FAIR REPRESENTATION WITHOUT THE FAIR REPRESENTATION ACT: HOW MODIFYING 2 U.S.C. § 2C CAN FIX GERRYMANDERING

"A dependence on the people is, no doubt, the primary control on the government . . . ."[1]
James Madison
Federalist Papers, No. 51

"He who controls redistricting can control Congress . . . ."[2]
Karl Rove

TABLE OF CONTENTS

INTRODUCTION

Gerrymandering is not a new phenomenon, having been employed as a political weapon in America for almost the entire

1. THE FEDERALIST NO. 51, at 234 (James Madison) (Dover Thrift ed., 2014).
2. Karl Rove, *The GOP Targets State Legislatures: He Who Controls Redistricting Can Control Congress*, WALL ST. J. (Mar. 4, 2010, 5:01 AM), https://www.wsj.com/articles/SB10001424052748703862704575099670689398044.

duration of the country's existence.[3] Though it has long been a nefarious method of protecting incumbents and ensuring job security, its use as a weapon for political parties to amass power has increased in recent years as computer modeling has made predicting voter trends more accurate and made gerrymandering a more precise science.[4]

Americans overwhelmingly view gerrymandering as plainly undemocratic and have expressed a desire for judicial intervention from the Supreme Court.[5] However, the Court held that partisan gerrymandering is a nonjusticiable political question in *Rucho v. Common Cause*,[6] effectively punting the issue to the legislature.[7] But there is a conflict of interest inherent in letting politicians draw political boundaries. Part II discusses the use of redistricting commissions to mitigate that conflict of interest. Though commissions can produce incremental changes in the fight against gerrymandering,[8] two factors will prevent them from being able to completely solve problems posed by gerrymandering. First, it is impossible to wholly remove partisan influence from the line-drawing process, and having lines drawn by an independent commission will not stop both parties from alleging bias and claiming that the lines have been drawn unfairly. Second, to achieve "fair" representation, there must be some degree of gerrymandering of single-member districts. Completely neutral maps will lead to majority groups—whether political, racial, economic, ethnic, etc.—winning at disproportionate rates and minority groups being underrepresented when compared to their population.

As such, measures like the Fair Representation Act have proposed unique ways to eliminate gerrymandering.[9] Part III discusses the Fair Representation Act and its use of multimember districts and ranked-choice voting as a way to minimize

3. Steven J. Mulroy, *The Great Unskewing: Remedying Structural Bias in U.S. Elections*, 58 U. LOUISVILLE L. REV 101, 106 (2019).

4. *Id.* at 107.

5. *See* Memorandum from Lake Rsch. Partners & WPA Intel. on Partisan Redistricting–New Bipartisan National Poll to the Campaign Legal Ctr. 1 (Sept. 11, 2017) [hereinafter Memorandum on Partisan Redistricting], https://campaignlegal.org/sites/default/files/memo.CLCPartisanRedistricting.FINAL_.2.09082017%20%28002%29.pdf; Memorandum from ALG Rsch. & GS Strategy Grp. on New Bipartisan Poll on Gerrymandering and the Supreme Court to the Campaign Legal Ctr. 2 (Jan. 25, 2019) [hereinafter Memorandum on Bipartisan Poll], https://campaignlegal.org/sites/default/files/2019-01/CLC%20Bipartisan%20Redistrictig%20Poll.pdf.

6. 139 S. Ct. 2484 (2019).

7. *Id.* at 2506–07.

8. *See* Mulroy, *supra* note 3, at 119.

9. *See generally* Fair Representation Act, H.R. 3863, 117th Cong. (as referred to H. Comm. on the Judiciary & Comm. on H. Admin., June 14, 2021).

gerrymandering by having fewer district lines to gerrymander.[10] In doing so, advocates of the act argue that it will decrease polarization, increase competitive races, and lead to the election of congressional delegations that are more reflective of their constituents.[11]

Despite the benefits of such voting reform, the Fair Representation Act has not garnered widespread support.[12] Part IV discusses potential reasons for this lukewarm reception of comprehensive reform like the Fair Representation Act—most notably—fear that multimember districts will be used for discriminatory purposes, and that it is a piece of legislation that requires legislators to vote against their personal self-interests.

Given the lack of support for the Fair Representation Act, Part V proposes an alternative solution. Rather than an act that dictates voting reform through multimember districts and imposes the use of ranked-choice voting on the states,[13] this Comment discusses changing 2 U.S.C. § 2c to *allow* states, should they choose, to use multimember districts. This Part also considers whether it is prudent to allow for the unconditional use of multimember districts or whether their use should be made conditional on the use of ranked-choice voting to elect representatives from the multimember districts.

I. GERRYMANDERING

Gerrymandering is "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength."[14] The two predominate techniques, packing and cracking, are manners in which those who draw the lines can create districts in which the outcome in future elections is reliably predetermined.[15] "Packing" means filling a district with an insurmountable majority of an opposing party,[16] cramming as many members of the opposing party into the district as possible. Though conceding that district to the opposing party in a landslide, the opposition will not win any of the surrounding districts.[17] Sacrifice one in order to win several surrounding districts.[18] "Cracking" means fracturing a cohesive group into several districts.[19] By splitting a large group into several

10. *See infra* Part III; *see also* H.R. 3863 §§ 101–206.
11. *See infra* Part III.
12. *See infra* notes 142–43 and accompanying text.
13. *See* H.R. 3863.
14. *Gerrymandering*, BLACK'S LAW DICTIONARY (11th ed. 2019).
15. *See* Vieth v. Jubelirer, 541 U.S. 267, 286–87, 286 n.7 (2004) (plurality opinion).
16. *Id.* at 286 n.7.
17. *See id.* at 298.
18. *See id.*
19. *Id.* at 286 n.7.

districts, members of that once large group are now fragmented and dispersed, rendering them the minority party in several districts, often incapable of influencing the outcome of an election.[20]

Gerrymandering has a long history in the United States. In 1812, the Governor of Massachusetts, Elbridge Gerry, signed into law a districting plan that was deliberately drawn to favor his party.[21] The contorted districts, packed and cracked to ensure Democratic-Republicans would maintain power, included one that resembled a salamander.[22] From the governor's name and the amphibious appearance of the district, the gerrymander portmanteau was born.[23] Governor Gerry removed the power to elect representatives from the hands of Massachusetts's citizens and put it in the hands of those who drew the district lines.

Over 200 years of gerrymandering[24] has led to at least one issue on which Americans can agree: our disdain for gerrymandering is nonpartisan. Rejecting Karl Rove's quip that Congress is controlled by those with the power to draw district lines[25] and instead sharing the founders' desire that the people control governments,[26] 71 percent of Americans polled in 2017 wanted the Supreme Court to place limits on lawmakers' ability to manipulate voting maps and gerrymander districts.[27] In 2019, 72 percent of Americans indicated that they wished the Supreme Court would set rules for when partisan gerrymandering violated the Constitution.[28]

But public desire for a judicial solution does not create justiciability. In *Rucho v. Common Cause*, the Supreme Court held that claims of partisan gerrymandering present political questions beyond the reach of federal courts.[29] In district court, the plaintiff relied on empirical data to challenge redistricting maps drawn by the North Carolina state legislature.[30] Based on a statistical analysis of thousands of computer-generated districting plans, the plaintiff

20. *Id.* at 343 (Souter, J., dissenting) (describing cracking as splitting a group into "impotent fractions").

21. Mulroy, *supra* note 3, at 106.

22. *Id.*

23. *Id.*

24. *Id.*

25. Rove, *supra* note 2 (identifying specific towns to be targeted by Republican candidates running for state legislatures, as "state legislative races . . . will determine who redraws congressional district lines after this year's census, a process that could determine which party controls upwards of 20 seats and whether many other seats will be competitive").

26. *See* THE FEDERALIST NO. 51, *supra* note 1, at 234 (James Madison).

27. Memorandum on Partisan Redistricting, *supra* note 5, at 1.

28. Memorandum on Bipartisan Poll, *supra* note 5, at 2.

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

30. Common Cause v. Rucho, 279 F. Supp. 3d 587, 607–08 (M.D.N.C. 2018), *vacated*, 139 S. Ct. 2484 (2019).

contended that the redistricting plans drawn by the North Carolina General Assembly were such an "extreme statistical outlier" that there was no explanation other than partisan gamesmanship.[31] The district court agreed, noting that the degree to which the lines favored one party indicated that the redistricting plan demonstrated such "partisan favoritism [that] 'simply is not authorized by the Elections Clause.'"[32] The district court recognized that the power of computer-aided analysis was not possible in previous generations:

> More fundamentally, there is no constitutional basis for dismissing Plaintiffs' claims as judicially unmanageable—not because they are irrelevant, unreliable, or incorrectly applied, but simply because they rely on new, sophisticated empirical methods that derive from academic research. The Constitution does not require the federal courts to act like Galileo's Inquisition and enjoin consideration of new academic theories, and the knowledge gained therefrom, simply because such theories provide a new understanding of how to give effect to our long-established governing principles. That is not what the founding generation did when it adopted a Constitution grounded in the then-untested political theories of Locke, Montesquieu, and Rousseau. That is not what the Supreme Court did when it recognized that advances in our understanding of psychology had proven that separate could not be equal. And that is not what we do here.[33]

On appeal, the Supreme Court acknowledged that "[t]he districting plans at issue here are highly partisan, by any measure."[34] But the Court noted that partisan gerrymandering is, to an extent, acceptable.[35] The real issue at hand is "determining when [partisan] gerrymandering has gone too far."[36] And on this issue, the Court found that there exists no manageable standard to determine when gerrymandering becomes *too* partisan.[37] The district court had previously warned that failing to accept statistical analysis aided by computers as a manageable standard "would be to admit that the judiciary lacks the competence—or willingness—to keep pace with the technical advances that simultaneously facilitate such invidious

31. *Id.* at 608 (emphasis omitted).

32. *Id.* at 690 (quoting Cook v. Gralike, 531 U.S. 510, 526 (2001)).

33. *Id.* at 634 (citation omitted).

34. *Rucho*, 139 S. Ct. at 2491.

35. *See id.* at 2498 ("The question is one of degree . . . .").

36. *Id.* at 2497 ("The 'central problem' is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is 'determining when political gerrymandering has gone too far.'" (quoting Vieth v. Jubelirer, 541 U.S. 267, 296 (2004) (plurality opinion))).

37. *See id.* at 2506–07.

partisanship and provide an opportunity to remedy it."[38] And yet, the Supreme Court rejected the notion that computer-aided statistical analysis could provide a manageable solution.[39] In ruling that partisan gerrymandering was a nonjusticiable issue, the Court acknowledged that though the proposed maps were drawn with partisan intent,[40] a statistical analysis could only show that a proposed map deviated from one that was neutral.[41] But because deviations in and of themselves are not unconstitutional, such an analysis does nothing to resolve "the original unanswerable question (How much political motivation and effect is too much?)."[42] With federal courts unable to resolve issues of partisan gerrymandering, the responsibility falls on the legislature to develop creative solutions to address this issue.

II. THE SHORTFALLS OF INDEPENDENT REDISTRICTING

Even before *Rucho* closed the federal judiciary to questions of partisan gerrymandering, state legislatures attempted to address gerrymandering's ills, oftentimes in response to citizen initiatives calling for voting reform.[43] But as noted by the founders, ceding uncontrollable power over federal elections to state legislatures is a

38. *Common Cause*, 279 F. Supp. 3d at 632.

39. *See Rucho*, 139 S. Ct. at 2502 ("Appellees and the dissent propose a number of 'tests' for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially . . . manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.").

40. *Id.* at 2505 ("These cases involve blatant examples of partisanship driving districting decisions.").

41. *Id.* The Court also said that there are several reasons why a proposed map may deviate from neutral and that expecting the Court to invalidate a map based on an inquiry into the mapmakers' intent was an unmanageable test:

> As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves. It is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map could be constitutional or not depending solely on what the mapmakers said they set out to do. That possibility illustrates that the dissent's proposed constitutional test is indeterminate and arbitrary.

Id.

42. *Id.* (quoting Vieth v. Jubelirer, 541 U.S. 267, 296–97 (2004) (plurality opinion)).

43. *See* Annie Lo, *Citizen and Legislative Efforts to Reform Redistricting in 2018*, BRENNAN CTR. FOR JUST. (Nov. 7, 2018), https://www.brennancenter.org/our-work/analysis-opinion/citizen-and-legislative-efforts-reform-redistricting-2018.

worrisome proposition.[44] Echoing the founders' concerns in giving state legislatures unbridled control over the regulation of congressional elections, 62 percent of Americans indicate that they want independent redistricting commissions to draw district lines rather than the state legislature itself.[45] Many citizen initiatives have proposed taking the ability to draw district lines out of the hands of the legislature, noting the conflict of interest that exists when partisan politicians in state legislatures are drawing district lines for federal congressional districts in which their peers are running, or for which they may be planning on running themselves in the future.[46]

Due in part to these citizen initiatives, ten states entrust a commission with drawing congressional districts.[47] An additional four states have an advisory commission that may assist the legislature with drawing the district lines, and three states have a commission that will make line-drawing decisions, but only if the legislature is unable to come to a consensus on a plan.[48] Although each state commission is designed slightly differently, they all operate to create varying degrees of separation between the legislature and the drawing of district lines to mitigate the potential conflict of interest that is inherent in politicians drawing political lines.[49]

Though they may minimize the conflict of interest inherent in political officials drawing political boundaries,[50] independent redistricting commissions cannot entirely solve the problem of gerrymandering for a variety of reasons, two of which are the basis of this Comment. First, it is difficult, if not impossible, to create a commission that is independent of partisan bias. In contrast to the difficulty of creating independence, it is easy for a bad actor to sow

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44. *See* THE FEDERALIST NO. 59, *supra* note 1, at 265–66 (Alexander Hamilton) ("Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it . . . ."); THE FEDERALIST NO. 60, *supra* note 1, at 269 (Alexander Hamilton) ("We have seen, that an uncontrollable power over the elections to the federal government could not, without hazard, be committed to the State legislatures.").

45. Memorandum on Bipartisan Poll, *supra* note 5, at 3.

46. *See* Lo, *supra* note 43.

47. *Redistricting Commissions: Congressional Plans*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 10, 2021), https://www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx.

48. *Id.*

49. *See* Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808, 1817–19 (2012) (discussing the degrees of legislative conflict of interest separation achieved by independent redistricting commissions).

50. *See infra* notes 65–66 and accompanying text.

distrust in even the most independent and nonpartisan of commissions and delegitimize the process by alleging political gamesmanship.[51] Second, single-member districts encourage, or even require, partisan gerrymandering in order to achieve fair representation.[52] Districts must be drawn reliably red or blue to ensure that the minority party will have *some* representation in a state's congressional delegation.

A. The "Independence" of Independent Redistricting Commissions

Arizona State Legislature v. Arizona Independent Redistricting Commission[53] showed both the potential value of, and practical shortfalls of, independent redistricting commissions. Writing for the majority, Justice Ginsburg stated that the Elections Clause was "intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate."[54] Harkening back to the concerns of the founders, Justice Ginsburg pointed to the conflict of interest that exists if state legislators are empowered to draw their own district lines or draw congressional district lines for the districts in which their partisan compatriots are running.[55] Independent redistricting commissions were created "against a 'background of recurring redistricting turmoil,'"[56] and these commissions have been successful in achieving their goals:

> Independent redistricting commissions, it is true, "have not eliminated the inevitable partisan suspicions associated with political line-drawing." But "they have succeeded to a great degree [in limiting the conflict of interest implicit in legislative control over redistricting]." They thus impede legislators from choosing their voters instead of facilitating the voters' choice of their representatives.[57]

Conversely, Chief Justice Roberts's dissent argued that redistricting commissions are buoyed by partisanship, maintain

51. *See infra* notes 77–86 and accompanying text.

52. *See infra* notes 87–89 and accompanying text.

53. 576 U.S. 787 (2015).

54. *Id.* at 815.

55. *See id.* (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 241 (Max Farrand ed., rev. vol. 1966) (James Madison)); *see also* Cain, *supra* note 49, at 1824–27 (discussing redistricting commissions as a way to purge legislative and political influence on the redistricting process and minimize the conflict of interest that occurs when legislators draw districts).

56. *Ariz. State Legislature*, 576 U.S. at 796 (quoting Cain, *supra* note 49, at 1831).

57. *Id.* at 821 (alteration in original) (citations omitted) (quoting Cain, *supra* note 49, at 1808).

political bias in the map drawing process,[58] and are a failed high-minded experiment, despite their good intentions.[59]

Although Chief Justice Roberts's dissent was dismissive of the incremental gains that independent redistricting commissions have provided in the battle against partisan gerrymandering,[60] questioning whether commissions are truly independent is a valid concern. The National Conference of State Legislatures purposefully omits the term "independent" when discussing redistricting commissions since it may erroneously lead someone to believe that the commissions are free from political influence.[61] "Independent" only means that the district lines are not directly drawn by the legislature; it is not intended to imply that commission members are free from partisan ties or influence.[62]

In some of these commissions, members are elected politicians.[63] In others, they are private citizens, appointed by elected political officials.[64] Some other states acknowledge that private citizens hold partisan tendencies and attempt to mitigate this conflict by mandating that commissions be composed of an equal number of members from each major party.[65] Regardless of the manner in which commissions are formed, it is clear that calling redistricting commissions "independent" is a non sequitur, or misleading at best:

> In the frequently quoted words of Robert G. Dixon, Jr., "all districting is gerrymandering." Indeed, it is difficult to think of politically neutral individuals to whom one could entrust the redistricting process . . . . While we can surely agree that some persons are less partisan than others, the appointment of a

58. *Id.* at 848–49 (Roberts, C.J., dissenting).

59. *Id.* at 820 (majority opinion).

60. *See id.* at 848–49 (Roberts, C.J., dissenting).

61. *Redistricting Commissions: Congressional Plans*, *supra* note 47 ("Please note that NCSL does not use the phrase 'independent commissions.' All NCSL redistricting [materials] refer to any non-legislative institution tasked with redistricting as a 'commission,' without further categorization." (bold and italics omitted)).

62. *Id.*

63. *See, e.g.*, VA. CONST. art. II, § 6-A; VA. CODE ANN. §§ 30-391 to -394 (2022) (specifying that the majority and minority leaders of each chamber select two members of their caucus to serve on the commission, along with citizens selected by retired judges).

64. *See, e.g.*, ARIZ. CONST. art. IV, pt. 2, § 1 (mandating that the highest-ranking officer in each of Arizona's legislative chambers will each pick one commission member, as well as the minority leaders of each chamber, with a fifth chairperson being elected by the four chosen members).

65. *See, e.g.*, CAL. CONST. art. XXI, § 2(c)(2); CAL. GOV'T. CODE § 8252(f)–(g) (Deering 2022) (specifying the commission must include five Democrats, five Republicans, and four unaffiliated voters, chosen through a combination of lottery process and appointments).

> truly nonpartisan individual to a redistricting commission would require us to locate Plato's philosopher-king.[66]

Commissions are made up of human beings with partisan leanings, who use voting trend data, election results, voter rolls, and party registration data to draw district lines.[67] Bias, even if unconscious, is inescapably intertwined with the decision-making of those on the commissions drawing district lines.

Even if a commission were to escape partisan bias and establish procedures to mitigate political influence,[68] a commission's legitimacy is tenuous. A commission's work can be tarnished, and its members painted as biased through political gamesmanship and allegations absent substantiating evidence.

Rep. Blake Moore of Utah has pushed for independent commissions made up of citizens to draw district lines as opposed to legislators.[69] As a Republican in a solidly red state,[70] Representative Moore acknowledges such reform may not dramatically change the composition of Utah's congressional delegation, but he believes it is a policy that will increase public confidence in the government.[71] By

66. Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 848–49 (1997) (footnotes omitted) (quoting ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 462 (1968)).

67. *See* DAVID DALEY, RATF**KED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA'S DEMOCRACY 51–60 (2016) (describing the information and technology available to mapmakers drawing congressional districts).

68. Not included in this discussion, as it is the only state to adopt such a framework, Iowa has adopted an approach in which the commission cannot look at voting data, like voting trends, voter rolls, and party affiliation, when drawing district lines. *Id.* at 152. Essentially, the commission is drawing the lines without knowledge of the voting tendencies of neighborhoods. *Id.* For a detailed discussion on Iowa's redistricting commission, see *id.* at 148–59.

69. *See* Nicole Nixon, *Would an Independent Commission Really Draw 'Better Boundaries'? A Look at Prop 4*, KUER 90.1 (Oct. 8, 2018, 6:00 AM), https://www.kuer.org/utah-politics/2018-10-08/would-an-independent-commission-really-draw-better-boundaries-a-look-at-prop-4 (summarizing 2018 Utah ballot initiative for independent redistricting commission and Rep. Blake Moore's support of it).

70. Of Utah's active registered voters that have declared a party affiliation, 73% are Republican, while 19% are Democrat. *Current Voter Registration Statistics*, VOTE.UTAH.GOV (Aug. 8, 2022), https://voteinfo.utah.gov/current-voter-registration-statistics.

71. *Cf.* All Things Considered, *Democrats in Utah Could Gain a Bit More Power, if Redistricting Measure Passes*, NPR, at 02:45 (Oct. 30, 2018, 4:30 PM), https://www.npr.org/2018/10/30/662253551/democrats-in-utah-could-gain-a-bit-more-power-if-redistricting-measure-passes (Rep. Blake Moore arguing that an independent commission would ensure that "politicians don't get to choose their voters, that voters actually choose our politicians"); *id.* at 02:50 ("Republican

allowing independent commissions to draw district lines, the public will no longer have the perception that legislators gerrymandered district lines for their own benefit, striking deals in smoke-filled backrooms. In his view, independent commissions can create a sense of trust in the government that is lacking in the general public:

> [T]he legislature looks like a shadowy body that has manipulated rules for their own benefit. So make it stop. Let an independent commission draw the lines. Republicans will still win and create the sound policy Utahans want . . . . Good policies get passed and there's no criticism that the process has been nefarious.[72]

Unfortunately, Representative Moore's optimism has not always borne out in states that have adopted independent commissions. Recent history has shown that even independent commissions can be viewed as shadowy bodies, unable to escape the allegations of partisan bias, as opponents attempt to delegitimize the redistricting process.[73]

Arizona's redistricting commission is made up of five citizens.[74] The highest-ranking members of the state house and senate, and the minority party leaders of both chambers, each select one private citizen to serve on the commission.[75] Those four appointed commissioners then elect a fifth person to act as the commission chairperson.[76]

In 2011, Arizona's redistricting commission consisted of two Republicans, two Democrats, and an independent as its chairperson.[77] Despite its balanced composition, the work of the committee was quickly attacked as biased.[78] At a public meeting of the Arizona Independent Redistricting Committee, the chairperson was blasted by members of the public, called "highly partisan . . . or an incapable chair," an "[i]ndependent [who] is not really an independent," and a "[c]ockroach[.]"[79] Citizens called for the governor to remove the chairperson for ineptitude and gross partisan bias.[80]

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supporters like Moore say an independent redistricting commission would force their party to be more responsive to voters.").

72. DAVID DALEY, UNRIGGED: HOW AMERICANS ARE BATTLING BACK TO SAVE DEMOCRACY 100 (2020) (quoting Representative Moore).

73. *See infra* notes 74–86 and accompanying text.

74. ARIZ. CONST. art IV, pt. 2, § 1(3).

75. *Id.* § 1(6).

76. *Id.* § 1(8).

77. Ariz. Indep. Redistricting Comm'n v. Brewer, 275 P.3d 1267, 1269 (Ariz. 2012).

78. DALEY, *supra* note 67, at 161.

79. *Id.*

80. *Id.*

Shortly thereafter, the governor removed the chairperson for gross misconduct, citing a "failure to consider or determine whether the creation of a competitive district is practicable or does not cause significant detriment to . . . other goals."[81] Only three hours later, the Arizona Supreme Court blocked the governor's attempt to remove the chairperson,[82] holding that under Arizona's Constitution, the governor did not have the authority to remove the redistricting commission's chairperson.[83] Even though the governor never pointed to any specific actions or decisions that suggested partisan bias on the part of the chairperson, and the chairperson was allowed to resume her duties, the damage had been done.[84] Moving forward, the chairperson was viewed as a Trojan horse, independent in name only, attempting to manipulate the commission into drawing district lines that would favor one party.[85] Without alleging a single incident of misconduct or bias, the act of attempting to remove the commissioner delegitimized the commission in the court of public opinion, giving the commission the appearance of a partisan entity that lacked the independence claimed by its name.[86]

B. "Fair" Representation

Further complicating the efforts of independent redistricting commissions is the notion of "fair" representation. Inherent in the use of single-member districts is a need to gerrymander.[87] Completely neutral lines are likely to result in an overrepresentation of majority groups in Congress.[88] Creating more fair representation, therefore, means purposeful gerrymandering to ensure that there are districts that can be reliably won by minority groups.[89] But creating

81. *Brewer*, 275 P.3d at 1270. Technically, the removal of the chairperson was executed by Arizona Secretary of State and acting governor, Ken Bennett, while elected Governor Janice Brewer was out of state. *Id.* The Supreme Court of Arizona refers to the actions taken by Bennett during his time as acting governor on behalf of Governor Brewer, as well as any actions taken by Governor Brewer herself, as actions taken by the governor. *See id.* n.2.

82. DALEY, *supra* note 67, at 168.

83. *Brewer*, 275 P.3d at 1275.

84. *Id.*

85. DALEY, *supra* note 67, at 168.

86. *See* Cain, *supra* note 49, at 1836 (noting that attempting to remove chairperson for "'gross misconduct' . . . apparently mean[s] proposing boundaries that the majority party does not like").

87. *See* Michael Li & Laura Royden, *Does the Anti-Gerrymandering Campaign Threaten Minority Voting Rights?*, BRENNAN CTR. FOR JUST. (Oct. 10, 2017), https://www.brennancenter.org/our-work/analysis-opinion/does-anti-gerrymandering-campaign-threaten-minority-voting-rights.

88. *See* Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CAL. L. REV. 1589, 1604 (2004).

89. *See id.*

reliable districts in which the results of a general election are reliably predetermined has taken the power of the vote out of the hands of the citizens and given it to those who draw the lines.

Supporters of independent redistricting commissions point to California's 2010 redistricting plan as an example of the benefits that independent commissions can bring in creating neutral redistricting plans.[90] But computer modeling shows that Republicans would need to win 55.7 percent of the vote in California in order to get 50 percent of the state's seats in Congress.[91] In 2014, Democratic candidates won 57 percent of the vote, but that translated to 73.6 percent of the congressional seats.[92] California's redistricting commission, however, never intended to draw lines that would yield congressional delegations that proportionally reflect the partisan makeup of their constituents.[93] Instead, its mission is to draw what it perceives as "fair" districts,[94] a nebulous term that will not quell any public debate or provide a manageable standard for drawing district lines.[95]

As part of this quest for "fairness," a commission may draw lines in a way to ensure that minority parties will be represented by winning at least some of the districts.[96] The premise of this argument is that if completely neutral lines are drawn, the majority party can sweep every district and minority groups will be underrepresented among elected officials:

> Partisan gerrymandering is so difficult to adjudicate because there is no way to district in a neutral fashion. Some degree of gerrymandering is necessary to ensure a semblance of proportionality: if each district is a perfect microcosm of the state, the party with slightly more voters statewide will win

90. *See* Andrew Spencer et al., *Escaping the Thicket: The Ranked Choice Voting Solution to America's Districting Crisis*, 46 CUMB. L. REV. 377, 388 (2016).

91. *Id.*

92. *Id.*

93. *See About Us*, WE DRAW THE LINES CA, https://www.wedrawthelinesca.org/about_us (last visited July 18, 2022).

94. *See id.* (stating one of its goals is to "provide *fair* representation for all Californians" (emphasis added)).

95. *See* Vieth v. Jubelirer, 541 U.S. 267, 291 (2004) (plurality opinion) ("'Fairness' does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.").

96. *See* Nathaniel Rakich, *How this Redistricting Cycle Failed to Increase Representation for People of Color–and Could Even Set it Back*, FIVE THIRTY EIGHT (Mar. 17, 2022, 6:00 AM), https://fivethirtyeight.com/features/how-this-redistricting-cycle-failed-to-increase-representation-for-people-of-color-and-could-even-set-it-back/.

> every district and take the entirety of each district's allocated seats; thus, a party with a slight advantage statewide will wind up with 100 percent of the legislative seats.[97]

Take, for example, Massachusetts. As of 2021, approximately 32 percent of Massachusetts's registered voters are Democrats, 10 percent are Republicans, and 57 percent are not registered with either major party.[98] However, electoral history shows that the unaffiliated voters tend to lean Republican.[99] Five of the last six governors of Massachusetts have been Republicans.[100] Since 1996, Democratic presidential candidates have received approximately 60–65 percent of the vote, with Republicans receiving approximately 30–40 percent.[101] Based on recent voting history, if we assume that 30–40 percent of Massachusetts voters tend to vote Republican, a proportionally representative congressional delegation for Massachusetts would be approximately three Republicans and six Democrats from the state's nine congressional districts. But Massachusetts has not elected a Republican representative to Congress since 1995, with Democrats winning 128 consecutive elections across the state's congressional districts over the last twenty-five years.[102]

Counterbalancing Democrats' overrepresentation in Massachusetts's congressional delegation, Republicans are overrepresented in Arkansas's congressional delegation. Approximately 60 percent of Arkansas voters supported Republican candidates in the last four presidential elections, with Democrats

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97. Easha Anand, *Finding a Path Through the Political Thicket: In Defense of Partisan Gerrymandering's Justiciability*, 102 CAL. L. REV. 917, 924 (2014).

98. *See Massachusetts Registered Voter Enrollment: 1948–2021*, SEC'Y OF THE COMMONWEALTH OF MASS., https://www.sec.state.ma.us/ele/eleenr/enridx.htm (last visited July 18, 2022).

99. *See* Joshua Miller & Matt Stout, *The Number of Independent Voters in the State Keeps Climbing*, BOS. GLOBE (Aug. 29, 2018, 11:59 PM), https://www.bostonglobe.com/metro/2018/08/29/the-number-independent-voters-state-keeps-climbing/uvvxg4b23qtOFJGPhQHmVK/story.html.

100. *See Former Governors—Massachusetts*, NAT'L GOVERNORS ASS'N, https://www.nga.org/former-governors/massachusetts/ (last visited July 18, 2022); *Massachusetts Gov. Charlie Baker*, NAT'L GOVERNORS ASS'N, https://www.nga.org/governor/charlie-baker/ (last visited July 18, 2022).

101. *See Massachusetts Election Statistics*, SEC'Y OF THE COMMONWEALTH OF MASS.,
https://electionstats.state.ma.us/elections/search/year_from:1996/year_to:2020/office_id:1/stage:General (last visited July 18, 2022).

102. *See Massachusetts Election Statistics*, SEC'Y OF THE COMMONWEALTH OF MASS.,
https://electionstats.state.ma.us/elections/search/year_from:1995/year_to:2020/office_id:5/stage:General (last visited July 18, 2022).

receiving approximately 35 percent of the vote.[103] But no Democrats have been elected to Arkansas's congressional delegation in the past five elections.[104] In states where each district is a microcosm of the state as a whole, the majority party of the state as a whole is the majority party of every district and will reliably sweep every congressional district.

In an attempt to create fairer congressional delegations that reflect the composition of the voters of the state as a whole, line drawers sometimes gerrymander districts to produce reliable outcomes in which the minority party can win at least some districts and be represented in the state's congressional delegation.[105] But this process is inherently undemocratic. Redistricting "tak[es] the decision-making out of the hands of voters and impos[es] what map-makers determine to be fair results . . . by drawing district lines with predetermined partisan outcomes."[106]

The result is that general elections are elections in name only, easily won by the candidate whose party has a stranglehold on the district. Between 1998 and 2004, 90 percent of congressional races were noncompetitive, with margins of victory greater than 10 percent.[107] Recently, the number of competitive districts has further diminished, with general election results being foregone conclusions: "'We're all out there talking about 75 to 100 competitive districts nationwide . . . . That's the big lie . . . . After you actually look at redistricting, in the 2012 cycle, it was about 35 to 50. And then in the 2014 cycle, . . . [t]here are a couple dozen competitive districts . . . 20 to 30, at most.'"[108] The lack of competitive districts is not merely theoretical or political commentators yelling at clouds. Shortly after the 2012 election, FairVote, a nonprofit organization that advocates

103. *Arkansas*, 270 TO WIN, https://www.270towin.com/states/Arkansas (last visited July 18, 2022). In part because it uses an open primary system, few voters in Arkansas are affiliated with a party, with only 7 percent of voters registered as Republicans and 5 percent of voters registered as Democrats. *See* ARK. SEC'Y OF STATE, VR STATISTICS COUNT REPORT: PARTY COUNT REPORT FOR JURISDICTIONS 6 (2021), https://www.sos.arkansas.gov/uploads/VR_Statistics_Report_for_June_2021.pdf. However, polling indicated that although there are more Republican adults (46 percent) than Democrat adults (38 percent), the state is much more purple than its recent congressional delegations would indicate. *See Party Affiliation Among Adults in Arkansas*, PEW RSCH. CTR., https://www.pewforum.org/religious-landscape-study/state/arkansas/party-affiliation/ (last visited July 18, 2022).

104. *Arkansas*, *supra* note 103.

105. Spencer et al., *supra* note 90, at 394.

106. *Id.*

107. Rob Richie & Andrew Spencer, *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, from City Councils to Congress*, 47 U. RICHMOND L. REV. 959, 972 (2013).

108. DALEY, *supra* note 67, at 101 (quoting former Rep. Steve Israel).

for voting reform, predicted results for the 2014 congressional election.[109] FairVote did not know what candidates would run in two years; it simply based its predictions on the partisan proclivities of gerrymandered districts.[110] FairVote correctly predicted which party would win 434 of the 435 races—damning evidence that most districts have been gerrymandered to produce overwhelmingly predictable results and foregone conclusions in general elections.[111]

In sum, redistricting commissions may be a step in the right direction, but they have limitations in their quest to eliminate gerrymandering. Though not a failed high-minded experiment as alluded to by Chief Justice Roberts,[112] redistricting commissions do have significant shortcomings. It is impossible to remove all partisan influence, and it is relatively easy to delegitimize the work of the commissions by alleging bias and political gamesmanship. Even if commissions retain the trust of the public, drawing single-member districts is inextricably entangled with gerrymandering. In a quest for unmanageable and undefined "fair" representation, commissions may draw districts that will reliably elect members of minority groups. Although this will lead to more "fair" representation, it is a flawed process that takes voting power out of the hands of citizens and gives it to the line drawer.

III. FAIR REPRESENTATION ACT

Recognizing the limitations of single-member districts, the Fair Representation Act[113] proposes comprehensive electoral reform in an effort to minimize partisan gerrymandering and noncompetitive elections.[114] The act proposes that all states with more than one but less than six congressional districts be re-formed into one district that elects multiple members,[115] and any state with six or more districts be re-formed into larger districts that elect between three and five representatives.[116] The act also requires that congressional elections use ranked-choice voting, in which voters rank the candidates for

109. *Id.* at 196.

110. *Id.* at 196–97.

111. *See id.* at 196.

112. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 820 (2015).

113. Fair Representation Act, H.R. 3863, 117th Cong. (as referred to H. Comm. on the Judiciary & Comm. on H. Admin., June 14, 2021).

114. *See, e.g.*, *id.* § 101 (amending Title III of the Help America Vote Act of 2001 to require, inter alia, ranked-choice voting for House and Senate elections nationwide).

115. *Id.* § 202.

116. *Id.* § 201.

office in their order of preference, rather than choosing only the candidate they wish to elect.[117]

There are a series of argued benefits to the Fair Representation Act, such as efficiency and increased civility.[118] However, the two most significant purported benefits that warrant further discussion are that reform will decrease polarization and create a Congress that is more representative of the citizens it represents.

A. Polarization

The Fair Representation Act or similar reform may lead to decreased polarization within politics.[119] Because gerrymandering has created districts in which the outcome of a general election is a foregone conclusion, the contested election is the party's primary. Winning the primary often requires candidates to run to the flanks of their party's platform since it is activists on the party boundaries that are likely to decide the primary, not party moderates closer to the middle of the political spectrum.[120] Primaries turn into bitter battles on the fringes of the party, turning off moderates who do not feel invested in the issues debated.[121] With moderates disengaged,

117. *Id.* § 101. ("Each State shall carry out elections for the office of Senator and the office of Representative in Congress using a system of ranked choice voting under which each voter shall rank the candidates for the office in the order of the voter's preference . . . .").

118. *See* DALEY, *supra* note 72, at 199 (noting that when Maine introduced ranked-choice voting, "campaigns were so civil and high-minded that two hopefuls for governor actually cross-endorsed each other as second choice").

119. *See* Lee Drutman, *This Voting Reform Solves 2 of America's Biggest Political Problems: "Proportional" Voting Would Reduce Party Polarization and the Number of Wasted Votes*, VOX (July 26, 2017, 3:21 AM), https://www.vox.com/the-big-idea/2017/4/26/15425492/proportional-voting-polarization-urban-rural-third-parties (arguing that proportional representation is a solution to polarization and explaining how the Fair Representation Act would facilitate proportional representation).

120. *See* DALEY, *supra* note 67, at 156 ("What you have now is polarization—districts that are basically Democratic, more that are basically Republican, a few swing seats in there but not very many—not very many! What that means is that people can take more extreme positions, knowing that they're going to get elected, and it even promotes more of an extremism in the party because if you have a few activists in the party that are too far right or too far left, they can then tend to pull you that direction because they might decide the primary!" (quoting former U.S. Sen. Tom Harkin)); BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 222 (2008) ("In homogeneous voting districts, politicians have drifted to extremes, changing the nature of elections and even the type of person who will run for office.").

121. BISHOP, *supra* note 120, at 236 (noting that in homogenous districts, even though moderate citizens were members of the majority party, they felt discouraged from civic engagement because political campaigns "would be

candidates are pulled even further to the fringes, catering to the poles of the party, since those voters remain engaged and are more likely to show up and vote in the primary.[122]

Social psychologists have observed similar occurrences, dubbing them group polarization and the risky shift phenomenon.[123] Individuals surrounded by like-minded individuals, all of whom share a moderate or middle-of-the-road position, will over time drift as a group to a more polarized or extreme position.[124] Individuals are more likely to take extreme positions if they are surrounded by those who share their same moderate beliefs, and the group as a whole will shift to a more extreme viewpoint over time.[125] Complementary studies across several communities regarding political and social issues have shown the group polarization phenomenon and a shift in individual attitudes to more extreme positions following interaction with like-minded moderate community members.[126] With respect to gerrymandering, purposely drawing districts to be noncompetitive in which citizens are surrounded by like-minded Republicans or Democrats will lead to increased polarization.[127] Over time, risk shifting will cause these districts to adopt more radical ideas, running to the poles of the party platform and creating a greater political divide among citizens from red and blue districts.[128] This has borne out in America. As districts have been drawn reliably red or blue, individuals within those districts have gone from holding moderate views that lean in the general direction of the majority to holding viewpoints that are at the polar extremes of the party platform.[129]

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extreme, and most of the issues [moderates] were concerned with were not at the extreme" (quoting L. Sandy Maisel)).

122. *Id.*

123. *See* James A.F. Stoner & David G. Myers, *Group Polarization and the Risky Shift*, *in* ENCYCLOPEDIA OF MGMT. THEORY 322, 322–24 (Eric H. Kessler ed., 2013).

124. *See id.* at 323–24.

125. *See* David G. Myers & Helmut Lamm, *The Group Polarization Phenomenon*, 83 PSYCH. BULL. 602, 602 (1976).

126. *See* Helmut Lamm & David G. Myers, *Group-Induced Polarization of Attitudes and Behavior*, *in* 11 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 145, 148 (Leonard Berkowitz ed., 1978).

127. *See* BISHOP, *supra* note 120, at 68–70.

128. *See id.* at 66–70.

129. *See Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/ (displaying an increase in polarization and a departure from moderate views for both conservative and liberal citizens since 1994).

The majority of Americans believe that *both* parties are too extreme and do not represent the views of most Americans.[130] Over half of Americans express concern about the partisan divide, noting that it has gotten to the point where opposing party members cannot even agree on basic facts, let alone plans and policy decisions.[131] The concerns of the general public are not unfounded; as polarization has risen, congressional action has stagnated.[132] Congress has grown more polarized and less productive.[133]

Of the thirty-three countries in the world that rank highly in human and political rights, only six, including the United States, use a winner-take-all voting system where a single candidate that receives the most votes is elected.[134] The other twenty-seven countries in the study use some sort of proportional representation and multimember districts in their elections.[135] A recent study of polarization in twelve countries shows that countries with winner-take-all elections in single-member districts, namely, the United States and Canada, have experienced dramatic increases in polarization.[136] In contrast, countries like Sweden, Norway, and Germany, three countries that use proportional representation voting systems, have seen a decrease in polarization over the past forty years.[137]

B. Proportional Representation

By decreasing polarization and reimagining elections, the Fair Representation Act will result in congressional delegations that are

130. *See* PARTISAN ANTIPATHY: MORE INTENSE, MORE PERSONAL, PEW RSCH. CTR. 7 (2019), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2019/10/10-10-19-Parties-report.pdf.

131. *Id.*

132. *See* SARAH BINDER, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS, POLARIZED WE GOVERN? 10 fig.3 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/BrookingsCEPM_Polarized_figReplacedTextRevTable Rev.pdf (showing a consistent rise in the frequency of legislative gridlock since the 1940s); BISHOP, *supra* note 120, at 247 fig.10.1 (depicting the decrease in moderates in Congress since the 1940s).

133. BISHOP, *supra* note 120, at 247 (stating that since 1966, Congress has grown "more ideologically balkanized and, at the same time, less productive").

134. Rob Richie, *Proportional Representation in Most Robust Democracies*, FAIRVOTE (Mar. 7, 2016), https://www.fairvote.org/proportional_representation_in_most_robust_democracies.

135. *See id.*

136. *See* Levi Boxell et al., *Cross-Country Trends in Affective Polarization* 2, 7 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26669, 2021), https://www.nber.org/papers/w26669.

137. *Id.*

more ideologically diverse[138] and more reflective of the delegation's constituents: "There are conservative Democrats and liberal Republicans. Safe-seat gerrymandering with single-member districts drives both out of the system. Multimember districts with ranked-choice voting would give them a real chance to compete."[139]

In addition to proportional representation with respect to political affiliation, the Fair Representation Act can help bring about congressional delegations that are more reflective of their constituents in all respects, including gender, race, and ethnicity. American cities that have used ranked-choice voting in multimember districts show more proportional representation with respect to gender than single-member districts.[140] Women, particularly women of color, have greater representation in municipal elections that use multimember districts than in elections with single-member districts.[141]

IV. CRITIQUES OF THE FAIR REPRESENTATION ACT

Despite its argued benefits, the Fair Representation Act has not been widely supported and failed to leave committee in the 115th and 116th Congresses.[142] It is not surprising that such dramatic reform has attracted a wide variety of criticism. Opponents claim it is too radical a concept that has no foundation in the American political tradition.[143] But "from the earliest days of the Republic, multimember districts were a common feature of our political system[]."[144] Others argue that a system that uses ranked-choice voting is just too complicated.[145] It is already difficult to make an informed choice between two candidates, and ranked-choice voting requires knowledge of more candidates and their platforms to rank

138. *See* Greg D. Adams, *Legislative Effects of Single-Member Vs. Multi-Member Districts*, 40 AM. J. POL. SCI. 129, 141 (1996).

139. LAWRENCE LESSIG, THEY DON'T REPRESENT US: AND HERE'S HOW THEY COULD—A BLUEPRINT FOR RECLAIMING OUR DEMOCRACY 153 (2019).

140. *See* SCOTT HOFER ET AL., THE TRADE-OFFS BETWEEN AT-LARGE AND SINGLE-MEMBER DISTRICTS 4 (Univ. of Hous. Hobby Sch. Pub. Affs., White Paper Series No. 14, 2018), https://uh.edu/hobby/cpp/white-paper-series/_images/hspa-white-paper-series_no.-14.pdf.

141. *Id.*

142. *See* H.R. 3057, 115th Cong. (2017); H.R. 4000, 116th Cong. (2019).

143. *See* DALEY, *supra* note 67, at 195 ("DC-based activists have pushed for both [ranked-choice voting] and multiple-member congressional districts for years, only to have insiders dismiss their ideas as too radical or impractical a change for Americans to accept.").

144. Holder v. Hall, 512 U.S. 874, 897–98 (1994) (Thomas, J., concurring).

145. *See* Bruce Ramsey, Opinion*, Ranked-Choice Voting Has Appeal, but It's Too Complicated*, SEATTLE TIMES (Oct. 13, 2009, 6:46 PM), https://www.seattletimes.com/opinion/ranked-choice-voting-has-appeal-but-its-too-complicated.

them on the ballot.[146] Even the process of filling out the ballot is more confusing.[147] But in places like Santa Fe, where ranked-choice voting was recently implemented for municipal elections, voters remarked that despite its novelty, they were not confused or overwhelmed by the process.[148] Concerns like these, regarding tradition or confusion, can be easily remedied by educating the general public. There are two other concerns, however, that warrant further analysis. First, multimember districts have been disfavored by the Supreme Court, and opponents of multimember districts argue that they dilute the votes of people of color and inhibit minority representation in Congress.[149] Second, it is difficult to gain congressional support for voting reform that would likely push many current congresspersons out of office.[150] Convincing a number of representatives to vote against their personal interests may be an insurmountable hurdle for the Fair Representation Act.

A. Discriminatory Impacts of Multimember Districts

The predominant thought process in the 1970s and 1980s was that multimember districts would dilute the votes of minority populations and prevent people of color from being elected to office.[151] This was argued to be especially true in areas with a high degree of racial discrimination, in which "white voters will not vote readily for a Black candidate or for a candidate closely identified with Black

146. *See id.*

147. *See id.* ("Fairness and democracy are important values, but they aren't everything. An election system needs to be simple, so that citizens will participate in it, trust it and accept the authority of the candidates chosen under it. And ranked-choice voting is not simple. To the average voter, it's a black box. I think that kills it.").

148. *See* Mulroy, *supra* note 3, at 129 (noting that ranked-choice voting was used in Santa Fe municipal elections in 2018, and despite being the first time it was seen by voters, 84 percent stated that the process was "not too confusing" or "not at all confusing" (quoting FAIRVOTE N.M., SANTA FE VOTERS SUPPORT RANKED CHOICE VOTING AND HAVE HIGH CONFIDENCE IN CITY ELECTIONS 1 (2018), https://www.fairvote.org/newmexico#2018_election).

149. *See* discussion *infra* Section IV.A.

150. *See* discussion *infra* Section IV.B.

151. *See* Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard After* Washington v. Davis, 76 MICH. L. REV. 694, 695 (1978) ("Multimember districting tends to submerge the voting strength of racial or ethnic minorities. For example, suppose that over half the voters in a single-member district are black. If a multimember district is formed by combining that district with districts containing a majority of white voters, the black voters might constitute something less than a majority of the larger district's voting population. If that occurs, the black voters have been 'submerged' in the white majority. Under some circumstances, such a submergence dilutes the voting strength of the minority, thereby impairing that group's ability to elect the representative of its choice.").

interests, or where Blacks find it difficult to join with other groups to form winning coalitions."[152]

In *Thornburg v. Gingles*,[153] the Court held that multimember districts were used to dilute the votes of black citizens, denying black voters the ability to participate equally in the political process, which led to black voters being underrepresented by their elected officials.[154] Vermont recently debated the use of multimember districts for seats in the state legislature.[155] As part of its study of multimember districts, the Vermont Racial Equity Task Force argued that the state should only use single-member districts and said that multimember districts are a "flagrant tactic[] designed to suppress and dilute the votes of communities of color."[156] In support of this argument, the task force only relied on a single unsigned comment from the Michigan Law Review, published in 1972.[157]

It is true that the Court has stated a preference for single-member districts when judicial intervention is required to draw districts[158] and has found instances where multimember districts were used to dilute the voting power of minority groups.[159] However, the Court does not contend that multimember districts are *inherently* discriminatory; multimember districts are not per se unconstitutional, nor do they lead to vote dilution in all instances.[160]

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152. Armand Derfner, *Multi-Member Districts and Black Voters*, 2 NAT'L BLACK L.J. 120, 120 (1972) ("As a practical matter, this means that multi-member districts are discriminatory in the South . . . .").

153. 478 U.S. 30 (1986).

154. *Id.* at 80.

155. *See* Sarah Mearhoff, *Vermont House Advances Multi-Member District Map Despite Concerns over Representation and Process*, VTDIGGER (Jan. 14, 2022), https://vtdigger.org/2022/01/14/vermont-house-advances-multi-member-district-map-despite-concerns-over-representation-and-process/.

156. REPORT OF THE VERMONT RACIAL EQUITY TASK FORCE 28 (2021).

157. *Id.* at 28 n.25 (citing Note, *supra* note 151). Though the Vermont Racial Equity Task Force report also cites to an American Civil Liberties Union article, that article only provides background information regarding vote dilution generally, not support for an argument that multimember districts suppress and dilute the votes of communities of color. *See id.* at 28 n.24.

158. *See, e.g.*, Connor v. Johnson, 402 U.S. 690, 692 (1971) (per curiam) ("[W]hen district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter."); Chapman v. Meier, 420 U.S. 1, 19 (1975) ("Absent particularly pressing features calling for multimember districts, a United States district court should refrain from imposing them upon a State.").

159. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 80 (1986).

160. *See* City of Mobile v. Bolden, 446 U.S. 55, 65–66 (1980); Whitcomb v. Chavis, 403 U.S. 124, 147 (1971) ("We are not ready, however, to agree that multi-member districts, wherever they exist, overrepresent their voters as compared with voters in single-member districts, even if the multi-member delegation tends to bloc voting.").

Rather, the Court has noted that multimember districts, just like single-member districts, have the potential to be used as a weapon to minimize the voting power of people of color.[161] Just as single-member districts can be gerrymandered to dilute the votes of people of color, multimember districts can be fashioned to ensure majority rule of all seats. When multimember districts are used with an at-large voting system, the end result is likely to be a body of elected officials comprised almost entirely of the majority with an underrepresentation of minority groups, "whether racial, economic, political or otherwise."[162] Multimember districts are not inherently discriminatory; it is the coupling of an at-large voting scheme in a multimember district that creates a system that minimizes the voting strength of people of color[163] and prevents people of color from reaching elected office.[164]

Conversely, when multimember districts are coupled with ranked-choice voting, it has *increased* representation of people of color.[165] Multimember districts coupled with ranked-choice voting "ha[ve] resulted in rough proportionality between electoral outcomes and minority groups' shares of the population" in Ireland, Australia, Malta, and several American cities.[166] In fact, ranked-choice voting in multimember districts can produce a more proportionally representative elected body than a series of single-member districts that were purposefully gerrymandered to reliably elect representatives from minority groups.[167]

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161. *See Bolden*, 446 U.S. at 66.

162. Jeffrey C. O'Neill, *Everything That Can Be Counted Does Not Necessarily Count: The Right to Vote and the Choice of a Voting System*, 2006 MICH. STATE L. REV. 327, 347; *see also* Rogers v. Lodge, 458 U.S. 613, 615–16 (1982) (noting that a voting scheme in which five board members are elected at-large "minimize[s] the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district.").

163. *See Thornburg*, 478 U.S. at 47 ("This Court has long recognized that multimember districts and at-large voting schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'" (alteration in original) (quoting Burns v. Richardson, 384 U.S. 73, 88 (1966))).

164. *See* O'Neill, *supra* note 162, at 348; Barbara L. Berry & Thomas R. Dye, *The Discriminatory Effects of At-Large Elections*, 7 FLA. ST. U. L. REV. 85, 93 (1979) ("[T]here is a significant relationship between at-large elections and black underrepresentation[.]").

165. *See* Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 342 (1998).

166. *Id.*

167. *Id.* at 350 (noting that in New York City elections in the 1970s, preference (ranked-choice) voting led to a much more proportional outcome in elections than did single-member district elections in which some districts were drawn specifically to be "minority-oriented").

B. Political Self-Interest

Perhaps the biggest obstacle to overcome is that the Fair Representation Act requires members of Congress to vote against their personal self-interests. The act may have some effects on the balance of power between the two major political parties in Congress as a whole,[168] but it would lead to substantially the same composition of congressional delegations in many states. Returning to the example of Massachusetts, the state is currently represented by nine Democrats.[169] Should the Fair Representation Act be implemented and its goals achieved, Massachusetts's congressional delegation would turn more purple and would likely be closer to six Democrats and three Republicans.[170] Solidly red delegations would turn purple as well, and a state like Arkansas would likely see its current congressional delegation turn from four Republicans to a delegation that includes a Democrat.[171] The net change throughout Congress may be small, but the shift in individual states' congressional delegations means that many congresspersons in gerrymandered districts would be likely to lose a future bid for reelection as the Fair Representation Act leads to more purple delegations.

This is, in part, why it is unlikely that the Fair Representation Act will ever gain the support necessary to pass through the House of Representatives; it requires representatives to vote against their personal interests. It asks the three least popular Democrats in the Massachusetts delegation, the two least popular Republicans in the Arkansas delegation, and a host of other representatives to vote for legislation that will likely put them out of a job. Perhaps this is why even those who support voting reform are dismissive of the Fair

168. The current Congress is comprised of 220 Democrats and 211 Republicans. *Party Breakdown*, U.S. HOUSE OF REPRESENTATIVES PRESS GALLERY, https://pressgallery.house.gov/member-data/party-breakdown (last visited July 21, 2022). A Congress in which the partisan breakdown of a state's representatives matches the political makeup of the state's voters would be 214 Democrats and 221 Republicans. Aaron Bycoffe et al., *The Atlas of Redistricting: Nation*, FIVETHIRTYEIGHT (Jan. 25, 2018, 6:00 AM), https://projects.fivethirtyeight.com/redistricting-maps/#Proportional.

169. BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search (last visited July 21, 2022) (refine search results by selecting "117" for Congress, "Representative" for Position, and "Massachusetts" for State).

170. Aaron Bycoffe et al., *The Atlas of Redistricting: Massachusetts*, FIVETHIRTYEIGHT (Jan. 25, 2018, 6:00 AM), https://projects.fivethirtyeight.com/redistricting-maps/massachusetts/#Proportional.

171. *Id.*

Representation Act and why it has not gained enough traction to pass out of committee.[172]

V. ACHIEVING FAIR REPRESENTATION WITHOUT THE FAIR REPRESENTATION ACT

Given the lack of support that the Fair Representation Act has garnered in the current and past two Congresses,[173] alternative avenues of reform should be considered. Rather than taking the approach of the Fair Representation Act and imposing a uniform system on all states, Congress can take action that will encourage states to adopt voting reform measures of their own volition. Although this strategy may be incremental and will not have an immediate, universal effect, it is a solution that may be able to avoid the resistance faced by the Fair Representation Act. By modifying or eliminating 2 U.S.C. § 2c to allow for the use of multimember districts in congressional districting, it will allow states to act as laboratories of democracy in an attempt to tackle the problem of gerrymandering.[174] In deferring to the states, "[t]he federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'"[175]

Currently, 2 U.S.C. § 2c prohibits the use of multimember congressional districts.[176] Strangely, this law was passed without debate, hearings, or congressional study[177] as an amendment to an immigration act.[178] At the time it was enacted, there was a legitimate

172. *Cf.* DALEY, *supra* note 67, at 197–98 (questioning whether there is the political will to pass such comprehensive reform as the Fair Representation Act).

173. *See* H.R. 3057, 115th Cong. (2017); H.R. 4000, 116th Cong. (2019).

174. *See* Oregon v. Ice, 555 U.S. 160, 171 (2009) ("We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems."); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

175. Bond v. United States, 564 U.S. 211, 221 (2011) (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

176. 2 U.S.C. § 2c ("[T]here shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative . . . .").

177. DAVID C. HUCKABEE & L. PAIGE WHITAKER, CONG. RSCH. SERV., RS21585, CONGRESSIONAL REDISTRICTING: IS AT-LARGE REPRESENTATION PERMITTED IN THE HOUSE OF REPRESENTATIVES? 2–3 (2003).

178. *See* Act of Dec. 14, 1967, Pub. L. No. 90-196, 81 Stat. 581, 581 (codified as 2 U.S.C. § 2c).

fear that multimember districts would be used with at-large voting schemes to dilute the votes of people of color.[179] After all, recent history had shown that multimember districts coupled with at-large voting schemes diluted the votes of minority parties and left minority groups underrepresented in Congress.[180] 2 U.S.C. § 2c "solved" this by banning multimember districts altogether.[181]

Given the benefits that multimember districts can provide when used with ranked-choice voting, the decision to ban multimember districts without debate or study was shortsighted and needs to be remedied in order to achieve proportional representation in Congress. There are two options: either eliminate 2 U.S.C. § 2c's prohibition on multimember districts altogether, or modify the statute to allow for multimember districts, but only if they include a proportional representation vote counting scheme, like ranked-choice voting. It is arguably more prudent to modify 2 U.S.C. § 2c to make the use of multimember districts conditional, and only allow them if ranked-choice voting is implemented, since multimember districts have been previously used as a weapon to dilute the votes of minority groups and prevent candidates of color from being elected to political office. Further, the ruling in *Shelby County v. Holder*[182] eliminated some mechanisms that protected voting rights.[183]

A. Eliminating the Restriction on Multimember Districts Altogether

Should Congress repeal 2 U.S.C. § 2c and allow for multimember districts in congressional elections, there would understandably be a concern that multimember districts would again be used as a tool to dilute the voting power of people of color. Although there are judicially crafted standards to prevent such dilution, the recent erosion of the legislative protections included in the Voting Rights Act

179. *See* Tory Mast, *The History of Single Member Districts for Congress: Seeking Fair Representation Before Full Representation*, FAIRVOTE, http://archive.fairvote.org/?page=526 (last visited July 23, 2022). In an at-large voting system in multimember districts, voters are allowed to vote for the number of seats to be elected from the districts, and the candidates that receive the most votes are elected. In such a system, it is likely that the winning candidates will all be from the majority party. At-large voting in multimember districts has been shown to create homogenous groups of elected officials, all from the majority party, and has been used as a weapon to prevent the election of candidates of color. *See* O'Neill, *supra* note 162, at 347–48.

180. Richie & Spencer, *supra* note 107, at 965–67 (describing the use of at-large elections in multimember districts as a way dilute the voting power of people of color during the Civil Rights Era).

181. § 2c.

182. 570 U.S. 529 (2013).

183. *Id.* at 557 (holding the preclearance requirement of the Voting Rights Act to be unconstitutional).

makes the outright elimination of 2 U.S.C. § 2c an unattractive proposition.

Gingles established a test for determining when a multimember district plan unconstitutionally dilutes the votes of people of color and impairs their ability to elect a representative of their choosing.[184] Under the *Gingles* test, a minority group challenging the districting plan must show that:

> [1.] [I]t is sufficiently large and geographically compact to constitute a majority in a single-member district; . . .
> [2.] [I]t is politically cohesive; [and] . . .
> [3.] [T]he white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate.[185]

In addition to the *Gingles* test, voting rights were previously protected by the preclearance requirement of Section 5 of the Voting Rights Act.[186] Section 5 required certain jurisdictions to obtain preclearance, or federal approval, before enforcing changes to voting laws to ensure that the changes had neither "the purpose [nor] . . . the effect of denying or abridging the right to vote on account of race or color."[187] *Shelby County*, however, gutted the Voting Rights Act.[188] Remarking that social conditions have changed since the Voting Rights Act of 1964 first established preclearance requirements, the Court seemed to argue that we were living in a post-racial America in which protections such as preclearance were no longer necessary to ensure racial equality in access to the voting booth and representation.[189]

Should Congress repeal 2 U.S.C. § 2c, jurisdictions that had a history of discriminatory laws would have been required to obtain preclearance prior to the decision in *Shelby County*. The preclearance requirement would have been an effective protective measure that would have addressed the concerns the legislature had in 1967 when it banned multimember districts. But in the wake of *Shelby County*, there is no preclearance requirement that would prevent multimember districts from being used as a weapon and coupled with winner-take-all elections to dilute the vote of people of color. *Gingles*

184. Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986).

185. *Id.* at 50–51.

186. Voting Rights Act of 1965, 52 U.S.C. § 10304, *invalidated by* Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

187. *Shelby Cnty.*, 570 U.S. at 537 (quoting 52 U.S.C. § 10304(a)).

188. *See id.* at 557 (holding the coverage formula of the Voting Rights Act § 4(b), which was used to subject specific jurisdictions to a preclearance requirement, to be unconstitutional).

189. *See id.* at 547 ("Nearly 50 years later, things have changed dramatically. Shelby County contends that the preclearance requirement, even without regard to its disparate coverage is unconstitutional. Its arguments have a good deal of force.").

offers a degree of protection, but it is a reactive test applied after voting rights have been infringed upon, not a requirement that jurisdictions receive permission to make any changes to voting laws—permission that is only granted if the changes will not infringe upon voting rights. Given the recent erosion of the Voting Rights Act, giving states the unconditional right to use multimember districts in congressional elections is a questionable proposal.

B. Making the Use of Multimember Districts Conditional

Given the effects of *Shelby County*, it would be more prudent to condition the use of multimember districts on the implementation of ranked-choice voting. We know that coupling multimember districts with winner-take-all elections dilutes the votes of racial and ethnic minorities, in violation of the Voting Rights Act.[190] We do not need preclearance to tell us a plan that combines multimember districts with winner-take-all elections is unconstitutional. We do not need to wait for such a plan to be challenged and the *Gingles* test applied. The concerns of coupling multimember districts with winner-take-all elections are just as valid today as they were in 1967 when 2 U.S.C. § 2c was enacted.[191] However, the difference today is that we now know that multimember districts can benefit our electorate when coupled with ranked-choice voting. Therefore, 2 U.S.C. § 2c should be modified to allow for states to use multimember districts for congressional districting *on the condition* that ranked-choice voting be used in the elections.

Modifying 2 U.S.C. § 2c in this manner mitigates the two concerns discussed earlier in opposition to the Fair Representation Act.[192] First, by making the use of multimember districts conditional upon the use of ranked-choice voting for congressional elections, this proposal will prevent multimember districts from being used as a tool to dilute the votes of people of color. Second, such a solution is more likely to be adopted by members of Congress than the Fair Representation Act. The Fair Representation Act faces resistance for a number of reasons. It is bold and dramatic reform, but political inertia is difficult to overcome, particularly in these highly polarized times characterized by increasing legislative gridlock. It asks representatives to vote against their personal self-interests. Also, it is likely to face opposition for encroaching upon traditions of federalism. The Elections Clause grants Congress the power to make any law to alter regulations for elections,[193] but individual states have

190. *See* Note, *supra* note 151, at 695.

191. *See* 2 U.S.C. § 2c; *see also* Note, *supra* note 151, at 695 (discussing concerns that multimember districts could cause minority groups of voters to be diluted and impair their ability to elect the representative of their choice).

192. *See supra* Part IV.

193. U.S. CONST. art. I, § 4, cl. 1.

traditionally determined the manner in which they hold elections.[194] Prior to 2 U.S.C. § 2c being enacted, several states *chose* to use multimember districts through the 1960s.[195] Maine recently *chose* to use ranked-choice voting in its federal elections.[196] Districting and election methods are generally left to the choice of the states;[197] the Fair Representation Act makes that choice for the states.

Modifying 2 U.S.C. § 2c to make the use of multimember districts conditional on the implementation of ranked-choice voting does not impose voting reform on the states. Rather, it gives states increased freedom in determining the best manner in which to address the problem of gerrymandering. Because there is no guarantee that individual states will immediately enact reform, individual legislatures are less worried about job security than they would be if voting for the Fair Representation Act. Though this solution may not be the overnight change that the Fair Representation Act would theoretically provide, it is a more realistic, incremental approach, in which states are given increased freedom to act as the laboratories of democracy, searching for creative solutions to the problem of gerrymandering.

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194. *See id.*

195. Mast, *supra* note 179.

196. LESSIG, *supra* note 139, at 153; *see also* ME. STAT. tit. 21-A, § 601(1) (2021).

197. *See* U.S. CONST. art. I, § 4, cl. 1.

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