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Why We Can't Have Nice Things: Equality, Proportionality, and Our Abridged Voting Rights Regime

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WHY WE CAN'T HAVE NICE THINGS: EQUALITY, PROPORTIONALITY, AND OUR ABRIDGED VOTING RIGHTS REGIME

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What constraints should the protection of political equality place on the design of electoral systems? With the exception of requiring approximate population equality across a jurisdiction's districts, the U.S. voting rights regime accepts substantial disproportionality in voting strength. This Article addresses the current Supreme Court's abandonment of the Second Reconstruction's "one person, one vote" standard with regard to both racial and partisan gerrymandering, and assesses the role that Congress and political science have played in this transition. This Article argues that an unabridged voting rights regime must recognize a standard of proportional representation derived from the protection of individual political equality.

INTRODUCTION

What constraints should the protection of political equality place on the design of electoral systems? The Framers of the United States Constitution emphasized equal rights and descriptive representation as prerequisites for the realization of popular sovereignty through elected legislatures.[1] Yet only by the 1960s—after civil war, social movements, federal legislation, and Supreme

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[1] *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 165, 187-88 (1993) (describing John Adams's ideal of legislative representation as "a portrait of the people at large in miniature" and the legitimacy of government authority as dependent on popular sovereignty).

Court rulings—was the aspirational language of men "created equal"[2] and recognition of such through law expanded to include most U.S. adults. During the Second Reconstruction,[3] the Supreme Court affirmed that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[4]

But in striking down the coverage formula of the Voting Rights Act of 1965 ("VRA") in 2013,[5] the Court took the first of several steps over the next decade to restrict congressional authority over implementation of the VRA, in favor of greater deference to state interests and what might be considered the "usual burdens of voting."[6] As the Court grows ever more sensitive to claims of racial predominance in districting, traditional districting criteria may serve to further shrink the already abridged space that *Thornburg v. Gingles* opened to provide relief.[7] Then in 2019, a quarter-century after the Court declared partisan vote dilution justiciable, it reversed course in *Rucho v. Common Cause*, finding that "[p]artisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence."[8]

It has taken more than half a century for lawmakers, political scientists, litigants, and courts to converge on a voting rights regime, but, with the exception of population equality across districts within a jurisdiction, that regime accepts substantial disproportionality in voting strength. In accepting this structural inequality, most of the attention and resources of political science and election law are dedicated to uncovering marginal institutional effects on participation and representation, while tens of millions of eligible voters are virtually invisible to the electoral process, because we fail to confront deeper structural barriers in our electoral systems.

The future of United States election law, election science, and our shared role in protecting democracy rests on our capacity to

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[2] THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

[3] The Second Reconstruction generally refers to the period from the late 1940s through the 1960s when Black Americans made significant legal gains in rights granted during the original post-Civil War Reconstruction. *See generally* J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION (1999) (discussing the advancement and recession of Second Reconstruction voting rights); MANNING MARABLE, RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION AND BEYOND IN BLACK AMERICA, 1945–2006 (3d ed. 2007).

[4] Gray v. Sanders, 372 U.S. 368, 381 (1963).

[5] *See* Shelby Cnty. v. Holder, 570 U.S. 529, 530 (2013).

[6] Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2338 (2021) (citing Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 198 (2008)).

[7] 478 U.S. 30 (1986).

[8] 139 S. Ct. 2484, 2499 (2019).

clarify the logical and legal relationship between political equality, majority rule, and proportional representation, and to advocate for institutional reforms that meet the task at hand.

This Article addresses the Supreme Court's abandonment of the Second Reconstruction's "one person, one vote" standard, and argues that an effective and constitutional voting rights regime requires recognition of a proportional representation standard derived from the protection of individual political equality. Part I summarizes the current state of the voting rights regime, specifically through the lens of racial and partisan vote dilution claims, and shows how the rejection of proportionality as the guiding standard has contributed to the erosion of voting rights. Part II charts a path to the proportionality standard through political equality, advocating for proportional electoral systems as the best solution to fulfill the constitutional protection of political equality.

I. THE U.S. VOTING RIGHTS REGIME: BLINDNESS AND GOBBLEDYGOOK

The Second Reconstruction engendered a revolution in the law of democracy in the 1960s. Alongside paramount legislative advances like the Civil Rights Act of 1964[9] and the VRA[10], which provided a new set of tools to enforce individual rights, the era brought forth political equality as a key criterion for districting and voting procedures.

The Supreme Court's first explicit recognition of political equality as dependent on the weight of voting strength emerged from a series of cases, including *Baker v. Carr*[11] and *Wesberry v. Sanders*,[12] concerning districts with dramatic population discrepancies, or malapportionment (the "malapportionment cases"). The effect of malapportionment on the weight of votes is intuitive: in a legislature elected from numerous electoral districts, if one district has twice the population of the other, the more populated district's votes count for only half as much as votes in the less populated district. The outcome is equivalent to giving those in the less populated district two votes in determining legislative representation. A minority of statewide voters in less populated districts could easily control a majority of legislative seats.

Recognition of the "one person, one vote" principle in *Reynolds v. Sims*,[13] the now "self-evident" status of the logic of

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[9] 42 U.S.C. §§ 2000(a)–(h).
[10] Voting Rights Act, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).
[11] 369 U.S. 186, 187–88 (1962).
[12] 376 U.S. 1, 3 (1964).
[13] 377 U.S. 533, 558 (1964).

population equality between districts,[14] and the course it set for the Court in addressing pathologies in electoral politics surely make the decision among the most important in the democracy canon.[15] Malapportionment vote dilution cases largely disappeared after the 1970s, in part because the standards—population equality, with up to 10 percent deviation in state and local systems[16]—were so clear, that their application was rather seamlessly incorporated into the redistricting process in subsequent decades.[17]

But *Reynolds* also left several questions unanswered—like whether race or partisanship is the correct lens through which to view specific voting abridgments,[18] what courts' role should be in regulating political entrenchment, and in what form the one person, one vote principle should extend to gerrymandering.[19] In addition to these open questions, strategic interventions by congressional leadership—especially through VRA reauthorizations that tended toward a status quo prohibition against blatant discrimination[20]—along with party-supported litigants[21] advocating remedies within a single-seat, bipartisan framework, have produced a truncated—or abridged—voting rights regime.

We have reached a point where the unanswered questions and unarticulated implications of *Reynolds* do not merely haunt the Court, they possess it. A fragile Court majority recently defended the precedential, non-proportional standard to identify and remedy VRA violations, but the Court as a body grows increasingly hostile to the race-conscious principles embodied in the VRA. Similarly,

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[14] Guy-Uriel Charles & Luis Fuentes-Rohwer, Reynolds *Reconsidered*, 67 ALA. L. REV. 485, 486 (2015).

[15] *Id.* at 535.

[16] *See, e.g.*, LACKLAND H. BLOOM JR., DO GREAT CASES MAKE BAD LAW? 235–52 (2014).

[17] *See* Bernard Grofman, *Race and Redistricting in the 21st Century*, *in* DIVERSITY IN DEMOCRACY: MINORITY REPRESENTATION IN THE UNITED STATES 253 (2006).

[18] *See Reynolds*, 377 U.S. at 561.

[19] *See generally* Charles & Fuentes-Rohwer, *supra* note 14, at 486–88.

[20] *See* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments To The Voting Rights Act: A Legislative History*, 40 WASH. AND LEE L. REV. 1347, 1367–69 (1983) (explaining the 1982 effort to restore the effects test in White v. Regester, 412 U.S. 755 (1973)); *see also* Charles & Fuentes-Rohwer, *supra* note 14, at 1430 (describing subsequent reauthorization efforts as largely "backwards-looking"); *see generally* Grofman, *supra* note 17, at 255.

[21] *See generally* Lisa Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. REV. 563 (2013) (discussing the role of the major parties directing redistricting litigation); *see also* Olga Pierce et al., *The Hidden Hands in Redistricting: Corporations and Other Powerful Interests*, PROPUBLICA (Sept. 23, 2011, 9:03 AM), https://www.propublica.org/article/hidden-hands-in-redistricting-corporations-special-interests [https://perma.cc/8MV3-J7RF]; Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing*, 14 CARDOZO L. REV. 1237, 1268 (1993).

the Court's failure to recognize the link between partisan vote dilution and proportional representation resulted in confusion over the application of non-proportional standards, and the eventual rejection of *any* standard to regulate partisan gerrymandering.

Part I.A of this Article first assesses the consequences of this possession in the context of racial vote dilution, focusing on the Court's most recent racial vote dilution case, *Allen v. Milligan*.[22] Next, Part I.B shows how *Reynolds*' unanswered questions have also resulted in the Court's declaration of judicial impotence in the landmark partisan vote dilution case, *Rucho v. Common Cause*.[23]

A. Racial Vote Dilution Claims

One of the Second Reconstruction's primary victories was the passage of the Voting Rights Act, which prohibited the denial or abridgment of the right to vote on account of race or color.[24] The search for a test of racially discriminatory effects resulted in the Court's first embrace of a scientific assessment of the interaction between behavioral patterns (racially polarized voting) and electoral structures (district boundaries) since the malapportionment cases. In the 1986 case *Thornburg v. Gingles*, the Court adopted a three-prong test designed to conform to single-seat elections, where a single representative is elected to represent a geographic community: to prove a claim of racial discrimination under Section 2 of the VRA, a plaintiff must show (1) that a population of minority residents is sufficiently numerous and geographically compact to elect a candidate from a single district; (2) that the minority community is "politically cohesive" or votes as a bloc; and (3) that the majority community also votes as a bloc (establishing racially polarized voting), which generally results in the defeat of minority-supported candidates.[25] These three elements are required to demonstrate vote dilution resulting from racially polarized voting *and* the specific configuration of the district boundaries.

The establishment of the *Gingles* test was an important advancement in voting rights. The test could determine the degree of racially polarized voting, and it showed how strategically changing the proportion of certain voters within district boundaries can have the same dilutive effects as altering total populations

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[22] 599 U.S. 1 (2023).
[23] 139 S. Ct. 2484, 2484 (2019).
[24] *See* Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.
[25] *See* Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986). For a brief overview of the *Gingles* test and racially polarized voting, see Todd Hendricks, *Racially Polarized Voting: An Overview*, FORDHAM L. VOTING RTS. & DEMOCRACY F. (Apr. 17, 2023, 10:45 AM), https://fordhamdemocracyproject.com/2023/04/17/racially-polarized-voting-an-overview [https://perma.cc/K59U-4WXA].

between districts. While the parameters of the test need not assume a single-seat district as a remedy, in application, *Gingles* initiated the search for majority-minority single-seat districts.[26] This shift in strategy was significant. The 1990 redistricting cycle resulted in the single largest increase in Congressional members of color, elected from majority-minority districts.[27]

Sections IV and V of the VRA required states and jurisdictions with a history of discrimination to seek federal government approval before implementing proposed changes to their election laws.[28] The enforcement of these provisions and implementation of protections through *Gingles* constituted an interbranch agreement to combat racial discrimination that would hold for over a quarter century. But in 2013's *Shelby County v. Holder*,[29] the Court defected, declaring that the "extraordinary" measures imposed on preclearance jurisdictions were no longer constitutionally justified.[30] In doing so, the Court signaled the end of an era of cooperation that had grown out of the VRA between Congress and the Department of Justice regarding both the importance and the implementation of policy solutions.

Congressional leadership played an important role in setting up this confrontation. Rather than risk upsetting the existing coalition that supported VRA reauthorization in 2006, and despite the availability of better data and statistical techniques to identify vote dilution more granularly, Congress chose not to revise the coverage formula for state preclearance, which relied on registration and turnout inequality data collected in the early 1970s.[31] This political negligence made it easier for the Court to exercise skepticism over the continued pervasiveness (and meaning) of racial discrimination, and the justifiability of geographically targeting jurisdictions for preclearance.[32]

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[26] Geoffrey Skelley, *How Majority-Minority Districts Fueled Diversity in Congress*, FIVETHIRTYEIGHT (Aug. 14, 2023, 2:14 PM), https://fivethirtyeight.com/features/majority-minority-congressional-districts-diversity-representation/ [https://perma.cc/95CV-X6ED].

[27] *Id.*

[28] Guy-Uriel Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. R. 1389, 1420 (2015); Voting Rights Act of 1965, Pub. L. 89-110, §§ 3–4, 79 Stat. 437.

[29] 570 U.S. 529 (2013).

[30] *Id.* at 534–37 (arguing that the measures were no longer constitutionally justified as the conditions, such as the racial gap in voter registration and turnout, no longer characterized voting patterns in the covered jurisdictions); *id.* at 543–45 (contending that the measures sharply depart from the Tenth Amendment's principles of states' rights).

[31] *See* Bernard Grofman, *Devising a Sensible Trigger for Section 5 of the Voting Rights Act*, 12 ELECTION LAW J.: RULES, POL., AND POL'Y 332, 332–33 (2013), https://doi.org/10.1089/elj.2013.1230 [https://perma.cc/FLL7-DL9G].

[32] *Id*.

In striking down the VRA coverage formula in 2013,[33] the Court took the first of several steps over the next decade to restrict congressional authority over VRA implementation in favor of greater deference to state interests and what might be considered the "usual burdens of voting."[34] This inversion of the VRA's core aim—to protect voters of color from state interference[35]—reflects the Court's ongoing reassessment of the meaning of "one person, one vote" as a constitutional and political question, and the conservative majority's attempt to pull out from the political thicket.

It then came as a surprise to many in the voting rights community when, in 2023, the Court in *Allen* upheld the constitutionality of Section 2 of the VRA, as well as *Gingles*. The *Allen* case concerned a challenge to the constitutionality of Section 2 on the grounds that requiring the state of Alabama to even consider race in its redistricting plan constituted a "race-based" imposition of proportional representation.[36]

Voting rights advocates cheered the decision as a "win for democracy,"[37] proclaiming that the VRA "lives on to fight another day."[38] On its face, *Allen* was a strong rebuke of Alabama's radical misinterpretation of *Gingles* and a defense of the use of racial data to identify and remedy dilutive effects as prescribed under *Gingles*.[39] Alabama argued that Section 2 claims must be compared

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[33] *See Shelby Cnty.*, 570 U.S. at 586.

[34] *Brnovich,* 141 S. Ct. at 2338 (citing Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 198 (2008)).

[35] *See* Guy-Uriel Charles & Lewis Fuentes-Rohwer, *The Court's Voting-Rights Decision Was Worse Than People Think*, THE ATLANTIC (July 8, 2021), https://www.theatlantic.com/ideas/archive/2021/07/brnovich-vra-scotus-decision-arizona-voting-right/619330/ [https://perma.cc/K7C9-XVS6].

[36] *See Allen*, 599 U.S. at 16–18.

[37] *Supreme Court Decision in* Allen v. Milligan *Is a Win for Democracy*, LAWS. COMM. FOR C.R. UNDER L. (June 8, 2023), https://www.lawyerscommittee.org/supreme-court-decision-in-allen-v-milligan-is-a-win-for-democracy/ [https://perma.cc/XS78-PNJX].

[38] *ACS Statement in Response to SCOTUS Decision in* Allen v. Milligan*,* AM. CONST. SOC'Y (June 8, 2023), https://www.acslaw.org/pressrelease/acs-statement-in-response-to-scotus-decision-in-allen-v-milligan/ [https://perma.cc/FHN8-9PD8]; *see also* Nicholas Stephanopoulos, *Breaking: Plaintiffs Win in* Allen v. Milligan, ELECTION L. BLOG (June 8, 2023), https://electionlawblog.org/?p=136683 [https://perma.cc/NZ3K-W3J5].

[39] 599 U.S. at 22–26. First, the *Allen* majority identified several problems with Alabama's proposed racially blind benchmark. For example, the majority criticized the state for failing to present a benchmark for assessing Section 2 violations under the statutory requirement of considering the "totality of circumstances." *See id.* at 25 (denouncing the state's proposed standard for "run[ning] headlong into [the Court's] precedent."). The majority also rejected the state's argument that the racially blind benchmark was required under *Gingles*, reasoning that the *Gingles* framework, when properly applied, establishes significant constraints on proportionality, as evidenced in the Court's case law. *Id.* at 26–27.

to a benchmark of racially "blind" plans that do not take racial data into account and, further, that Section 2 jurisprudence "inevitably" demands racially proportional seat allocation, in violation of the Constitution.[40]

As Professor Guy-Uriel Charles opined, what was most remarkable about the decision was its conventionality:

> The majority applied its prior precedents, particularly *Thornburg v. Gingles*, almost mechanically. The recitation and deployment of legislative history was fairly standard. There were no convoluted interpretations of the statutory text. There were no gaslighting quips about race. Instead, the Court recited . . . that there is a difference between racial awareness, which is necessary if we are to give full effect to [S]ection 2, and racial predominance, which violates the Constitution.[41]

Less conventional in the decision was the confrontation between Chief Justice Roberts, writing for the majority, and Justice Thomas, specifically over the question of proportional representation as a standard for operationalizing political equality. The exchange revealed the contortions required of the majority to justify a disproportional, abridged vision of political equality. Forced by Justice Thomas' persistence in revealing the obvious, the majority, in Part III.B.1, reaffirmed that Section 2 claims involve a "quintessentially race-conscious calculus"—but only after noting that, in 1982, Congress explicitly rejected proportionality as a standard out of concern that racial "quotas" would be "strongly resented by the American public."[42] The political compromise that emerged in the 1982 VRA reauthorization, the majority opinion emphasized, was to decouple consideration of proportionality from equality, using the Court's own language to define unconstitutional harm as "less opportunity [for protected classes than] other residents *in the district* to participate in the political processes and to elect legislators of their choice."[43] Section 2 does not generally prohibit

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[40] *See id.* at 23–24, 40–41.

[41] Guy-Uriel Charles, *The Remarkable Conventionality of* Allen v. Milligan, ELECTION L. BLOG (June 8, 2023), https://electionlawblog.org/?p=136710 [https://perma.cc/DW75-NHMD].

[42] Justices Sotomayor, Kagan, and Jackson joined Chief Justice Roberts in full. *See Allen*, 599 U.S. at 9–42. Justice Kavanaugh joined the majority except for Part III.B.1. *See id.* at 42–45 (Kavanaugh, J., concurring). Justice Thomas' dissenting opinion was joined by Justice Gorsuch in full, Justice Barrett for Parts II and III, and Justice Alito for Parts II-A and II-B. *See id.* at 45–91 (Thomas, J., dissenting); *see id.* at 91–109 (Alito, J., dissenting).

[43] *Id.* at 5 (citing White v. Regester, 412 U.S. 755, 766 (1973)) (emphasis added).

violations of political equality, but only those inequalities that arise between voters *within districts*, such that the overall racial proportions of a locality or state are not taken into consideration.

Parts II.A and II.B of Justice Thomas' dissent cover his long-held view that all vote dilution claims rest on a theory of and implicitly rely on an ideal benchmark of proportional representation:[44]

> The text of § 2 and the logic of vote-dilution claims require a meaningfully race-neutral benchmark, and no race-neutral benchmark can justify the District Court's finding of vote dilution in these cases. The only benchmark that can justify it—and the one that the District Court demonstrably applied—is the decidedly nonneutral benchmark of proportional allocation of political power based on race.[45]

Most of Part II.A is dedicated to demonstrating that any "objective and workable" standard in vote dilution cases necessitates the existence of a hypothetical ideal or undiluted plan from which comparisons can be made.[46] As to core standards for Section 2, Justice Thomas argues that if the section even applies to districting plans, "equal openness" or "equal opportunity" may work, but certainly not proportional racial representation.[47] He states this is a consequence of language in the VRA, a compromise engineered in 1982.[48] Moreover, "[w]hatever 'equal openness' means in the context of single-member districting, no 'meaningful comparison' is possible using a benchmark that builds in a presumption in favor of minority-controlled districts."[49] Section II.B addresses this last point—that the implicit benchmark adopted by plaintiffs, the district court, and eventually the Supreme Court majority is a "proportional allocation of political power according to race."[50] According to Justice Thomas, such a benchmark—one that allocates power based on race—cannot be constitutional

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[44] *Id* at 50 (Thomas, J., dissenting).
[45] *Id.* at 50–51 (Thomas, J., dissenting).
[46] *Id.* (citing Holder v. Hall, 512 U.S. 874, 881 (1994) (plurality opinion)).
[47] *Id.* at 53–54. (Thomas, J., dissenting).
[48] *Id.* The history of the 1982 reauthorization plays heavily here. Space does not permit a retelling of the events that led to the compromise language, but it grew out of a fear of racial quotas and association of proportional representation with racial representation. Those efforts were coordinated by Senator Orrin Hatch. *See generally* ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1989).
[49] *Id.* at 53–54. (Thomas, J., dissenting).
[50] *Id.* at 51.

because race-neutrality can only be achieved through blindness, or not taking racial data into account.[51]

Justice Thomas sees the "gravitational force of proportionality"[52] throughout the district court opinion, in other case materials,[53] and probably in the conventional wisdom that VRA districts can *approximate* proportional racial representation under specific conditions, namely when minority communities are geographically concentrated and there are few communities of interest to represent.[54] He notes that the district court "even built proportionality into its understanding of *Gingles*' first precondition, finding the [*Allen*] plaintiffs' illustrative maps to be reasonably configured in part *because* they 'provide[d] a number of majority-Black districts . . . roughly proportional to the Black percentage of the population.'"[55] Per Justice Thomas, "[o]nce one accepts the proposition that the effectiveness of votes is measured in terms of the control of seats," zeroing in on the gravitational pull, then "the core of any vote dilution claim 'is inherently based on ratios between the numbers of the minority in the population and the numbers of seats controlled,' and there is no more logical ratio than direct proportionality."[56]

Tragically, the questions of which "numbers" and which "population" is the relevant population escaped any critical examination. In this sense, both Justice Thomas and the *Allen* majority are quixotically jousting with imaginary adversaries, for just as the majority refuses to acknowledge the "gravitational force of proportionality,"[57] Justice Thomas refuses to acknowledge that population proportionality is in fact *not* the benchmark applied by the majority, nor is it the most logical benchmark available.

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[51] Thus, we might distinguish three race-oriented benchmarks: race-forward (population-based proportionality), race-conscious (consider racial voting patterns), and race-blind (consider nothing). *See* Nicholas O. Stephanopoulos & Jowei Chen, *The Race-Blind Future of Voting Rights*, 4 YALE L. J. 778–1049 (2021) (describing the differential impact of race-blind versus race-conscious benchmarks).

[52] *Allen*, 599 U.S. at 71.

[53] Justice Thomas even notes that "[a]s a matter of mathematics," single-member districting "tends to deal out representation far short of proportionality to virtually *all* minorities, from environmentalists in Alaska to Republicans in Massachusetts." *Allen*, 599 U.S. at 56 (citing Moon Duchin & Douglas M. Spencer, *Models, Race, and the Law*, 130 YALE L. J. F. 744, 752 (2021)).

[54] *See* Jack Santucci et al., TOWARDS A DIFFERENT KIND OF PARTY GOVERNMENT? PROPORTIONAL REPRESENTATION FOR FEDERAL ELECTIONS, 2023 APSA TASK FORCE ON RESPONSIBLE POL. PARTIES (forthcoming 2023), 154–55.

[55] *Allen*, 599 U.S. at 72 (Thomas, J., dissenting) (citation omitted).

[56] *Id.* at 71–72 (Thomas, J., dissenting) (citing Holder v. Hall, 512 U.S. 874, 902 (1994)).

[57] *Id.* at 72 (Thomas, J., dissenting).

Consider the benchmark that Alabama proposed and Justice Thomas accepted: discrimination claims should be judged against a baseline plan that does not take racial data into account and is thus racially "blind."[58] That is one possible benchmark, but one that, as Justice Kavanaugh points out, does not identify discriminatory effects.[59] Proportionality of racial population is an alternative benchmark, but it too fails to identify discriminatory effects, because it is not a principle derived from acceptance that "the effectiveness of votes is measured in terms of the control of seats."[60] Indeed, population proportionality is a measure of persons, not votes—the only conditions where population proportionality would serve as a measure of vote dilution would be if the entire population under consideration turned out to vote, and voting was 100 percent racially polarized.[61]

Gingles is derived from the presumption that discriminatory effects are measured by reference to the relationship between votes and control of seats. But the test has been anchored to consideration of additional redistricting criteria and has been applied almost exclusively to the creation of single-seat districting remedies, which are disproportional by design.[62] As the *Allen* majority pointed out in response to Justice Thomas's dissent, "'[n]umerous lower courts' have upheld districting maps 'where, due to minority populations' geographic diffusion, plaintiffs couldn't design an additional majority-minority district' or satisfy the compactness requirement."[63] In addition, the majority points to the fact that "proportional representation of minority voters is absent from nearly every corner of this country despite § 2 being in effect for over 40 years. And in case after case, we have rejected districting plans that

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[58] *Id.* at 23 ("The centerpiece of the State's effort is what it calls the 'race-neutral benchmark.' The theory behind it is this: using modern computer technology, mapmakers can now generate millions of possible districting maps for a given State. The maps can be designed to comply with traditional districting criteria but to not consider race.")

[59] *Id.* at 43–44 (Kavanaugh, J., concurring in part).

[60] *Id*. at 71 (Thomas, J., dissenting).

[61] For an application of how the assumption of 100 percent racially polarized voting can be used in predictive models of minority representation, see Yuki Atsusuka, *A Logical Model for Predicting Minority Representation: Application to Redistricting and Voting Rights Cases*, 115 AM. POL. SCI. REVIEW 1210–1225 (2021).

[62] *Gingles* has been strongly anchored to additional districting criteria at least since *Shaw v. Reno*, 509 U.S. 530 (1993). Single-seat districts are disproportional by design in that a single party or representative receives 100 percent of the representation, without necessarily receiving 100 percent of the vote. For a recent application of *Gingles* to single-seat districts by the author of the test, see Bernard Grofman, *Report of the Special Master*, 326 F. Supp. 3d 128 (E.D. Va. 2018).

[63] *Allen*, 599 U.S. at 29.

would bring States closer to proportionality when those plans violate traditional districting criteria."[64]

Indeed, while *Allen* affirmed *Gingles*, the Court also sent a clear signal about its temporality. The *Gingles* framework situates consideration of discriminatory effects only within a context that includes a "reasonably configured" district as a remedy so that the population size and geographic compactness of the targeted community restrict the application of the remedy.[65]

It is true that Section 2 claims ultimately rest on the presence of racially polarized voting, and to the extent that voting is no longer racially polarized, there is no harm to remedy. *Gingles* and the entire VRA are self-limiting in that regard. But even if voting is racially polarized and a protected class of voters is geographically concentrated, unless the number of voters is large enough to create a minority-influence district, there is no remedy. Similarly, even if voting is racially polarized and a protected class of voters is large enough to constitute a minority-influence district, unless those voters are geographically concentrated enough to constitute a reasonably configured district, the current regime offers no remedy. In other words, the survival of the benchmark is not dependent solely on the eradication of racial vote dilution as the goal, but also on the single-seat terms of the solution.

Allen acknowledges, and almost welcomes, this point. Because the first prong of the *Gingles* test relies on residential segregation to identify whether a district can be reasonably configured, as residential segregation itself declines—which the Court notes "it has 'sharply' done since the 1970s"[66]—it becomes increasingly difficult to satisfy traditional redistricting criteria like compactness. To the extent that racial segregation is a proxy for racism, one could argue that the first *Gingles* prong actually estimates the harm, but as the Court pointed out, "due to minority populations' geographic diffusion," numerous courts have not allowed remedial plans to be adopted, despite evidence of racially polarized voting and vote dilution.[67] As the Court grows ever more sensitive to claims of racial predominance in districting, traditional districting criteria may serve to further shrink the already abridged space that *Gingles* opened to provide relief.

For those keeping score, there are now four Justices who have signed onto the claim that the current, if implicit, benchmark for racial vote dilution claims under Section 2 is racial representation in proportion to population. Justices Thomas and Gorsuch hold the strongest opposition to this insidious standard,

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[64] *Id.* at 29, n.4.
[65] *Id.* at 17–18.
[66] *Id.* at 28.
[67] *Id.* at 29.

they would possibly deny that vote dilution is even a justiciable violation.[68] Justice Barrett, who joined Parts II and III of *Allen*, would presumably consider some standard outside the *Gingles* framework because it is not a race-blind benchmark.[69] Justice Alito agreed with the majority that *Gingles* is still operable, but he would apply a "sharper" method to cut out race predomination, thereby further limiting its application.[70]

Notably, Justice Alito's position is not too far from Justice Kavanaugh's, who joined the majority opinion except for Part III.B.1, the part declaring that Section 2 "demands consideration of race" and that using racial data is very much part of the enterprise of racial vote dilution claims.[71] In his concurring opinion, Justice Kavanaugh aligns himself closer to Justice Thomas on the point that "even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future."[72] That brings the number of Justices who have signaled openness to requiring racial blindness to five.

The Supreme Court's willingness to regulate the allocation of political power along racial lines is likely coming to an end. The 1982 revisions, which put real force behind the VRA, also ensured that the tensions between political equality and a winner-take-all remedy that requires such allocation would come to a head. Failure to recognize the link between political equality, proportional representation, and majority rule prevents the Court from finding its way. In the case of partisan vote dilution, the Court's confusion over proportionality has resulted in it effectively giving up on ensuring free and fair partisan competition.

B. Partisan Vote Dilution Claims

Practical, professional, and political factors undermined a build-out of successful partisan vote dilution case law along the path of previous vote dilution cases. First, because racial, economic, and regional divisions crossed party lines, partisan vote dilution in the 1980s and 1990s was not as extreme as in the malapportionment

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[68] *Id.* at 45–46 (Thomas, J., dissenting) (arguing that, under Section 2's text, challenges cannot be brought against a state in its choosing of districting schemes; rather, challenges are only justiciable if they concern a citizen's access to the ballot or the processes for counting ballots).

[69] *Id.* at 34.

[70] *Id.* at 95 (Alito, J., dissenting). Justice Alito would have remanded *Allen* back to the lower court with his specific guidance in the application of *Gingles*.

[71] *Id.* at 30 (citing Abbott v. Perez, 138 S. Ct. 2305, 2315 (2018)).

[72] 599 U.S. at 45 (Kavanaugh, J., concurring).

cases that the Court addressed in the 1960s.[73] Second, because voters can change classification by shifting party preferences across elections, the durability of bias in a districting plan became an additional factor in considering the robustness of partisan vote dilution.[74] Third, and perhaps most important, even with more than half a century in the political thicket of regulating electoral systems, the Court was simply more reluctant to directly regulate partisan conflict.[75]

As with the *Gingles* test discussed above, the application of scientific estimates of partisan vote dilution tended to take single-seat electoral systems and two-party competition as a starting point.[76] Consider the partisan vote dilution metric most widely cited in the scientific literature, partisan symmetry.[77] The measure was first identified in the United States in 1973 as "The Relationship between Seats and Votes in Two-Party Systems"[78] and formalized as a "Unified Method of Evaluating Electoral Systems and Redistricting Plans."[79]

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[73] *See generally* BERNARD GROFMAN, RACE AND REDISTRICTING IN THE 1990S (2003); MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY (Bernard Grofman et al. eds., 1992).

[74] *See* Davis v. Bandemer, 478 U.S. 109, 156 (1986) (O'Connor, J., concurring) ("[V]oters can—and often do—move from one party to the other or support candidates from both parties.").

[75] *See generally* Nicholas Stephanopoulos, *The Dance of Partisanship and Districting*, 13 HARV. L. & POL'Y REV. 508 (2019).

[76] Partisan symmetry as a metric is not inherently limited to such constraints. *See generally* Gary King, *Electoral Responsiveness and Partisan Bias in Multiparty Democracies*, 15 LEG. STUD. Q. 159 (1990). Prior partisan vote dilution cases include *Vieth v. Jubelirer*, 541 U.S. 267 (2004) and *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

[77] *See generally* Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after* LULAC v. Perry, 6 ELECTION L.J. 2 (2007).

[78] *See generally* Edward R. Tufte, *The Relationship between Seats and Votes in Two-Party Systems*, 67 AM. POL. SCI. REV. 540 (1973).

[79] *See generally* Andrew Gelman & Gary King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, 38 AM. J. POL. SCI. 514 (1994).

Partisan vote dilution is measured as the difference in seat shares that voters in competing parties receive when the parties receive the same share of voter support.[80] In other words, the model estimates the degree to which voters receive equal treatment (symmetric seat shares) in the conversion of votes to seats. In the context of single-seat districting, the model does not consider disproportional outcomes asymmetric. Justice Breyer illustrated the flaws of this feature with the following example:

> Given a fairly large state population with a fairly large congressional delegation, districts assigned so as to be perfectly random in respect to politics would translate a small shift in political sentiment, say a shift from 51% Republican to 49% Republican, into a seismic shift in the makeup of the legislative delegation, say from 100% Republican to 100% Democrat.[81]

Even such a seismic shift treats voters equally in that a majority of voters receive 100 percent of the representation, independent of which party they support. Majority rule, and an abridged political equality, or equal opportunity within the constraints of a winner-take-all system, is protected.

Similarly, another measure dubbed the efficiency gap was designed in the wake of the 2006 decision *League of United Latin American Citizens v. Perry*.[82] The efficiency gap measures the difference between individual votes wasted (meaning votes that do not contribute to seats won) by each party's supporters in an

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[80] Several formulas, ranging from calculations that can be done by hand to computational simulations, are available to estimate symmetry. *See* ALEX KEENA ET AL., GERRYMANDERING THE STATES: PARTISANSHIP, RACE, AND THE TRANSFORMATION OF AMERICAN FEDERALISM 27–31 (2021).

[81] *Vieth*, 541 U.S. at 358–59 (2004) (Breyer, J., dissenting). The ability of the symmetry metric to distinguish between bugs and features of single-seat, two-party competition has given rise to a lively debate over how we should think about and measure partisan bias as a political concept. *See generally* Jonathan N. Katz et al., *Theoretical Foundations and Empirical Evaluations of Partisan Fairness in District-Based Democracies*, 114 AM. POL. SCI. REV. 164 (2020); Daryl DeFord et al., *Implementing Partisan Symmetry: Problems and Paradoxes*, 31 POL. ANALYSIS 305 (2021) https://doi.org/10.1017/pan.2021.49 [https://perma.cc/S56D-59UW]; Jonathan N. Katz et al., *The Essential Role of Statistical Inference in Evaluating Electoral Systems: A Response to DeFord et al.*, 31 POL. ANALYSIS 325 (2021), https://doi.org/10.1017/pan.2021.46 [https://perma.cc/6CKW-58DS]; Daryl DeFord et al., *Implementing Partisan Symmetry: A Response to a Response*, 31 POL. ANALYSIS 332 (2021), https://doi.org/10.1017/pan.2021.47 [https://perma.cc/TBT9-BRKX].

[82] 548 U.S. 399 (2006).

election.[83] The intuition is that one person, one vote requires a single-seat system that minimizes wasted votes.[84] Unlike the original symmetry measure, the efficiency gap does not partition out the distortive effects of hyper-responsiveness (like the one Justice Breyer described), but neither is it a measure of total proportionality in voting strength.[85]

Indeed, none of the most popular measures used in recent scholarly analysis or litigation, whether excess seats or lopsided outcomes tests, the mean-median difference, or the use of computer-generated map simulations, use proportionality in voting strength as a measure of fairness.[86] Over the last three decades, lawmakers, political scientists, and litigants have converged on a voting rights regime that, *with the exception of population equality across districts within a jurisdiction*, considers substantial disproportionality in voting strength an acceptable outcome.

In partisan vote dilution cases, the spiritual possession of the Court took a specific form, that of the ghost of the late Justice Antonin Scalia. The Court channeled Justice Scalia's critique of proportional representation when, in 2019, it declared itself and all federal courts impotent to regulate partisan competition.[87] Given the extent to which all voting rights policies are increasingly framed, not as moral or democratic issues, but as partisan choices, this was an especially troubling development.[88] In 2004, writing for the plurality in *Vieth v. Jubelirer*,[89] Justice Scalia argued that the lack of a judicially discoverable and manageable standard prevents the Court from adjudicating partisan vote dilution claims.[90]

In *Vieth*, Justice Scalia accepted that the malapportionment cases provide a clear standard for adjudication—whether

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[83] *See generally* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. (2015).

[84] Nicholas Stephanopoulos, *Proportional Representation—Brooding and Omnipresent to the End*, BALKINIZATION (Dec. 22, 2023), https://balkin.blogspot.com/2022/12/proportional-representationbrooding-and.html [https://perma.cc/A3KU-J5YH].

[85] *See* KEENA, *supra* note 80, at 33.

[86] *See id.* at 36–39.

[87] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (holding that partisan gerrymandering claims are nonjusticiable political questions for federal courts).

[88] *See* Justin Levitt, *Section 5 as Simulacrum,* 123 YALE L.J. 151 (2013) (discussing the impact of partisan polarization enveloping voting rights issues); *see also* Richard Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. 58 (2014) (same).

[89] 541 U.S. 267 (2004).

[90] ANTHONY J. MCGANN ET AL., GERRYMANDERING IN AMERICA: THE HOUSE OF REPRESENTATIVES, THE SUPREME COURT, AND THE FUTURE OF POPULAR SOVEREIGNTY 198–203 (2016).

populations between districts are approximately equal—but found that there is no such standard in the context of partisan gerrymandering.[91] As such, Justice Scalia contended, "[o]ur one-person, one-vote cases . . . have no bearing upon this question, neither in principle nor in practicality."[92]

Even though *Reynolds*[93] explained that "[w]eighing the votes of citizens differently, *by any method or means*, merely because of where they happen to reside, hardly seems justifiable,"[94] Scalia justified his conclusion in *Vieth* by claiming that equal protection for individual voters does not extend to a right to majority rule.[95] Specifically, Justice Scalia asserted that the majority rule standard "rests upon the principle that groups (or at least political-action groups) have a right to proportional representation. But the Constitution contains no such principle. It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups."[96] While Justice Kennedy, joining in part, held out hope that a standard could be developed, Justice Scalia's argument would eventually carry the day in the 2019 decision *Rucho v. Common Cause*.[97]

No federal cases successfully met the standards alluded to in previous vote dilution cases, and a quarter-century after the Court declared partisan vote dilution justiciable, it reversed course in *Rucho*,[98] finding that "[p]artisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence."[99] The *Rucho* Court went on to state that claims of partisan vote dilution "invariably sound in a desire for proportional representation" while the Court's precedents "clearly foreclose any claim that the Constitution requires proportional representation."[100]

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[91] *Vieth*, 541 U.S. at 284–90.
[92] *Id.* at 290 (citing Reynolds v. Sims, 377 U.S. 533 (1964) and Wesberry v. Sanders, 376 U.S. 1 (1964)).
[93] Reynolds v. Sims, 377 U.S. 533 (1964).
[94] *Id.* at 563 (emphasis added).
[95] *Vieth*, 541 U.S. at 284–290.
[96] *Id.* at 288.
[97] Rucho v. Common Cause, 139 S. Ct. 2484, 2499 (2019).
[98] *Id*.
[99] *Id*.
[100] *Id.* (quoting Davis v. Bandemer, 478 U.S. 109, 159 (1986) (O'Connor, J, concurring)).

Writing for the *Rucho* majority fifteen years after *Vieth*, Chief Justice Roberts echoed Justice Scalia's claim:

> It hardly follows from that principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support. . . . More fundamentally, 'vote dilution' in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties.[101]

The Court also rejected any equivalency between racial vote dilution and partisan vote dilution, stating that while "race-based decision making is inherently suspect," drawing district boundaries to gain a partisan advantage is a permissible intent even when it is predominant."[102]

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, dissented in the strongest terms possible to the majority going "tragically wrong" in neglecting to regulate partisan advantage-seeking.[103] Whereas the majority focused on parties, the dissent centered its analysis on vote dilution:

> By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer. . . . By that mechanism, politicians can cherry-pick voters to ensure their reelection. And the power becomes, as Madison put it, 'in the Government over the people.'[104]

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[101] *Id.* at 2501.
[102] *Id.* at 2503 (internal citations and quotations omitted).
[103] *Id.* at 2509 (Kagan, J., dissenting).
[104] *Id.* at 2511 (citing 4 Annals of Cong. 934 (1794)).

Attempting to refute Justice Scalia's "group rights" thesis, Justice Kagan argues that malapportionment and partisan gerrymandering create the same harm, vote dilution:

> [T]his Court in its one-person, one-vote decisions prohibited creating districts with significantly different populations. . . . The constitutional injury in a partisan gerrymandering case is much the same, except that the dilution is based on party affiliation. In such a case, too, the districters have set out to reduce the weight of certain citizens' votes, and thereby deprive them of their capacity to 'full[y] and effective[ly] participat[e] in the political process[].'"[105]

Justice Kagan's analysis considered a three-prong test structurally similar to *Gingles*, with a focus on statistical and contextual evidence centered on "the facts about how these districts operated"[106] and how sorting voters between districts, while maintaining overall population equality, achieves the same end as malapportionment—to "beat democracy."[107]

In contrast, Chief Justice Roberts's opinions in both *Rucho* and *Allen* suggest that it is contumely that plaintiffs "require courts to judge a contest of computers when there is no reliable way to determine who wins, or even where the finish line is."[108] His critique in *Allen* focuses on the use of what are known as mapping vignettes, or samples of computer-simulated districting plans.[109] Importantly, the majority in *Allen* correctly points out the folly of interpreting these samples as representative of the underlying universe of possible plans.[110] Computer-generated mapping algorithms cannot be counted on to search the landscape of possible plans in an unbiased manner, and this has been known since the technology was first developed.[111] Regarding the search for justiciable standards, he concludes in *Allen* that "neither the text of § 2 nor the fraught debate that produced it suggests that 'equal access' to the fundamental right of voting turns on computer

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[105] *Id.* at 2514 (internal citations omitted).
[106] *Id.* at 2519.
[107] *Id.*
[108] *Allen*, 599 U.S. at 37.
[109] *See, e.g.*, Cory McCartan et al., *Simulated Redistricting Plans for the Analysis and Evaluation of Redistricting in the United States*, 9 SCI. DATA 689 (2022); Olivia Guest et al., *Gerrymandering and Computational Redistricting*, 2 J. OF COMPUTATIONAL SOC. SCI. 119-31 (2019).
[110] *Allen*, 599 U.S. at 104.
[111] *See* Micah Altman et al., *From Crayons to Computers: The Evolution of Computer Use in Redistricting*, 23 SOC. SCI. COMPUT. REV. 334–46 (2005).

simulations that are technically complicated, expensive to produce, and available to '[o]nly a small cadre of university researchers [that] have the resources and expertise to run' them."[112]

Chief Justice Roberts's skepticism of statistical models also runs throughout *Rucho*, particularly concern about the predictability of future voting patterns. The Chief Justice is concerned that "[e]ven the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change."[113] More famously, the Chief Justice declared during oral argument in the *Rucho* precursor, *Gill v. Whitford*,[114] "You're taking these issues away from democracy and you're throwing them into the courts pursuant to, and it may be simply my educational background, what I can only describe as sociological gobbledygook."[115]

Partisan vote dilution has now been declared federally non-justiciable.[116] As with the regime built to combat racial vote dilution claims, the search for a justiciable and manageable partisan vote dilution standard was handicapped from the outset by accepting a disproportional electoral remedy. The best standards developed within that framework offer solutions to ensure that voters aligned with party A are at least not systemically worse off than voters aligned with party B under the same conditions. That is the best we can do.

Protections against partisan gerrymandering typically do not even consider minor party supporters and provide substantive relief for major party supporters only in fairly competitive states. As discussed, consensus over the Court's role in combating racial electoral discrimination has also broken, largely along party lines. *Gingles* has been upheld, but only under the threat of a radical and disruptive alternative framework that split the Courts' conservative Justices in *Allen*.[117] Nearly six decades after the Court first recognized the threat that vote dilution poses to political equality,[118] they never made good on the promise to fix it. We are left with a

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[112] *Allen*, 599 U.S. at 9 (internal citations omitted).
[113] Rucho v. Common Cause, 139 S. Ct. 2484, 2503 (2019).
[114] 138 S. Ct. 1916 (2018).
[115] Oral Argument at 35:22, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161), https://www.oyez.org/cases/2017/16-1161 [https://perma.cc/288H-HJPL].
[116] *Rucho*, 139 S. Ct. at 2524.
[117] *Compare Allen*, 599 U.S. 31–33, 1516 (2023) (rejecting Justice Thomas's dissenting arguments that *Gingles* must be overruled, and that Section 2 is "wholly inapplicable" to districting) *with id.* at 51–54 (Thomas, J., dissenting) and *id.* at 95–97 (Alito, J., dissenting). *See also* L. PAIGE WHITAKER, CONG. RSCH. SERV., LSB11002, ALLEN V. MILLIGAN: SUPREME COURT HOLDS THAT ALABAMA REDISTRICTING MAP LIKELY VIOLATED SECTION 2 OF THE VOTING RIGHTS ACT 3–4 (2023) (detailing the split amongst the conservative Justices' majority, concurring, and dissenting opinions).
[118] *See* Baker v. Carr*,* 369 U.S. 186, 347 (1962)..

voting rights regime that protects at best an abridged form of political equality.

II. CONFRONTING THE LOGIC OF PROPORTIONALITY

Current legal protections against vote dilution, where they are still justiciable, are only protections against *relative* dilution within the constraints of our existing electoral system. Whether at the primary nomination stage or in general elections, our winner-take-all legislative contests provide most voters with little opportunity to cast an effective vote to express their preferred policies or parties.[119] The political representation of racial, ethnic, and linguistic minorities remains a perennial issue in contemporary politics.[120] While our single-seat system has proven capable of representing some racial groups more or less in proportion to their numbers,[121] it "works" less for geographically dispersed or heterogenous groups, or where there are multiple communities of interest to represent.[122]

At the same time, election litigation has been a growth industry (although 2020 may be a high water mark),[123] with both parties raising over $150 million in the 2021–2022 cycle to direct litigation efforts.[124] Corporations, unions, and party-aligned interest groups, in addition to the formal party organizations, have played an ever-increasing role in funding and shaping the process of redistricting litigation.[125] Claims that all this litigation is working in

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[119] *See* Lee Drutman, *What We Lose When We Lose Competitive Congressional Districts*, FIVETHIRTYEIGHT (June 23, 2022), https://fivethirtyeight.com/features/what-we-lose-when-we-lose-competitive-congressional-districts/ [https://perma.cc/K2VX-95EK].

[120] *See generally* JACK SANTUCCI ET AL., *supra* note 54; Lee Drutman, *Elections, Political Parties, and Multiracial, Multiethnic Democracy: How the United States Gets It Wrong*, 96 N.Y.U. L. REV. 985 (2021).

[121] *See generally* David Lublin et al., *Has the Voting Rights Act Outlived Its Usefulness? In a Word, "No,"* 34 LEGIS. STUD. Q. 525 (2009); Loren Collingwood & Sean Long, *Can States Promote Minority Representation? Assessing the Effects of the California Voting Rights Act*, 57 URB AFFS. REV. 731 (2021).

[122] *See generally* Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans*, 4 CA. J. POL. & POL'Y 1 (2012).

[123] *See* Richard Hasen, *Election Litigation Fell Almost 25 Percent in 2021-22 Compared to Last Midterm Election Season (2017-18), But Slump May Not Last [Corrected]*, ELECTION L. BLOG (Apr. 26, 2023), https://electionlawblog.org/?p=135791 [https://perma.cc/755X-CNMQ].

[124] *See* Derek Muller, *Democratic, Republican Fundraising for Election Litigation Tops $154 million in 2021-22 Cycle, 30% Increase Over 2020 Presidential Cycle*, ELECTION L. BLOG (Apr. 3, 2023, 1:28 PM), https://electionlawblog.org/?p=135401 [https://perma.cc/9QST-ZE69].

[125] *See* Olga Pierce et al., *supra* note 21; STEVE BICKERSTAFF, LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE DOWNFALL OF TOM DELAY

the service of voters, as opposed to trying to control electoral outcomes, are dubious. As Professors Justin Grimmer and Eitan Hersh have recently shown, much of the attention and litigation concerning electoral reforms may be inconsequential because controversial laws tend to target very small populations (e.g., Black voters without identification, moving a few thousand voters into or out of a district), such that "most of the laws that are fought over so vigorously in statehouses and in courtrooms cannot affect any but the very closest elections."[126]

Of course, it is the closest elections that matter most to political parties.[127] Studies of overall null effects from election law changes should not draw attention away from the impact of electoral microclimates on voter turnout,[128] or the cumulative impact of election laws that impact large populations.[129] But the fact that so much attention, including political science resources, is dedicated to uncovering marginal institutional effects on participation and representation, while tens of millions of eligible voters are virtually invisible to the electoral process, suggests the need to confront the deeper structural barriers of our electoral systems.[130]

A. Political Equality and Majority Rule

The future of United States election law, election science, and our shared role in protecting democracy rests on our capacity to clarify the logical and legal relationship between political equality, majority rule, and proportional representation, as well as advocate for institutional reforms that meet the task at hand.

274–84 (2007); Kathleen M. Sullivan & Pamela S. Karlan, *The Elysian Fields of the Law*, 57 STAN. L. REV. 695, 702, 710 (2004).

[126] Justin Grimmer & Eitan Hersh, *How Election Rules Affect Who Wins* (June 29, 2023), https://www.eitanhersh.com/uploads/7/9/7/5/7975685/effectslaws_062923.pdf [https://perma.cc/57LM-43GG].

[127] *See generally* Justin Grimmer et al., *Are Close Elections Random*? (Aug. 2, 2011), https://www.semanticscholar.org/paper/Are-Close-Elections-Random-Grimmer-Hersh/94a492c6a5257ff4d3caee9b2cd49490354611d6 [https://perma.cc/BQ7U-5MZK].

[128] *See* Hannah L. Walker, et al., *Early Voting Changes and Voter Turnout: North Carolina in the 2016 General Election*, 41 POL. BEHAV. 841 (2018).

[129] *See* KEENA, *supra* note 80, at 135–147; Jacob M. Grumbach, *Laboratories of Democratic Backsliding*, 117 AM. POL. SCI. REV. 967–84 (2023), https://doi.org/10.1017/S0003055422000934 [https://perma.cc/2R77-HN2Y].

[130] *See generally* Andrea Benjamin et al., *Achieving Multiracial, Multiparty Democracy*, UNION OF CONCERNED SCIENTISTS (2022), https://www.ucsusa.org/sites/default/files/2022-07/achieving-multiracial-multiparty-democracy.pdf [https://perma.cc/YGS8-US38]; Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor*, 114 NW. U. L. REV. 633 (2019).

That project begins with the recognition that the Court in *Rucho* erred in claiming that "[i]t hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support."[131] In both principle and practicality, the one person, one vote cases have a direct bearing on the question of vote dilution, whether racial or partisan.

Control of legislative seats is a direct function of the weight of individual votes. The insight that electoral systems, and specifically seat allocation rules, condition the weight of votes, goes back at least to Charles Lutwidge Dodgson.[132] Equally weighted votes are required to avoid "manufactured majorities" or election inversion—when a minority of voters controls a majority of seats—as recognized in Kenneth May's seminal work three-quarters of a century ago.[133] More recent social choice analyses show that, for an electoral system to satisfy formal conditions of political equality, it must give a majority of seats to whichever coalition wins a majority of votes.[134] Thus, the standard of majority rule is directly (and constitutionally) derived from political equality, or the equal weight of votes.

Justifying the majority rule standard depends on accepting that voters have a right to equal protection in legislative elections *as a whole*, rather than just individual districts, and that partisan control of seats is the central feature of that result. First, consider the

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[131] Rucho v. Common Cause, 139 S. Ct. 2484, 2501 (2019).

[132] *See* CHARLES LUTWIDGE DODGSON, THE PRINCIPLES OF PARLIAMENTARY REPRESENTATION (1884). Readers may know the author better by his pen name, Lewis Carroll.

[133] *See generally* Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680 (1952); Kenneth O. May, *A Note on the Complete Independence of the Conditions for Simple Majority Decision*, 21 ECONOMETRICA 172 (1953).

[134] *See* Eliora Van Der Hout & Anthony J. McGann, *Proportional Representation Within the Limits of Liberalism Alone*, 39 BRIT. J. OF POL. SCI. 735–54 (2009), https://doi.org/10.1017/S0007123409000684 [https://perma.cc/P27A-UGQQ]; Eliora Van Der Hout & Anthony J. McGann, *Liberal Political Equality Implies Proportional Representation,* 33 SOC. CHOICE & WELFARE 617–27 (2009), https://doi.org/10.1007/s00355-009-0382-8 [https://perma.cc/A65J-QW6A]. One critical review of Van der Hout and McGann's formal proofs argues that to get proportionality from liberal axioms, coalition must be defined neutrality. Intuitively, this means that if the voters for parties in a particular coalition swap their votes for parties in a different coalition, the coalitions must swap vote share. A liberal defense would be this: If a group of voters can give their assent to one coalition, and if this group of voters changes its mind and then gives it support to another coalition, that coalition gets the seats this group of voters is able to award. *See* Stefan Wintein & Conrad Heilmann, *Liberal Political Equality Does Not Imply Proportional Representation*, 59 SOC. CHOICE & WELFARE 63–91 (2022), https://doi.org/10.1007/s00355-021-01385-0 [https://perma.cc/T4U8-TTA5].

importance of legislatures as single representative bodies rather than collections of individual representatives. The Framers certainly considered congressional representation in collective terms: Article I, Section 2, of the Constitution dictates that the House of Representatives shall be chosen "by the People of the several states" rather than the "peoples" or members of individual districts,[135] which are not even mentioned in Article 1, Section 4.[136] In other words, the people *as a whole* elect the House *as a whole.*[137]

The Court reiterated this argument in the malapportionment cases. In *Wesberry*, for example, the Court states that the House is elected "by the People of the several States" such that, if states choose to elect by district, they may not "draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others."[138] The general causal connection is straightforward: it is the performance of legislatures (the House, state legislatures, city councils) *as a whole*, deliberating and producing collective outputs, that impacts an individual voter's well-being. Even if the election in District A respects political equality and majority rule, abuses in other districts or states can result in massive misrepresentation that weakens the voting strength of District A's representative and those she joins in coalition, the clearest case being when a majority of voters only win a minority of seats. It is preposterous to claim that the voters in District A enjoy equal protection if the election of the legislature results in such a dilution of their representative strength.

Second, whether the violation occurs through District A's representative in coalition *with other representatives* matters. It is an objective, institutional fact that legislatures are organized by partisan coalitions, namely political parties.[139] Legislative leadership, like the Speaker of the House, is chosen based on partisan affiliation; and majority partisan coalitions exercise considerable control over procedural resources, committee

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[135] U.S. CONST. art. I, § 2.
[136] *Id.* § 4.
[137] *See* THE FEDERALIST No. 39 (James Madison) ("The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State.").
[138] Wesberry v. Sanders, 376 U.S. 1, 7, 14, 18 (1964) (quoting U.S. CONST. art. I, § 2); *see also* ANTHONY J. MCGANN ET AL., *supra* note 90, at 207 (citing Wesberry v. Sanders, 376 U.S. 1 (1964)).
[139] *See* A Rep. of the Comm. on Pol. Parties, *Toward a More Responsible Two-Party System*, 44 AM. POL. SCI. REV. 1, 1–14 (1950), https://doi.org/10.2307/1950998 [https://perma.cc/GR7Y-TCQH]; Am. Pol. Science Ass'n Comm. on Pol. Parties, *More than Red and Blue: Political Parties and American Democracy*, PROTECT DEM. (July 11, 2023), https://protectdemocracy.org/work/more-than-red-and-blue-political-parties-and-american-democracy/ [https://perma.cc/52YT-7TBK].

assignments and chairs, and the rules and timing of legislative deliberation.[140]

As collective actors, parties integrate the goal of maximizing seat shares by advancing a "policy brand" with a plan of legislative action.[141] If voters are not given equal opportunity to influence the result of partisan coalition building, they have been denied equal protection through the operation of electoral laws. Crucially, the right to political equality is not dependent on the internal cohesiveness of parties or the level of party discipline. Because legislative organization is a result of partisan coalition building, when party cohesiveness is weak, it is even more consequential if some voters have a systemic advantage over others.

The protection of political equality, reflected in the majority rule standard, thus extends into coalition formation and deliberation over the formation of law. In determining the composition of the legislature, seat allocation rules that respect individual equality must not discriminate against voters to choose for themselves the group identities that determine issue salience within governing coalitions. The seat allocation rule that comes closest to procedurally embodying that normative commitment is pure proportional representation.

B. The Proportionality Standard

Popular sovereignty and self-governance require institutions that minimize "those inequalities that negatively influence an individual's contribution to the collective decision-making process."[142] In protecting political equality (or failing to), electoral systems thus instantiate necessary conditions required for democratic deliberation. Electoral systems have a long reach into the policymaking process.

Democratic deliberation requires that a political system not "circumscribe in advance the range of views on offer in deliberative arenas" at electoral and legislative stages of the decision-making

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[140] *See* Reut Itzkovitch-Malka & Matthew S. Shugart, *Committee Assignment Patterns in Fragmented Multiparty Settings: Party Personnel Practices and Coalition Management*, PARTY POLS. (Oct. 12, 2022), https://doi.org/10.1177/13540688221128591 [https://perma.cc/CWX5-PGML]; GARY W. COX & MATHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES 50–86 (2005); GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 235–254 (1993).

[141] *See generally* MATTHEW S. SHUGART ET AL., PARTY PERSONNEL STRATEGIES: ELECTORAL SYSTEMS AND PARLIAMENTARY COMMITTEE ASSIGNMENTS 49–78 (2021).

[142] JACK KNIGHT & JAMES JOHNSON, THE PRIORITY OF DEMOCRACY: POLITICAL CONSEQUENCES OF PRAGMATISM 210 (2011).

process.[143] Protecting individual political equality through the electoral process is a necessary prerequisite if legislative outputs are to result from a public contest over reasoned alternatives, rather than being "imposed by one or a few well-placed parties."[144] Recognizing that all political systems resolve conflict through the reduction of complexity and synthesis of differences,[145] what characterizes that process as more or less democratic is the degree to which the majority rule standard, and by extension political equality, is operative throughout the stages of selective pressures that generate pre- and post-election alliances, legislative coalitions, and decisions about the procedural rules that regulate lawmaking.

While all electoral systems by design constrain the dimensionality of political discourse on the front end, only proportional systems accurately reflect the multidimensionality of views of the choices offered in the electorate, approximating an unrestricted domain for deliberation over policy alternatives.[146] The proportional conversion of electoral preferences into legislative coalitions provides that equal opportunity for citizens supporting those coalitions is "carried right through the policymaking process."[147]

The standard of proportional representation is thus derived directly from the protection of individual political equality. For a seat allocation rule to satisfy conditions of equal treatment, it cannot dilute the weight of votes, or otherwise discriminate against voters, on the basis of their identities (anonymity), and it cannot dilute the value or discriminate between electoral alternatives (neutrality toward candidates, lists, parties, etc.).[148] Further, because legislative decisions typically depend on the relative size of competing coalitions, the rule must not dilute legislative support between coalitions of alternatives. Any electoral system that systematically

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[143] *Id.* at 215.
[144] *Id.* at 217.
[145] *See generally* NIKLAS LUHMANN, SOCIAL SYSTEMS 188–95 (Dirk Baecker & John Bednarz trans., 1995); David Easton, *An Approach to the Analysis of Political Systems*, 9 WORLD POLS. 383–400 (1957).
[146] *See* Steffen Ganghof, *Four Visions of Democracy: Powell's Elections as Instruments of Democracy and Beyond*, 13 POL. STUD. REV. 69, 73 (2015) (emphasis omitted). Ganghof distinguishes between "simple" and "complex" majoritarianism across stages of coalition building and decision-making, but I do not introduce this terminology so as not to confuse it with "simple" versus "compound" democracy, a related but distinct classification scheme for political systems. *Id.* at 69–70.
[147] *Id.* at 70 (citing G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS 20–44 (2000)).
[148] For an extended conversation about how these requirements apply in practice, see ANTHONY MCGANN, THE LOGIC OF DEMOCRACY: RECONCILING EQUALITY, DELIBERATION, AND MINORITY PROTECTION 35–59 (2006).

prevents proportional representation violates the principle of political equality.

In practice, there are a variety of proportional electoral systems from which to choose, and no electoral system short of a single, nationwide district can generate perfectly proportional representation.[149] Even highly proportional systems are not immune to election inversion, and any proportional system that could realistically be adopted for Congress, with small district magnitudes in smaller states, would be far from perfect.[150] But a proportional representation standard need not be perfect—it need only identify when a given districting plan is so disproportional as to deny voters seats, and, in the extreme case, whether a plan can be reasonably expected to violate majority rule.

Deviation from proportionality is as intuitive, and nearly as simple to measure, as population deviation across districts. In the simplest case, it is the difference in the percentage of voters supporting a party and the percentage of seats that the party wins. In multi-party electoral systems, a common disproportionality metric, such as Gallagher's *D*, provides a standardized measure.[151] Electoral thresholds, the minimal percent of votes that a candidate or party needs to win a seat, are set by the size of the assembly or delegation and district magnitude, in addition to electoral formula specifications, and possible minimal thresholds for parties to win a seat, as components of the electoral system. States with single, statewide electoral districts could establish proportional representation districts that maximize proportionality, though larger states would likely still desire to create several multi-seat districts.

For any districted electoral system, and any set of voters supporting a set of candidates or party, the total disproportionality of an electoral system can be partitioned into the portions that are caused by (1) malapportionment, (2) turnout rate differences across districts linked to coalition/party vote shares (that might allow a group to receive a larger portion of seats for a given vote share), and

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[149] Consideration of the variety of systems and their properties is beyond the scope of this article. *See generally* Santucci et al., *supra* note 54, at 155–58; Orit Kedar et al., *Are Voters Equal Under Proportional Representation?*, 60 AM. J. POL. SCI. 676–91 (2016).

[150] *See generally* Peter Kurrild-Klitgaard, *Election Inversions, Coalitions and Proportional Representation: Examples from Danish Elections* (Munich Pers. RePEC Archive, Working Paper No. 35302, 2011), https://mpra.ub.uni-muenchen.de/35302/7/MPRA_paper_35302.pdf [https://perma.cc/FV2T-N5V9]; Nicholas R. Miller, *Election Inversions Under Proportional Representation*, 38 SCANDINAVIAN POL. STUD. 4 (2015).

[151] The Gallagher index is computed by taking the square root of half the sum of the squares of the difference between percent of votes and percent of seats for each of the political parties. *See* Rein Taagepera, *Deviation from Proportional Representation and Proportionality Profiles*, *in* PREDICTING PARTY SIZES: THE LOGIC OF SIMPLE ELECTORAL SYSTEMS 65–82 (Rein Taagepera ed., 2007).

(3) differences in vote shares arising from geographic differences in support across districts.[152] Any set of voters that could establish that a districting plan generates districting-induced disproportionality above the system's electoral threshold, could show a violation of political equality.

Of course, even open-list proportional representation systems—among the most proportional and easy to implement from the voters' perspective[153]—are no panacea. Majority voters cannot be forced to support minority-supported candidates, and there is some evidence of potential gaps in voter support for ethnic and linguistic minorities within party lists.[154] Yet there is less pressure under proportional representation for racial and ethnic minorities to conform to dominant group terms in exchange for representation. Minority representation is typically stronger under proportional representation compared to first-past-the-post[155] because of the ability of racial and ethnic parties to win seats through lower

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[152] Estimates of ethnic/racial group vote shares can be approximated using the same inferential statistics used under *Gingles*, and this framework for uncovering bias can be generalized. *See generally* Bernard Grofman et al., *An Integrated Perspective on the Three Potential Sources of Partisan Bias: Malapportionment, Turnout Differences, and the Geographic Distribution of Party Vote Shares*, 16 ELECTORAL STUD. 457–70 (1997).

[153] OLPR allocates seats proportional to the vote share that a party's list of candidates receives. Proposals for OLPR adoption in the U.S. emphasize ease of implementation (voters select a single candidate as they largely do now) and the capacity for more "centrist" parties to cordon off radical coalitions that threaten democratic stability). *See* Jack Santucci, *A Modest and Timely Proposal*, VOTEGUY (Dec. 9, 2020), https://www.voteguy.com/2020/12/09/a-modest-and-timely-proposal [https://perma.cc/7ZHW-FA3G]; *see also* Matthew S. Shugart, *Emergency Electoral Reform: OLPR for the US House*, FRUITS & VOTES (Jan. 19, 2021), https://fruitsandvotes.wordpress.com/2021/01/19/emergency-electoral-reform-olpr-for-the-us-house [https://perma.cc/F3TT-QACB].

[154] *See generally* Oleh Protsyk & Konstantin Sachariew, *Recruitment and Representation of Ethnic Minorities under Proportional Representation: Evidence from Bulgaria*, 36 E. EUR. POL. & SOC'YS 319 (2012); Josefina Sipinen & Peter Söderlund, *Explaining the Migrant–Native Vote Gap under Open-List Proportional Representation*, PARTY POL. (July 6, 2022), https://doi.org/10.1177/13540688221113665 [https://perma.cc/CT57-758S].

[154] *See generally* Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCRACY 96, 101 (2004); PIPPA NORRIS, MAKING DEMOCRATIC GOVERNANCE WORK: HOW REGIMES SHAPE PROSPERITY, WELFARE, AND PEACE 187–96 (2012); ANDREW REYNOLDS ET AL., ELECTORAL SYSTEM DESIGN: THE NEW INTERNATIONAL IDEA HANDBOOK 35–119 (2005).

[155] *See generally* Josh Franklin, *First Past the Post Voting: Our Elections Explained*, COMMON CAUSE (June 22, 2020), https://www.commoncause.org/colorado/democracy-wire/first-past-the-post-voting-our-elections-explained [https://perma.cc/247F-ZJS6].

electoral thresholds,[156] as well as the tendency for major parties to run more inclusive slates.[157]

Proportional representation in the United States is not likely to become a reality without a sustained democracy movement that includes the voting rights community in collaboration with broader policy groups like environmental justice advocates, whose legislative goals are directly linked to the protection and expansion of electoral democracy. Continuing political dysfunction will also facilitate the defection of established party system leaders, who will play a large role in building successful legislative coalitions in local, state, and federal government.

Finally, courts will continue to play a role. Informed judicial guidelines may already be emerging. Recently, the Supreme Court of California remanded a California Voting Rights Act (CVRA) case back to an appellate court with instructions about how to properly administer the *Gingles* framework minus the first prong, which the CVRA does not require.[158] In its guidelines, the California Supreme Court explicitly reminded the appellate court that "several alternative at-large election methods" might better enhance the power of racial minorities to elect their candidates of choice, compared to single-seat district elections.[159]

CONCLUSION

The VRA will continue to be an essential tool to combat vote denial and discriminatory vote dilution in the near future, but its days may be numbered. Our current voting rights regime, which offers less-than-ideal tools to combat racial dilution claims and has ceased to provide adequate mechanisms to combat partisan gerrymandering, makes it necessary to extend the protection of political equality to all voters regardless of background or geographic jurisdiction. Only proportional representation can accomplish this.

Several constitutional features of the United States political system violate political equality by design, especially our

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[156] *See generally* Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCRACY 96–109 (2004); PIPPA NORRIS, MAKING DEMOCRATIC GOVERNANCE WORK: HOW REGIMES SHAPE PROSPERITY, WELFARE, AND PEACE (2012); ANDREW REYNOLDS ET AL., ELECTORAL SYSTEM DESIGN: THE NEW INTERNATIONAL IDEA HANDBOOK (2005).

[157] *See* Michael Latner & Anthony J. McGann, *Geographical Representation Under Proportional Representation: The Cases of Israel and The Netherlands,* 4 ELECTORAL STUD. 709, 725–34 (2005); MATTHEW S. SHUGART & REIN TAAGEPERA, VOTES FROM SEATS: LOGICAL MODELS OF ELECTORAL SYSTEMS 76–77, 89–90 (2017).

[158] Pico Neighborhood Ass'n v. City of Santa Monica, 534 P.3d 54, 71 (Cal. 2023), *as modified* (Sept. 20, 2023).

[159] *Id*. at 66.

supermajoritarian policymaking structure.[160] It is even more important, then, that we at least extend political equality and majority rule to the one federal institution for which it was intended, the House of Representatives. Proportional state and local electoral systems would also move us considerably closer to living up to the principle of political equality.

[160] *See* Anthony J. McGann & Michael Latner, *The Calculus of Consensus Democracy: Rethinking Patterns of Democracy Without Veto Players*, 46 COMPAR. POL. STUD. 823 (2013); ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2006).