protection Clause to be offended "only when the electoral system is arranged in a manner that will consistently degrade . . . a group of voters' influence on the political process as a whole."²¹⁵ Justice White requires that the group of voters be underrepresented statewide as opposed to within individual districts based on his unrealistic assumption that supporters of a losing candidate may be adequately represented by the candidate elected to their district whom they did not support.²¹⁶ Similarly suspect is Justice White's faith that supporters of a losing candidate may also be virtually represented by a representative elected to a different district who shares their views.²¹⁷ Although the plan in *Bandemer* created several "safe" districts for Republicans, Justice White did not consider them

²¹² See *Kirkpatrick v. Preisler*, 394 U.S. 526, 528-29 (1969) (noting that Missouri's redistricting plan contained two districts which respectively were 3.13% above and 2.84% below the mathematical ideal of absolute population equality between districts and that "the General Assembly had rejected a redistricting plan submitted to it which provided for districts with smaller population variances among them").

²¹³ See *Bandemer*, 478 U.S. at 127 (White, J., plurality opinion).

²¹⁴ *Id.* at 128.

²¹⁵ *Id.* at 132.

²¹⁶ See *id.*; *supra* notes 90-92 and accompanying text.

²¹⁷ See *Bandemer*, 478 U.S. at 132 (White, J., plurality opinion); see also *supra* notes 90-92 and accompanying text.

sufficient to support a finding of statewide discrimination against Democrats.²¹⁸

In addition to the difficulty of establishing statewide loss of influence, which is compounded by Justice White's broad view of representation, plaintiffs seeking to vindicate their group right must also prove "consistent degradation," meaning actual electoral disadvantage continuing beyond the results of one or two elections.²¹⁹ By focusing on a single election, the plaintiffs in *Bandemer* failed to prove that the Republican's plan would continue to relegate Democrats to a minority status in the future.²²⁰

With such a high threshold of proof, it is virtually impossible to succeed on a claim of partisan gerrymandering, and therefore the group right to minority representation established in *Bandemer* is illusory.²²¹ Underlying this illusion may be an assumption on the part of the Court that political parties require protection only under the most egregious circumstances. For example, while the Republicans' plan in *Bandemer* disadvantaged Democrats, such imbalance would be "corrected" if Democrats regained control. In her concurrence, Justice O'Connor explicitly operates under this assumption, reasoning that partisan struggles through gerrymandering are bounded and therefore judicial intervention is unnecessary.²²² This assumption reveals the Court's preference for the two-party system. Though Democrats and Republicans may not require protection due to the continually turning nature of the political tide, minority and third parties are consistently and unjustifiably shut out.

Because of the supreme protection it affords individual rights to representation in the apportionment cases and the remedy it

²¹⁸ See *Bandemer*, 478 U.S. at 136 (White, J., plurality opinion) (noting that "[s]imply showing that there are multimember districts in the State and that those districts are constructed so as to be safely Republican or Democratic in no way bolsters the contention that there has been statewide discrimination against Democratic voters").

²¹⁹ *Id.* at 142-43.

²²⁰ See *id.* at 139-40 (noting that "[t]he mere lack of control of the General Assembly after a single election does not rise to the requisite level [of a history of disproportionate results]").

²²¹ In the two major partisan gerrymandering cases following *Bandemer*, the plaintiffs similarly were found unable to meet their substantial burden of proof. See *Badham v. Eu*, 488 U.S. 1024 (1989); *Republican Party v. Wilder*, 774 F. Supp. 400 (W.D. Va. 1991).

²²² See *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring) ("The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States.").

created to achieve that protection, the Court must deny the existence of an individual right in the gerrymandering cases. This opposition of individual and group rights in the apportionment and gerrymandering cases respectively, however, is disingenuous. "Group rights are also individual rights and vice versa."²²³ The individual voting rights of each member of the disadvantaged political group are abridged in the same manner that the individual voting rights of residents of an overpopulated district are undervalued by giving each resident "less of" the representative. The Court, however, apparently disagrees. Given the grossly divergent burdens of proof in *Reynolds* and *Bandemer*, it is clear that the Court perceives the diminution of a political group's voting power as somehow less objectionable than population-based vote dilution.²²⁴

b. *Whitcomb and Bolden and Minority Vote Dilution*

The indefensibility of the Court's individual/group right distinction is amplified in the minority vote dilution context. In *Whitcomb v. Chavis*,²²⁵ the Court broadened its concept of equality of representation from an individual right of strict population equality to include a group right of minority representation for racial groups. Although structurally multimember districts often provide perfect population equality,²²⁶ *Whitcomb* held that an Equal Protection Clause violation nonetheless could be found if the voting strength of racial minority groups was submerged by the multimember district.²²⁷ As in the gerrymandering cases, howev-

²²³ Low-Beer, *supra* note 4, at 175.

²²⁴ For a critical analysis of the Court's jurisprudence in this area, see Cain, *supra* note 20, at 264 (suggesting that the Court has been motivated by the fact that "[i]t is morally less complicated to ignore the group attributes of individuals and give them only individual rights").

²²⁵ 403 U.S. 124 (1971).

²²⁶ A multimember district, for instance, could encompass the entire state. Because there are no other districts among which to equalize the population, the multimember district would necessarily be equal in population.

²²⁷ See *Whitcomb*, 403 U.S. at 141-44. Justice White cited the broad underlying principles in *Reynolds* to support this conclusion. See *id.* at 141-42 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)). Applying the fair and effective representation standard to racial minorities is especially appropriate given the fact that the Court in *Reynolds* partially derived its 14th Amendment right to an equally effective vote from the 15th Amendment's prohibition of denying voting rights on the basis of race. See *Reynolds*, 377 U.S. at 555 n.28, 557-58; see also *id.* 614-15 n.72 (Harlan, J., dissenting).

Tribe explained why multimember districts may be constitutionally suspect in relation to racial minorities:

er, a closer examination of the circumstances of the cases reveals the Court's fleeting commitment to the group right of minority representation.

In *Whitcomb*, the Court denied the plaintiff's claim of minority vote dilution because of insufficient evidence without providing any guidance as to what would constitute sufficient evidence. Although Justice White alluded that findings that African-Americans were unable to register, vote, or choose and participate in political parties, might have been helpful,²²⁸ what evidentiary standards were necessary to prove "that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups"²²⁹ was unclear. Plaintiffs seeking vindication of their group right under *Whitcomb* were largely at the mercy of the Court.

Removing all ambiguity, Justice Stewart in *City of Mobile v. Bolden*²³⁰ established invidious purpose as the constitutional standard for cases involving at-large vote dilution. In order to support a claim, the plaintiff must prove that the plan for multimember districts was "conceived or operated as [a] purposeful device to further racial discrimination."²³¹ Because proving the subjective intent of lawmakers is the legal equivalent of finding the Holy Grail, the minority-group right to protection against racial vote dilution became a nominal right.

In order to support this result, Justice Stewart had to distinguish multimember district dilution from population-based vote dilution, which has no intent requirement.²³² Contrary to his dissent in *Lucas v. Forty-fourth General Assembly*,²³³ Justice Stewart's opinion

The "winner-take-all" character of the typical election scheme creates the possibility that a specific majority will elect all of the representatives from a multimember district whereas the outvoted minority might have been able to elect some representatives if the multimember district had been broken down into several single member districts.

LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1075 (2d ed. 1988).

²²⁸ See *Whitcomb*, 403 U.S. at 149-50.

²²⁹ *White v. Regester*, 412 U.S. 755, 765 (1973) (citing *Whitcomb*).

²³⁰ 446 U.S. 55 (1980).

²³¹ *Id.* at 66 (quoting *Whitcomb*, 403 U.S. at 149).

²³² See James Blacksher & Larry Menefee, *At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution*, in *MINORITY VOTE DILUTION*, *supra* note 7, at 203, 217-18.

²³³ 377 U.S. 713, 744-65 (1964) (Stewart, J., dissenting). Justice Stewart believed legislative apportionment was too complex a task to be achieved only by "the uncritical, simplistic, and heavy-handed application of sixth-grade arithmetic." *Id.* at 750. Stewart envisioned apportionment as "a process of accommodating group interests" intended "to insure effective representation in the State's legislature . . . of the

in *Bolden* limited the scope of *Reynolds* to an individual right to one person, one vote so as to distinguish it from the purported group right of *Bolden*.²³⁴ The following example, however, illustrates why the segregation of individual and group rights is insupportable:

If members of a geographically concentrated, cohesive racial group find themselves split into voting minorities among several election districts, each will suffer inequality of his or her voting strength, and the Stevens-Stewart distinction between individual and group rights cannot explain why he or she ought to be required to advance, additionally, proof that the apportionment-makers intended to accomplish this dilution.²³⁵

Structuring its apportionment, gerrymandering, and minority vote dilution jurisprudence according to this two-tiered standard, the Court has made the equal population guarantee of majority control its paramount constitutional concern.²³⁶ The Court confined its strict judicial scrutiny to claims of population-based voting dilution, while other forms of underrepresentation, such as racially and politically based abridgement of voting strength, have been subject only to deferential standards such as invidious intent²³⁷ and "actual discriminatory effect."²³⁸ By holding the one person, one vote rule, which is not explicitly required by the Constitution but was extrapolated largely from the Fifteenth Amendment, to be a more fundamental constitutional right than the right to be free from racial vote dilution, the Court has misconstrued the Constitution's priorities.²³⁹

various groups and interests making up the electorate." *Id.* at 749.

²³⁴ See *Bolden*, 446 U.S. at 77 (noting that *Reynolds* "confers a substantive right to participate in elections on an equal basis with other qualified voters" but finding that this right "does not protect any 'political group,' however defined, from electoral defeat").

²³⁵ Blacksher & Menefee, *supra* note 232, at 229.

²³⁶ See, e.g., *Whitcomb v. Chavis*, 403 U.S. 124, 166 (1971) (Harlan, J., concurring in the judgment) (claiming that the reapportionment cases "can be best understood . . . as reflections of deep *personal* commitments by some members of the Court to the principles of pure majoritarian democracy").

²³⁷ In the 1982 Amendments to the Voting Rights Act, Congress codified the "results" test from *White v. Regester* for racial vote dilution cases in order to escape the burden of *Bolden*'s intent standard. See S. REP. NO. 417, 97th Cong., 2d Sess. 2, 27 (1982).

²³⁸ *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (White, J., plurality opinion).

²³⁹ See, e.g., Blacksher & Menefee, *supra* note 232, at 204 ("A review of the evolution of the *Reynolds* doctrine as it affected racial minorities suggests that constitutional priorities have been misplaced by the Court's inability to discover judicially manageable standards for multimember-district vote dilution.").

As opposed to this mutually exclusive resolution of the conflict between majority rule and minority representation, a system of proportional representation could accommodate both values. Although the election contests themselves would not involve majority rule, as each representative need only attain her proportional threshold, a group constituting a majority of the state would still receive a majority of the seats. Similarly, the ultimate decision-making of Congress would continue to utilize majority rule. Proportional representation thus compromises the use of majority rule in the election contests in order to accommodate and further the goal of minority representation.

3. An Alternative Explanation for the Distinction: The Perceived Lack of Judicially Manageable Standards

The seemingly capricious distinction between individual and group rights is perhaps better explained as an unwillingness on the part of the Court to make substantive judgments about political equality, preferring instead to limit itself to formal and easily definable concepts of representation.²⁴⁰ The Court's conservatism in substantively defining the contours of political equality stems from *Baker v. Carr*,²⁴¹ the first case to intervene in the political thicket. The *Baker* Court cautioned against deciding a "political" question without "judicially discoverable and manageable standards for resolving it."²⁴²

It is true that the simplicity of the one person, one vote standard increases judicial manageability. A court need only examine the statistical evidence to determine whether there has been a violation. Defining and enforcing representational fairness for parties and minority groups, however, did not prove so easily manageable. Unlike the one person, one vote standard, the Court could find no bright-line test to differentiate a legitimate districting plan from *Bandemer's* partisan gerrymander or *White's* unconstitutional minority vote dilution. The Court's inability to articulate a judicially manageable standard of representational fairness for groups may account for its undervaluation of the group right to minority

²⁴⁰ See Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 SUP. CT. REV. 175, 257 (arguing that the Court should abandon simple mathematical tests and squarely face the complex issues of fair representation).

²⁴¹ 369 U.S. 186 (1962).

²⁴² *Id.* at 217.

representation in the gerrymandering and minority vote dilution cases.²⁴³

*B. A Foray into Substantive Fairness: Attempting
to Delimit the Right to an Undiluted Vote*

Although critics of the Court's voting rights jurisprudence claim that "the Constitution requires some measure of substantive fairness beyond [the current emphasis on] formal equality,"²⁴⁴ the Court has avoided substantive decisions as to the comparative influence of certain groups.²⁴⁵ The Court's formalistic focus on the inputs of the electoral process, such as the eligibility to vote and the equal weighting of votes, denotes a narrow vision of the political equality at the heart of the Constitution. "[T]he duty of representation that

²⁴³ The Court's preoccupation with judicially manageable standards, however, appears to be misplaced. In establishing the new fundamental constitutional right of one person, one vote, the *Reynolds* majority based its holding on a much broader principle than population equality, defining the denial of equal representation as the undervaluation of citizens' voting power "by any method or means" and "no matter what their form." *Reynolds v. Sims*, 377 U.S. 533, 563 & n.40 (1964) (quoting *Colgrove v. Green*, 328 U.S. 549, 569-71 (1946) (Black, J., dissenting)). However, as the broad concept of one person, one vote was applied and translated in subsequent cases, it was simplified into a narrow standard, often producing ridiculous results. Particularly in its application to congressional legislative deviations, the one person, one vote standard is "sometimes applied with Procrustean rigidity today." Schuck, *supra* note 15, at 1343. Despite the qualification that "[m]athematical exactness or precision is hardly a workable constitutional requirement," *Reynolds*, 377 U.S. at 577, *Kirkpatrick* interpreted the one person, one vote standard to require a good faith effort to achieve zero deviation and denied a de minimis fixed standard. See *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). *Karcher* produced the absurd result of overturning *Kirkpatrick* as the 0.69% deviation approved in *Kirkpatrick* on remand was disallowed in *Karcher*. See *Karcher v. Daggett*, 462 U.S. 725, 744 (1983). In his dissent, Justice White criticized the *Karcher* majority's application of one person, one vote at the expense of the political minorities disadvantaged by gerrymandering. See *id.* at 765-83 (White, J., dissenting). Justice White wrote that "no one can seriously contend that such an inflexible insistence upon mathematical exactness will serve to promote 'fair and effective representation.' . . . Such sterile and mechanistic application only brings the principle of 'one man, one vote' into disrepute." *Id.* at 774 (White, J., dissenting). One critic has summarized the Court's penchant for focusing on the judicially manageable standard of one person, one vote to the exclusion of its ultimate goals by describing the Justices as little boys who learned to spell banana and did not know when to stop. Lani Guinier, Remarks in Law and the Political Process Seminar, in Philadelphia (Oct. 1992).

²⁴⁴ Levinson, *supra* note 4, at 279.

²⁴⁵ See Ackerman, *supra* note 10, at 716 n.4 (describing the Court in the reapportionment cases as "extremely hesitant about moving beyond formal equality to more substantive conceptions of democratic power-sharing"); cf. ELY, *supra* note 151, at 135 (noting that "the Court's role in protecting minorities should [not be limited to] removing barriers to their participation in the political process").

lies at the core of our system requires more than a voice and a vote."²⁴⁶ It is the output of the electoral process, such as the ability of groups within the political process to achieve actual representation within the legislature, that ensures substantive political equality.²⁴⁷ By assuring individuals formal access to the ballot without regard to the influence their votes may have on the election or within the legislature,²⁴⁸ the Court concludes its inquiry into political equality before it even begins.²⁴⁹ Although *Reynolds* ensures that legislators will be elected by, and represent, citizens in districts of substantially equal size, it does not attempt to inquire whether—in terms of how the legislature actually functions—the districts have equal power to affect legislative outcomes. The *Reynolds* one person, one vote standard also does not protect voters' ability to cast a decisive vote.

1. Avoiding a Clear Definition of Substantive Political Equality While Denying the Possibility of Proportional Representation

Because voters are not fairly represented when their ability to elect legislators is inhibited by a partisan gerrymander or a multimember district, the gerrymandering and minority vote dilution cases presented an opportunity to determine substantively what constitutionally mandated, fair representation entails. Nevertheless, the Court carefully avoided a clear definition of the substantive right at issue. In *White*, the Justices employed the

²⁴⁶ ELY, *supra* note 151, at 135.

²⁴⁷ See Guinier, *supra* note 82, at 288 (recommending an extension of the Court's focus "from opportunities to vote on election day to issues of legislative decision-making for politically marginalized groups" in order to move toward realization of political equality).

²⁴⁸ In his concurrence in *Bolden*, Justice Stevens explicitly advocated this separation. See *City of Mobile v. Bolden*, 446 U.S. 55, 83 (1980) (Stevens, J., concurring). Stevens believed vote dilution could be cleanly divided into two categories governed by different constitutional standards: "[T]here is a fundamental distinction between state action that inhibits an individual's right to vote and state action that affects the political strength of various groups that compete for leadership in a democratically governed community." *Id.* (Stevens, J., concurring). The former would require strict judicial scrutiny, while the latter would not. See *id.* at 83-85 (Stevens, J., concurring).

²⁴⁹ See, e.g., *Garza v. County of Los Angeles Bd. of Supervisors*, 918 F.2d 763, 783 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part) (claiming that of the two strands in the Court's jurisprudence, the Court's concern for the formal right to electoral equality is "akin to protecting freedom of speech" while its support for the substantive right of equal representation has been "far more conditional").

nebulous "totality of the circumstances"²⁵⁰ test in order to evade systematic analysis of the minority vote dilution phenomenon. The three preconditions announced in *Thornburg v. Gingles* provided only a process-based rather than a substantive measure of minority vote dilution.²⁵¹ In *Bandemer*, the Court failed to elucidate the meaning of the crucial baseline of electoral performance necessary to prove the "consistent[] degrad[ation of a] voter's or a group of voters' influence" statewide.²⁵² Offering no further clarification of its standards, the Court in *White*, *Gingles*, and *Bandemer* explicitly and repeatedly rejected proportional representation as the substantive right underlying these cases. However, the Court "doth protest too much,"²⁵³ as a closer examination of the standard hidden beneath the ambiguity will reveal a requirement of rough proportionality as the measure and remedy of vote dilution.²⁵⁴

2. A Case of Mistaken Identity: Misinterpreting the Concept of Proportional Representation

The Court's many protestations against proportional representation largely stem from its misconception of the term. The Justices' disclaimers regarding proportional representation refer to the use of proportionality as a means of measuring the absence of discrimination within the present single-member and multimember districts, and not to proportional representation as an alternative electoral system.²⁵⁵ Using this peculiarly American variant of proportional representation, the Court believes that requiring a right to proportionality would entail providing representation to a group in proportion to their numbers within the population,²⁵⁶ which

²⁵⁰ *White v. Regester*, 412 U.S. 755, 769 (1973).

²⁵¹ See 478 U.S. 30, 77-79 (1986); see also Guinier, *supra* note 82, at 292 ("[T]he [Voting Rights Act] must use a substantive measure of political equality, not merely a process-based measure of minority group protections and access."); *infra* part III.B.3.b. (discussing and distinguishing *Gingles* as a Voting Rights Act case).

²⁵² See *Davis v. Bandemer*, 478 U.S. 109, 142-43 (1986) (White, J., plurality opinion).

²⁵³ WILLIAM SHAKESPEARE, *HAMLET* act 3, sc.1.

²⁵⁴ See discussion *infra* part III.B.3.a.i.

²⁵⁵ See Low-Beer, *supra* note 4, at 164 n.4.

²⁵⁶ See *Davis v. Bandemer*, 478 U.S. 109, 130 (1986) ("[W]e cannot hold that such a reapportionment law would violate the Equal Protection Clause because the voters in the losing party do not have representation in the legislature in proportion to the statewide vote received by their party candidates."). In conjunction with passing the 1982 Amendments to the Voting Rights Act, Congress was careful to add the following disclaimer: "[N]othing in this section establishes a right to have members

bears a striking resemblance to the racial quotas disallowed in affirmative action.²⁵⁷ This supposition, however, reveals the Court's reliance on descriptive representation as the type of representation necessary to remedy a minority group's vote dilution.²⁵⁸ As a requirement of "like bodies, not like minds," descriptive representation considers a minority adequately represented if the candidate elected reflects the demographics of the minority community.²⁵⁹ Therefore, African-Americans could only be adequately represented by a number of African-American representatives commensurate with their percentage of the population.

Proportional representation in its classic view as an electoral system would avoid the Court's narrow view of descriptive representation by providing for broader "interest representation."²⁶⁰ The at-large aspect of proportional representation allows voters to identify themselves with each other based on a consensus of shared interests as opposed to physical attributes. Although the organization along shared interests may often coincide with physical characteristics, such as race, because racial minorities share many of the same concerns, this does not have to be the case.²⁶¹ Indigent African-Americans, for instance, may prefer organizing with indigent Hispanics and Asian-Americans to collaborating with middle- and upper-class African-Americans who do not share their

of a protected class elected in numbers equal to their proportion in the population." See 42 U.S.C. § 1973(b) (1988).

²⁵⁷ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (rejecting the University of California's use of explicit racial classification in its special admissions program and preferring a plan like Harvard's where race is but one of many factors considered). The Court believes that using proportionality as a measure of fairness within the gerrymandering cases and as a measure of undilution within the Voting Rights Act cases would require it to enforce political and racial quotas. See also Schuck, *supra* note 15, at 1364 (noting the chilling prospect of the Court prescribing the partisan configuration of the legislature); Still, *supra* note 7, at 263 (attributing the courts' bias against claims of a right to proportional representation to their misinterpretation of proportional representation as a quota system, requiring racial or ethnic balance in elective bodies).

²⁵⁸ See *Wright v. Rockefeller*, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting) (criticizing the majority's acceptance of "racial electoral registers," which are electoral districts affirmatively drawn by the government along racial lines).

²⁵⁹ Guinier, *supra* note 82, at 285-86.

²⁶⁰ Guinier, *supra* note 72, at 1462 (coining the term "interest representation" to describe group identification based on an evaluation of shared interests).

²⁶¹ See Georgia A. Persons, *Electing Minorities and Women to Congress*, in UNITED STATES ELECTORAL SYSTEMS, *supra* note 32, at 15, 16 (noting that because individuals of Hispanic origins may be of any race, "experiences of discrimination are not as widely shared among members of the group, and self-identification with a minority status is not as widely shared within the group in politically significant ways").

interest in the betterment of social services. While proportional representation provides racial minorities with the opportunity to elect representatives in proportion to their numbers within the state's population, there is no expectation that they do so. A proportional representation system thereby allows for "proportionate interest representation" and does not require the "proportionate, descriptive representation" that implicates the Court's distaste for affirmative action and quotas.²⁶²

3. Requiring Its Own Form of Proportionality: Ignoring the Constraints of the Current Electoral System

*A paradox of the one man, one vote, revolution is that we now perceive our goal to be something approaching a proportional result, in terms of group access to the legislative process, while retaining the district method of election. But the district method itself, when combined with straight plurality election, is the source of many problems.*²⁶³

Because of its misconstrued concept of proportional representation, the Court was unable to recognize proportional representation in its classical sense as the substantive view of political equality required by the Constitution. The Court instead was forced to resort to terms like "fair" in *Reynolds*,²⁶⁴ and "dilution" in *Gingles*,²⁶⁵ to accomplish this result.²⁶⁶ *Bandemer* and *Gingles* reflect the Court's attempts to provide proportional representation within the confines of single-member districts without appreciating the impediments which the current system imposes. Viewing winner-take-all, plurality rule as sacrosanct, and succumbing to the traditional American hyperbole regarding the negative effects of proportional representation,²⁶⁷ the Court did not even consider

²⁶² Lani Guinier, *The Representation of Minority Interests: The Question of Single Member Districts*, 14 CARDOZO L. REV. 1135, 1154 n.70 (1993) (noting that the statutory disclaimer against proportional representation in the Voting Rights Act "only disavows the right to elect members of the protected group in proportion to their numbers" and "does not disavow a principle of proportional representation that measures proportionality by the empowerment norm [allowing minority group voters to vote according to shared interests rather than physical characteristics]").

²⁶³ Lijphart, *supra* note 120, at 910 (quoting Robert G. Dixon, Jr., *The Court, the People and "One Man, One Vote,"* in REAPPORTIONMENT IN THE 1970S 7, 13 (Nelson W. Polsby ed., 1971)).

²⁶⁴ 377 U.S. 533, 565 (1964).

²⁶⁵ 478 U.S. 30, 74 (1986).

²⁶⁶ See Cain, *supra* note 20, at 263 (stating that "Americans prefer to use terms such as *fairness* and *nondilution* of minority votes without explicitly defining them, which causes significant confusion because electoral fairness could in fact mean something other than proportionality").

²⁶⁷ See Matthew Cossolotto, *Proportional Voting Didn't Corrupt Italy*, N.Y. TIMES,

that a proportional representation electoral system might best accomplish its stated constitutional goals.²⁶⁸

a. *Bandemer: Looking Beneath the Ambiguity*

i. Proportional Representation is the Baseline for Measuring Undilution

In *Bandemer*, the Court interpreted *Reynolds's* right of "fair and effective" representation to include a broad right to an undiluted vote for political minority groups disadvantaged by partisan gerrymandering.²⁶⁹ While the Court constructed a standard for measuring a violation of this right, it did not explain what the crucial baseline for measuring claims entails. As Justice O'Connor noted in her concurrence, in order to determine whether and to what extent a districting plan "will consistently degrade . . . a group of voters' influence on the political process as a whole,"²⁷⁰ a court must compare a political group's share of the electorate to its post-gerrymander share of representatives in the legislature: "Absent any such norm, the inquiry the plurality proposes would be so standardless as to make the adjudication of political gerrymandering claims impossible."²⁷¹ Though the Court disclaimed any intention of making proportional representation the baseline,²⁷² it did not adequately define an alternative standard.²⁷³

Mar. 14, 1993, at E16 (criticizing the *New York Times's* depiction of proportional representation in Italy as contributing to the corruption of Italy's political parties).

²⁶⁸ See Lijphart, *supra* note 120, at 910 (arguing that "proportional representation 'may be the only way of making good on "one man-one vote" if that is interpreted: "one man, one vote, each vote to be as effective a vote as possible"' (quoting DIXON, *supra* note 10, at 525)).

²⁶⁹ See *Davis v. Bandemer*, 478 U.S. 109, 119 (1986). Gerrymandering will have the effect of diluting the voting strength of concentrated, similarly affiliated groups of voters, by enacting a new apportionment plan under which district lines divide these communities.

²⁷⁰ *Id.* at 110.

²⁷¹ *Id.* at 156 (O'Connor, J., concurring).

²⁷² This disclaimer was based on the Court's misperception of proportionality as requiring descriptive representation and political quotas: "Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportionment must draw district lines to come as near as possible to allocating seats . . . in proportion to what . . . [the parties'] anticipated statewide vote will be." *Id.* at 130 (White, J., plurality opinion).

²⁷³ *Id.* at 171 & n.10 (Powell, J., concurring in part and dissenting in part) (criticizing plurality for "its failure to enunciate any standard that affords guidance to legislatures and courts").

Having entered this area of substantive political equality and recognized a right to undilution, the Court, under *Baker*, must provide some "judicially discoverable and manageable standards for resolving it."²⁷⁴ In partisan gerrymandering cases, the only judicially manageable standard and remedy available is classic proportional representation.²⁷⁵ "Unlike the apportionment problem . . . , the gerrymandering problem cannot be satisfactorily resolved within a geographically districted system."²⁷⁶ Given single-member districts and the winner-take-all rule, it is impossible for all groups to be represented proportionately; therefore, all drawing of district lines will advantage one group and disadvantage another. As there is no feasible way to district objectively, any reapportionment plan that the Court might establish as a baseline will necessarily entail political valuations.²⁷⁷ Given that all political parties are protected by the Equal Protection Clause,²⁷⁸ there appears to be no equitable means for the Court to choose among them. Any action the Court might take could lead to an unconstitutional dilution of voting strength.²⁷⁹

²⁷⁴ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

²⁷⁵ See Schuck, *supra* note 15, at 1377 (describing the *Bandemer* Court's decision to make partisan gerrymandering claims justiciable as "a reckless gamble propelling the Court (and us with it) down a path whose destination is proportional representation"); see also Levinson, *supra* note 4, at 281 (arguing that judicial intervention into the area of gerrymandering requires analysis of substantive fairness of representation which will delegitimize the current presidential and congressional electoral systems and require reform of the representation system).

²⁷⁶ Low-Beer, *supra* note 4, at 173.

²⁷⁷ See DIXON, *supra* note 10, at 56 (claiming that all districting decisions "whether made by design or by chance, will have a crucial but arbitrary political effect").

²⁷⁸ Even the Court's principled means of districting on behalf of traditionally oppressed minorities has produced controversial results. See *United Jewish Orgs. v. Carey*, 430 U.S. 144, 152 (1977) (upholding creation of a "safe" district for African-Americans that decreased the ability of a distinct Hasidic community to elect representatives).

²⁷⁹ See *Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring) (noting that the Court's extension of a constitutional right to minority undilution to the two major parties allows "members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests" the ability to bring claims, thus rendering the Court's standard litigious and unmanageable).

ii. Proportional Representation as a Judicially Manageable
Standard with STV Proportional Representation as the Remedy

Proportional representation presents the only clean resolution of the Court's predicament. Because any group so desiring may vote cohesively, proportional representation eliminates the need for courts to make race-conscious judgments about which minority groups deserve distinct protection. Requiring proportional representation as an electoral system also solves the problems of the partisan gerrymander, as geographic districts become obsolete.²⁸⁰ Consisting of one at-large district objectively defined by the boundaries of the state,²⁸¹ proportional representation destroys the opportunity for self-interested majority-party legislators to manipulate district lines. All parties with support sufficient to surpass the threshold of representation (determined by the Droop formula) would be represented under STV proportional representation, in which the minimum number of minority votes would be wasted. After its initial establishment of STV proportional representation as a remedy, the Court can rely on the structure of a proportional representation system to guarantee political groups an equally meaningful, undiluted vote.²⁸² Unlike the highly ambiguous and litigious standard of *Bandemer*²⁸³ therefore, proportional representation provides a judicially manageable baseline and concomitant remedy.

²⁸⁰ Districts might still have to be used, however, in states with larger delegations, such as California, Texas, and New York. See *supra* note 59.

²⁸¹ Unlike district boundaries, the state boundaries are objective as Article I, § 2 of the Constitution requires that representatives be chosen from within each state, and state boundaries typically do not change.

²⁸² Because proportional representation weights each vote equally regardless of where it is cast, the structure of a proportional representation system also guarantees the right to an equally weighted vote. The at-large component of proportional representation eliminates the need to redraw districts to reflect population shifts. Presently, each reapportionment may give rise to a new adjudication given the strict application of the one person, one vote standard to congressional deviations.

²⁸³ 478 U.S. at 147 (O'Connor, J., concurring) (describing the plurality's standard as susceptible "to pervasive and unwarranted judicial superintendence of the legislative task of apportionment").

b. *Gingles: Interpreting the Voting Rights Act to Require "Rough" Proportional Representation—Addressing Congress's Silence*

As opposed to the constitutional interpretation involved in *Bandemer*, *Gingles* involves the Court's interpretation of congressional legislation, the Voting Rights Act. Although the interpretation of a congressional statute implicates a completely different standard of judicial review and subset of judicial concerns, a brief examination of the Court's treatment of the Voting Rights Act, nonetheless, is instructive. Many parallels exist between the Court's reasoning in the reapportionment cases and *Gingles* on the issue of judicially manageable standards and in *Bandemer* and *Gingles* concerning proportional representation.

While section 2 of the Voting Rights Act, as amended in 1982, provides a broad entitlement to racial minorities to be free from vote dilution²⁸⁴ and a broad definition of what constitutes a violation,²⁸⁵ the Court's translation of the section 2 "results test" into a judicially manageable standard and remedy in *Thornburg v. Gingles*²⁸⁶ has severely curtailed its scope and concomitantly has led to mechanistic application. Largely in reaction to the nature of the plaintiffs' claim in *Gingles*, the Court has established single-member, plurality-vote districting as a quasi-constitutional requirement.²⁸⁷ Because the plaintiffs argued that the "legislative decision to employ multimember, rather than single-member, districts . . . dilutes their votes by submerging them in a white majority,"²⁸⁸ they were forced to prove their likely success had single-member districts been used. Because requiring single-member districts was a remedy the Court felt comfortable applying, it held that the ability of a minority group to form a single-member district was the baseline for establishing a violation of section 2. By

²⁸⁴ See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. § 1973(a) (1988)) ("No voting qualification or prerequisite to voting . . . shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .").

²⁸⁵ Section 2(b) of the Voting Rights Act establishes that a violation exists where the "totality of circumstances" reveals that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (1988).

²⁸⁶ 478 U.S. 30 (1986).

²⁸⁷ See Schuck, *supra* note 15, at 1360.

²⁸⁸ *Gingles*, 478 U.S. at 46.

importing the existence of a remedy into the question of whether there was a violation, the Court limited claims to those minority groups numerous and geographically compact enough to form a single-member district. The Court also added two other conditions to bringing a claim: that the minority group be politically cohesive and that it usually be defeated by a white majority voting as a bloc.²⁸⁹ Although these three preconditions provide a judicially manageable standard for defining minority vote dilution, a judicially manageable standard—as demonstrated in the one person, one vote area—constricts the Court's vision of fair representation. Thus, groups that are too small or too diffuse to control a single-member district, but whose ability to influence elections has nevertheless been impaired in contravention of section 2, have no remedy under *Gingles*.²⁹⁰

Analogous to the Court's action in *Bandemer*, Congress recognized the right to an undiluted vote for racial minority groups in section 2, but was unwilling to provide a baseline against which to measure this right, satisfied with merely disclaiming proportional representation as the measure of undilution.²⁹¹ Despite the "no proportional representation" disclaimer of the 1982 Voting Rights

²⁸⁹ See *id.* at 52-61.

²⁹⁰ As the Court wrote:

We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to influence elections.

Id. at 46 n.12.

A recent Seventh Circuit case illustrates the possible unjust results under the formalistic *Gingles* test. Although the plaintiffs were insufficiently large to make up a majority black single-member district, they asserted that only a plurality was needed in order to elect a representative and provided evidence that they constituted a plurality. The Seventh Circuit affirmed the district court's grant of summary judgment for the defendants, however, refusing to explore the totality of the circumstances of the plaintiffs' claim without first determining whether the *Gingles* threshold criteria are met. Because plaintiffs did not constitute a majority in a single-member district, their claim was dismissed. See *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942-43 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989).

²⁹¹ Senator Orrin Hatch recognized the insufficiency of Congress's approach of citing the Senate Report factors as evidence of dilution without also providing a standard by which such evidence could be assessed and evaluated. See S. REP. NO. 417, 97th Cong., 2d Sess. 357 (1982).

Act Amendments²⁹² and the Court's proclaimed cognizance of it,²⁹³ the core value underlying *Gingles* three preconditions is a right to proportional representation—but only for compact, cohesive, and sizable minority groups.²⁹⁴ Because it functions within the constraints of a plurality rule system, this requirement is best described as “rough” proportional representation.²⁹⁵ A minority group that fulfills the three *Gingles* threshold requirements is entitled to representation commensurate with such strength upon a showing that the proposed multimember district plan will prevent it from realizing its potential.

Proportionality within the confines of single-member districts, however, is a grossly deficient remedy for the violation of a minority's right to undilution. Although creating a “majority minority” district as a remedy ensures symbolic representation of minority interests, it prevents minority voters from having an influence over white representatives. Such a system leads to “political ghettoization.”²⁹⁶ “Where blacks and whites are geographically separate, race-conscious districting by definition isolates blacks from potential white allies such as white women who are not geographically concentrated.”²⁹⁷ In wasting the votes of white liberals submerged within white, conservative districts, majority minority districts may not ensure minority groups, such as African-

²⁹² See 42 U.S.C. § 1973(b). But cf. *supra* note 262 (noting that the statutory disclaimer disavows only proportionate descriptive representation and not proportionate interest representation).

²⁹³ See *Gingles*, 478 U.S. at 36. (acknowledging that “[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered” in evaluating an alleged violation, but noting that § 2(b) cautions that “nothing in [§ 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population” (quoting 42 U.S.C. § 1973(b))).

²⁹⁴ See Cain, *supra* note 20, at 265; see also *Gingles*, 478 U.S. at 93 (O'Connor, J., concurring) (“[E]lectoral success has now emerged, under the Court's standard, as the linchpin of vote dilution claims, and . . . the elements of [a] vote dilution claim[] . . . create an entitlement to roughly proportional representation within the framework of single-member districts.”).

²⁹⁵ See Yanos, *supra* note 34, at 1812 (noting that “[i]n practice, courts have tended to determine the existence of a violation of the Voting Rights Act using a rough proportional representation standard”).

²⁹⁶ Bernard Grofman & Chandler Davidson, *Postscript: What is the Best Route to a Color-Blind Society?*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 20, at 300, 312 (describing “political ghettoization” as a situation where “black voters are concentrated in a handful of majority-black districts, with little or no influence in the remaining districts”).

²⁹⁷ Guinier, *supra* note 262, at 1163.

Americans, proportional legislative influence. Moreover, because majority minority districts isolate the minority groups, leaving other districts whiter and more Republican, the representative of a majority minority district is unlikely to exert significant influence within the legislature. The white representatives from the remaining districts will likely predominate.²⁹⁸

As in the gerrymandering context, utilizing an STV proportional representation electoral system as the baseline provides the Court with both a judicially manageable standard and a remedy²⁹⁹ that adequately rectifies the harm. By eliminating the winner-take-all element of the multimember system which is deleterious to minorities, proportional representation undermines the need for a Voting Rights Act with respect to House of Representatives elections. Racial minority groups previously subsumed by the white majority will be able to elect representatives in proportion to the number of voters who share their self-identified community of interests.³⁰⁰ Resolving the doctrinal inconsistencies of the present case law, the Court's establishment of STV proportional representation would cleanly remove it from the political thicket.

CONCLUSION

While finding a right to an STV proportional representation electoral system in the Equal Protection Clause of the Fourteenth Amendment may seem to some an interpretational stretch, it is no more unusual than the Court's finding, twenty-nine years ago,³⁰¹ that the same language mandates a one person, one vote approach. Unlike the one person, one vote standard, however, proportional representation would provide an equally manageable principle for judicial application, but one which would resist devolution into mechanistic application. The scope of the Equal Protection Clause has expanded exponentially since the Founders first implemented

²⁹⁸ See *id.*

²⁹⁹ Some voting rights attorneys are beginning to consider introducing claims of proportional representation as a remedy in Voting Rights Act cases. Edward Still, for instance, plans to file an amicus brief in *Clarke v. City of Cincinnati*, No. C-1-92-228 (S.D. Ohio), suggesting that STV proportional representation is the appropriate remedy. Telephone Interview with Edward Still, CPR! Advisory Board member (Apr. 12, 1993).

³⁰⁰ See Schuck, *supra* note 15, at 1361 (arguing that demands for a truer, more direct, minority representation can be satisfied only by an institutional change to proportional representation).

³⁰¹ See *Wesberry v. Sanders*, 376 U.S. 1 (1964).

the current winner-take-all, plurality rule system; a contemporary reexamination of this structure may reveal that the requirements of fair representation demand something else—namely, STV proportional representation.