Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of "Representation"?

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REDEFINING AMERICAN DEMOCRACY: DO ALTERNATIVE VOTING SYSTEMS CAPTURE THE TRUE MEANING OF “REPRESENTATION”?

James Thomas Tucker*

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The opinions expressed in this Article do not necessarily reflect those of the United States Department of Justice.
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[T]he Court has declared that strict constitutional scrutiny must be applied whenever race is “the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district . . . .” If continued pursuit of minority political representation is going to remain a goal of public policy, the time to consider alternatives other than race-conscious districting has arrived.

Richard Pildes & Kirsten Donoghue

I. INTRODUCTION

The Supreme Court’s creation of an equal protection claim for racial gerrymandering in Shaw v. Reno has left defenders of minority voting rights in much the same position as the proverbial Dutch boy—trying to stop too many leaks without enough fingers. Over the past quarter century, civil rights advocates have built a dike in the form of majority-minority single-member districts to stem the tide of racial bloc voting, the practice by which White voters in a particular district consistently vote in a manner that thwarts minority voters’ attempts to elect their

2. 509 U.S. 630 (1993) ("Shaw I") (holding that irrational reapportionment schemes that are meant to segregate voters on the basis of race are unconstitutional under the Equal Protection Clause).
3. That is, districts electing a single representative in which racial, ethnic, or language minorities comprise a majority of the population. See David Butler & Bruce Cain, Congressional Redistricting: Comparative and Theoretical Perspectives 159–60 (1992) (defining “majority minority districts” and “single-member district”).
candidate of choice. When the Shaw Court initially punched a hole in this dike by striking down a district map designed to create a majority Black district, minority voting rights groups responded by attempting to plug the opening with settled principles of constitutional law. But the Court remained undeterred, side-stepping its own precedents and rupturing the dike anew with each passing decision. The deluge of the Court's reasoning threatened to breach the dike in its entirety and again dilute the ability of minority voters to have the same opportunity as "other members of the electorate to participate in the political process and to elect representatives of their choice." Like the Dutch boy, many civil rights advocates believe they do not have enough fingers to fill all of the holes in the crumbling dike of majority-minority single-member districts.

5. Shaw I, 509 U.S. at 659 (White, J., dissenting).
6. See, e.g., Abrams v. Johnson, 521 U.S. 74 (1997) (finding the district court's redistricting plan for Georgia did not violate the Voting Rights Act's retrogression provision because the appropriate benchmark was the current plan containing one majority-Black district and not proposed plans creating two majority-Black districts that had never been in effect and were found to be unconstitutional); Bush v. Vera, 517 U.S. 952 (1996) (concluding that evidence supported findings that racially motivated gerrymandering had greater influence on drawing of Texas congressional district lines than political gerrymandering and was accomplished in large part by use of race as proxy for political data such as precinct general election voting patterns, precinct primary voting patterns, and legislators' experience); Shaw v. Hunt, 517 U.S. 899 (1996) ("Shaw II") (holding that remedying racial discrimination in redistricting is not a compelling state interest unless discrimination is identified and the redistricting jurisdiction has a strong basis in evidence to conclude that remedial action was necessary before it embarked on affirmative-action program); Miller v. Johnson, 515 U.S. 900 (1995) (holding that a Shaw claim could be stated by alleging that race was the predominant factor in the creation of district boundaries); United States v. Hayes, 515 U.S. 737 (1995) (holding that a person residing in an allegedly racially gerrymandered district has standing to bring a Shaw claim because that person has been denied equal treatment through use of racial criteria and accordingly has suffered special harm not experienced by persons residing outside the district).

7. 42 U.S.C. § 1973(b). For an extended critique of these decisions, see James Thomas Tucker, Affirmative Action and [Mis]representation: Part II—Deconstructing the Obstructionist Vision of the Right to Vote, 43 How L.J. 405 (2000) [hereinafter Deconstructing the Obstructionist Vision] (deconstructing what is described as the "Obstructionist vision of the right to vote," or the belief that protection of minority voting rights is limited to the right of individuals to cast a ballot and have it counted, but not a broader right of minorities to enjoy equal opportunities for political participation).
Faced with this rather bleak prospect, a growing number of minority voting rights commentators, congressional representatives, and state legislatures have explored alternative voting systems. These alternatives include cumulative voting, which was implemented in Chilton County, Alabama, as described by Pildes & Donoghue in their note. Lani Guinier, in her Foreword to Reflecting All of Us: The Case for Proportional Representation, presented the advantages of proportional representation alternatives in winner-take-all elections. Robert Richie & Steven Hill concluded in their reply to Reflecting All of Us, supra, that proportional representation systems may be the best way to combat vote dilution and achieve fairness for minorities without relying on race-conscious districting. Steven J. Mulroy's Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies, 77 N.C. L. Rev. 1867, 1876, 1890-91 (1999) and The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies, 33 Harv. C.R.-C.L. L. Rev. 333 (1998) argue that federal courts have authority to order alternative voting systems into effect where a plaintiff has demonstrated vote dilution that violates the Voting Rights Act, even if the plaintiff cannot demonstrate that the minority group is compact enough to form a majority in a single member district. Richard L. Engstrom & Robert R. Brischetto, Is Cumulative Voting Too Complex? Evidence from Exit Polls, 27 Stetson L. Rev. 813 (1998) maintain that alternative voting systems such as cumulative voting have become more attractive to those concerned with retaining or expanding opportunities for minority voters after Shaw. Samuel Issacharoff, Racial Gerrymandering in a Complex World: A Reply to Judge Sentelle, 45 Cath. U. L. Rev. 1257, 1267-68 (1996); Samuel Issacharoff, Supreme Court Destabilization of Single-Member Districts, 1995 U. Chi. Legal F. 205 (1995) suggest that redistricting pressures will force states to move away from redistricting in favor of alternative voting systems to avoid litigation under both the Voting Rights Act and the Equal Protection Clause by addressing minority concerns without the pressures of racial line-drawing that would arouse the scrutiny of Shaw and Miller. Pamela S. Karlan, Our Separatism? Voting Rights as an American Nationalities Policy, 1995 U. Chi. Legal F. 83 (1995) describes the advantages of alternative voting systems such as limited voting and cumulative voting to avoid the problems of balkanization and separation described by the Supreme Court in its Shaw jurisprudence. Douglas J. Amy, Real Choices/New Voices: The Case for Proportional Representation Elections in the United States 121-33 (1993) (proposing that proportional representation avoids pitfalls of "affirmative gerrymandering" of single-member majority-minority districts including the underrepresentation of minorities, cracking or fragmentation of minority groups, "bleaching" of districts to minimize the power of minority elected representatives, and claims of reverse discrimination by Whites).
islators\textsuperscript{10} have advocated building new dams that will withstand the Court's jurisprudential torrent. According to these proponents, alternative voting systems\textsuperscript{11} that secure proportional or semi-proportional representation\textsuperscript{12} are the best way to stem the tide of this "tyranny of the judiciary."\textsuperscript{13}


\textbf{11.} This Article uses "alternative voting systems" to refer to methods of election that depart from winner-take-all elections in geographically based single-member or multimember districts commonly used in the United States.

\textbf{12.} Proportional or semi-proportional systems "strive for proportionality in allocating the contested seats" with the overall goal of a political party or group of voters "to be represented in ... proportion to its share of the vote." Amy\textsuperscript{, supra} note 8, at 14. The single transferable vote is an example of a proportional voting system. Id. at 230–31. Semi-proportional systems include limited voting and cumulative voting "because they achieve more proportionality than single-member or multimember plurality or majority elections, but less than complete proportionality." Edward Still, Alternatives to Single-Member Districts, in Minority Vote Dilution 249, 258 (Chandler Davidson ed., 1989). See Amy\textsuperscript{, supra} note 8, at 232–33; Bernard Grofman, Criteria for Districting: A Social Science Perspective, 33 UCLA L. Rev. 77, 163 (1985). In the context of the discussion herein, references to proportional and semi-proportional systems at times will be used interchangeably, although it is important to keep in mind the differences between the two.

\textbf{13.} James Thomas Tucker, Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act, 7 WM. & MARY BILL RTS. J. 443 (1999) [hereinafter Tyranny of the Judiciary]. The term "judicial tyranny" describes how the Supreme Court and
that threatens to drown out political opportunities for racial, ethnic, and language minority groups. The three most commonly suggested methods include cumulative voting, limited voting, and the single-transferable vote, or "preference voting."

Cumulative voting uses multimember districts, which are districts from which more than one member of a representative body are elected. Voters are allowed to cast the same number of votes as seats to be filled, but they may combine those votes in any way they wish. Thus in a contest to fill three seats, a voter could cast all three votes for one candidate, two for one and one for another, or one for each of three candidates.

A minority group is guaranteed representation under cumulative voting if it limits the number of candidates it runs and exercises voter discipline.

Under limited voting, candidates can be elected either at-large (that is, all members of a representative body are elected from the entire jurisdiction) or from multimember districts. "[E]ach voter is allowed to vote for fewer candidates than the total number of seats contested. A voter may choose three candidates on a five-seat city council, five candidates on a seven-seat council, and so on." Limited voting does not prevent a disciplined majority from winning all seats if it evenly divides its votes among certain lower federal courts have disregarded their constitutional role in striking "an appropriate balance . . . between respect for majority rule and the protection of minorities from the tyranny of majority factionalism" in favor of "an inconsistent judicial view of what 'voting' means in the American democratic system." Id. at 454-55.

candidates on its slate and the number of votes cast by the minority group is smaller than the minimum threshold needed for election.\textsuperscript{21}

The single-transferable vote ("STV") uses multimember districts in which each party runs several different candidates. A STV process works in the following manner:

Candidates are listed individually on the ballot, and voters rank the various candidates, putting 1 by their first choice, 2 by their second choice, and so on. . . . The unique aspect of the STV counting system is the transference of votes to ensure that most voters contribute to the election of a candidate. Two kinds of transfers take place. First, once a candidate reaches the threshold [the minimum number of first-choice votes a candidate must receive to get elected] and is elected, any surplus ballots beyond that threshold are redistributed to the next available preferred candidate indicated on the ballot. After the redistribution of surplus ballots, the votes are recounted to see if any remaining candidates have reached the threshold. If no candidates reach the threshold during a counting round, the last place candidate is eliminated, and those votes are redistributed to the second-choice candidates and another count is made. The redistribution continues until all seats are filled.\textsuperscript{22}

For example, if six candidates are running for five seats, any candidate receiving more than one-sixth of the votes will be elected.\textsuperscript{23}

\textsuperscript{21} See Still, supra note 12, at 253–55. The formula for determining the threshold in limited voting systems, expressed as a percentage, is:

\[
\frac{\text{Number of Votes}}{\text{Number of Votes} + \text{Number of Seats}} \times 100
\]

See Limited and Cumulative Voting in Alabama, supra note 18, at 183.

\textsuperscript{22} Amy, supra note 8, at 18. To ensure election under STV, a candidate needs to receive a number of votes determined by the Droop formula:

\[
\frac{\text{Total Valid Votes}}{\text{Seats} + 1} + 1
\]


\textsuperscript{23} Id.
Unlike single-member districts, which are subject to the very sort of geographically group-based, race-conscious classifications that the Court has eschewed in its Shaw jurisprudence, these methods of election are based upon varying forms of individual choices to collectively exercise political power. Hence, alternative voting systems are said to offer "the way out" of the Shaw dilemma by providing all voters with equal access to the political process without creating majority-minority districts vulnerable to charges of racial gerrymandering.

But do alternative voting systems come at an unacceptable price to American democracy, replacing the drawbacks of race-conscious redistricting with their own systemic shortcomings? The answer to this question first requires an understanding of what representation means in the United States. Representation has many varying attributes, but most of all it "rests on the republican principle that the actions of government must be based upon the consent of the governed." Under the Madisonian model of democracy, consent has two key components: representation that is derived from the bedrock principle of majority

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25. The United States does not use a true democratic system, but instead "operates under what Madison termed a 'republican government,' in which the people 'assemble and administer [government] by their representatives and agents.'" Tyranny of the Judiciary, supra note 13, at 456 (quoting The Federalist No. 14, at 100 (James Madison) (Clinton Rositer ed., 1961)). It is this type of government to which this Article refers by the term "democracy."

26. In this limited sense, then, Justice Thomas is correct that answering this type of question "depends upon the selection of a theory for defining the fully 'effective' vote—at bottom, a theory for defining effective participation in representative government." Holder v. Hall, 512 U.S. 874, 897 (1994) (Thomas, J., concurring). Other Justices have made similar observations in their evaluations of voting rights cases. See generally Shaw I, 509 U.S. at 633 (describing one of the issues before the Court as "the meaning of the constitutional 'right' to vote"); Thornburg v. Gingles, 478 U.S. 30, 88 (1986) (O'Connor, J., concurring judgment) ("in order to decide whether an electoral system has made it harder for minority candidates to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system"); Baker v. Carr, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting) ("Talk of 'debasement' or 'dilution' is circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth.").

27. See Tyranny of the Judiciary, supra note 13, at 456-58. See also James Thomas Tucker, Affirmative Action and [Mis]representation: Part I—Reclaiming the Civil Rights Vision of the Right to Vote, 43 How L.J. 343 (2000) [hereinafter Reclaiming the Civil Rights Vision] (describing the civil rights vision of the right to vote as including the individual qualities of freedom, citizenship, and empowerment, and the group traits of consent, protection, and power).

28. Tyranny of the Judiciary, supra note 13, at 458. See also Reclaiming the Civil Rights Vision, supra note 27, at 381-87 (describing consent as an element of the civil rights vision of the right to vote). One scholar has described this covenant as requiring the "continuing consent of the governed in regular elections." David E Epstein, The Political Theory of the Constitution, in CONFRONTING THE CONSTITUTION 77, 122 (Allan Bloom ed., 1990).
rule, subject to the countervailing principle that minorities must be protected “from the untrammeled excesses of majority factionalism.” At the same time, representation has not developed in a theoretical vacuum in this country. Consent traditionally has rested upon geographical representation, which is used as a proxy for the political interests of groups of individual voters. Representatives of political territories are expected to be responsive to the needs of all of their constituents, including persons who did not or could not give consent to their representation. A strong two-party system also has evolved from the “winner-take-all” feature of majority rule. Madison’s vision for implementing a consent-based republican form of government, while laden with many defects, has endured in large part because of the stability created by these features.

This Article explores whether alternative voting systems are compatible with the meaning of representation in the United States. Part II begins by examining the role of geographical representation and the effect it has on the ability of individuals and groups of voters to give or withhold their consent. Part III follows this inquiry by assessing the relationship between representatives and constituents under majoritarian and proportional systems to determine the consequences of moving away from geographical representation towards models designed to enhance opportunities for all voters to choose winning candidates. A description of what a “majority” is and when and how it is attained to secure the people’s consent then is taken up in Part IV, providing some insight into the extent to which departures from majority rule are consistent with the American conception of representation. This discussion leads into Part V, which evaluates the role of our two-party system and ascertains whether proportional models of representation can cure the perceived defects of winner-take-all elections without undermining the continued stability of our Republic.

The focus of this inquiry is not merely on whether implementing some form of alternative voting system would alter the meaning of the right to vote and representation. Inevitably, any change in the method of election does so. Instead, it is necessary to also ask if proportional

29. See infra Part IV; Tyranny of the Judiciary, supra note 13, at 461–62.
30. Id. at 462. For an extended discussion of the role of the courts in protecting minorities from the tyranny of the majority, see Id.
31. See infra Part II.
32. See infra Part III.
33. See infra Part V.
34. The most obvious manner in which the constitutional model of consent was defective was through the disenfranchisement of Blacks, women, men without property, and Indians. See infra notes 282–86 and accompanying text.
35. Cf. Hanna Fenichel Pitkin, The Concept of Representation 10 (1967) ("[T]he single, basic meaning of representation will have very different applications depending on what is being made present or considered present, and in what circumstances.").
methods of representation modify the traditional meaning of consent in such a fundamental manner that American "democracy" itself is redefined. The article answers this question by concluding that some forms of proportional representation may be reconciled with our conception of representation, particularly in local government. At the same time, however, alternative voting systems appear to be less well suited for statewide political offices such as legislators and congressional Representatives. Changes to our political system should not be taken lightly. Nevertheless, some modifications to consent through proportional models may be desirable and even necessary to provide continued vitality to our Government and meaningful access to the ballot for minority voters.

II. GEOGRAPHICAL REPRESENTATION: CONSENT DEFINED BY TREES OR ACRES

Geographical representation occupies a preeminent position in how Americans define democracy. Under a purely "corporate" system of representation, consent is obtained not from individuals but instead from representatives speaking for groups of persons whose political interests are viewed as coterminous with the areas where they live. This feature of our governmental landscape evokes a pastoral scene in which the political interests of citizens are indistinguishable from the geography of the areas that are represented. Far too often, though, the tranquil picture has proven to be a mirage. Throughout our history, territorial representation has been used not to advance, but to thwart, the principle that government derive its "just powers from the consent of the governed." The following discussion shows that while the United States technically has moved away from a purely corporate method of representation, the so-called "objective" districting criteria used by redistricting bodies and scrutinized by the courts often renders this change of little consequence.

A. Geographical Representation: The Early American Framework

Geographical representation traces its origins to England and other western cultures. England derived its territorial method of representation

36. See generally Rosemarie Zagare, The Politics of Size: Representation in the United States, 1776-1850, at 37-38 (1987) ("The corporate method of representation presumed that physical proximity generated communal sentiment. Each geographic unit was thought to be an organic, cohesive community, whose residents knew one another, held common values, and shared compatible economic interests.").


38. Medieval assemblies in Europe initially were composed of representatives selected by rank, status, or class, but gradually drew their members from towns or other settled
from a feudal system in which members of the king’s assembly included townsmen and lords who represented themselves and the vassals who were tied to their lands. As England evolved into a constitutional monarchy, it developed a bicameral legislature in which members of the House of Lords continued to represent class interests and representatives of the House of Commons were chosen to represent the people from towns and boroughs. Together, the king and members of Parliament were said to express the collective consent of the nation. This form of “universal representation” was used to explain how even persons who were not permitted to elect representatives by geography, such as the American colonists, nevertheless were represented as if they actually had given their consent to be governed.

The British system of geographical representation subsequently was brought to the American colonies. Virginia elected the first legislative assembly in America in 1619, with its House of Burgesses comprised of members who “came from and represented various plantations, towns, and areas of the colony.” The other colonial assemblies also relied on territorial representation. By 1790, each of the original thirteen states elected members of their legislatures on the basis of geography. Six states elected their legislators entirely by either county or town. Six states chose their areas. Kenneth C. Martis, Districts, in 2 The Encyclopedia of the United States Congress 651 (Donald C. Bacon et al. eds., 1995) [hereinafter Congressional Encyclopedia]. Representation solely on the basis of geographic place first was used in the kingdoms of Aragon and Castile in the twelfth century, when representatives to the crown were selected by town. Kenneth C. Martis, The Historical Atlas of United States Congressional Districts, 1789–1983 2 (1982) [hereinafter Historical Atlas].

40. Id.
42. Reid, supra note 41, at 79–82. “Universal representation” was tied closely to the concept of “virtual representation,” whereby interests and not individuals were represented, “and as legislators were to reflect not the wishes of the majority, but the interests of their electors, who shared those interests were virtually represented.” Id. at 57–58. See Tyranny of the Judiciary, supra note 13, at 459–61. On the other hand, the absence of actual representation deprived American colonials of the right to give instructions and petition their grievances. See infra notes 159–68 and accompanying text.
44. Id.
45. Id.; Zagare, supra note 36, at 37.
46. Four states elected legislators by county alone: Delaware, with three Senators and seven Representatives per county; Georgia, with one Senator and two to five Representatives per county; New Jersey, with one member of the legislative council and three members of the Assembly per county; and North Carolina, with one “Representative” (Senator) and two Representatives per county. Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics 62–63 (1968). Rhode Island elected its legislators by town alone, with one Assistant and between two and six Representatives
legislators through a combination of Representatives elected by county or town and Senators elected by district.\(^7\) Connecticut elected up to two Representatives from each town, with twelve Assistants (Senators) elected at-large.\(^8\) The colonial experience firmly entrenched the use of representation by place at the local level.

The Constitutional Framers also relied upon geographical representation as the touchstone for obtaining consent of "the people" for the new federal government.\(^9\) The "Connecticut Plan" or "Great Compromise"\(^50\) used geography to choose members of both Houses of Congress: two Senators were to be elected from each state indirectly by the people through their state legislatures;\(^51\) and Representatives were to be "apportioned among the several States ... according to their respective Numbers"\(^52\) and elected directly by the people through popular elections.\(^53\) Although the

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47. Three states based representation on the number of taxable residents: Massachusetts and New Hampshire, elected their Representatives by town based upon ratable polls and Senators by districts apportioned as to taxes paid; Pennsylvania elected Representatives on the basis of taxable inhabitants with each county and Philadelphia to have at least one Representative, and elected Senators from districts containing as many as four Senators. \(\text{Id.}\) Maryland elected four Delegates per county plus two each from Annapolis and Baltimore, with nine Senators chosen by electors from the Western Shore and six Senators chosen by electors from the Eastern Shore. \(\text{Id.}\) New York elected seventy Representatives apportioned every seven years by county on a voter basis, and twenty-four freeholders elected from four districts apportioned every seven years on a freeholder basis. \(\text{Id.}\) Virginia elected two Representatives per county and one each from Williamsburgh, Norfolk, and other cities established by the Legislature, and elected Senators from twenty-four districts. \(\text{Id.}\)

48. \(\text{Id.}\)

49. "The 'consent of the governed' is ... a people-based concept." \(\text{Id.}\) at 16. Of course, "the people" who have been eligible to give or withhold their consent has varied considerably over time. See infra notes 282–86 and accompanying text.

50. The "Great Compromise," proposed by Roger Sherman of Connecticut, appeased the large states by establishing proportional representation in the House of Representatives based upon each state's total population and satisfied the small states by allocating each state two seats in the Senate. CATHARINE D. BOWEN, MIRACLE AT PHILADELPHIA 92–95, 185–87 (1966). See also JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 84, 88–89 (Gaillard Hunt & James B. Scott eds., 1970) (1920) (June 11, 1787) (statement of Roger Sherman); \(\text{Id.}\) at 254 (July 14, 1787) (statement of Roger Sherman); \(\text{Id.}\) at 259–60 (July 16, 1787) (final passage).

51. See U.S. CONST. art. I, § 3, cl. 1. Voters could not elect Senators directly until 1913, when the present at-large method of statewide elections was adopted. See U.S. CONST. amend. XVII, cl. 1.

52. U.S. CONST. art. I, § 2, cl. 3.

53. See U.S. CONST. art. I, § 2, cl. 1. See also FEDERALIST NO. 39, supra note 25, at 242 (James Madison) ("The House of Representatives, like that of one branch at least of all the State legislatures, is elected immediately by the great body of the people.").
Constitution does not require that members of the House represent "individual, geographically defined districts," scholars generally agree that the Constitutional Framers intended that Representatives be elected from districts. This conclusion is supported both by the limited debate during the Constitutional Convention over the method of electing Representatives, as well as the subsequent writings of Federalists and Anti-Federalists on the subject.

54. Zagari, supra note 36, at 107; Historical Atlas, supra note 38, at 2; Congressional Encyclopedia, supra note 38, at 652.

55. See generally 1 The Records of the Federal Convention of 1787, at 48–49 (Max Farrand rev. ed. 1966) (May 31, 1787) (George Mason) (suggesting that election of “the larger branch by the people . . . ought . . . to be taken not only from different parts of the whole republic, but also from different districts of the larger members of it, which had in several interests . . . different interests and views arising from difference of produce, of habits,” and so forth); Id. at 132–33 (June 6, 1787) (James Wilson) (“There is no danger of improper elections if made by large districts. Bad elections proceed from the smallness of the districts which give an opportunity to bad men to intrigue themselves into office.”) (emphasis in original); Id. at 179–80 (June 9, 1787) (James Wilson) (arguing that “Representatives of different districts ought clearly to hold the same proportion to each other, as their respective constituencies hold to each other”). Mason and Wilson made similar arguments in their unsuccessful attempt to have Senators elected directly by the people through districts. See id. at 134 (June 6, 1787) (Col. Mason) (maintaining that “there was a better chance for proper elections by the people, if divided into large districts, than by the State Legislatures”); Id. at 154 (June 7, 1787) (James Wilson) (supporting “an election by the people in large districts which [would] be most likely to obtain men of intelligence [and] uprightness; subdividing the districts only for the accommodation of voters”). See also The Origins of the American Constitution: A Documentary History 26 (Michael Kammen ed., 1986) [hereinafter Origins] (plan proposed by Charles Pinckney to elect the Senate from “four great districts”); Id. at 37 (plan proposed by Alexander Hamilton to have Senators chosen by electors of the people after the States were “divided into election districts”).

56. James Madison described how “each representative of the United States will be elected by five or six thousand citizens,” pointing to legislative districts in several states as examples of how geographical representation would operate at the federal level. The Federalist No. 57, supra note 25, at 354–56 (James Madison). For instance, “districts in New Hampshire in which the senators are chosen . . . are nearly as large as will be necessary for her representatives in the Congress.” Id. at 356. Similarly, Madison concluded that Philadelphia “is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of federal representatives.” Id. Moreover, according to Madison, districting was consistent with the belief that a representative elected from a geographical area with a smaller number of people would be sufficiently familiar with his constituents' interests to represent them adequately. See The Federalist No. 56, supra note 25, at 347–48 (James Madison) (“Divide the largest State into ten or twelve districts and it will be found that there will be no peculiar local interests in either which will not be within the knowledge of the representative of the district.”). See also infra part III (describing the relationship between representatives and their constituents).

57. For example, two well-known Anti-Federalist pieces criticized Article I, Section 4 of the Constitution, which permits Congress to regulate the elections of its members, suggesting instead that the Constitution require elections of Representatives from districts. See generally Observations Leading to a Fair Examination of the System of
While the Constitutional Framers and states were advocating the use of geographically based districts, there was a growing movement away from the accepted rationale for territorial representation. Westward expansion and the growth of large cities weakened the basis for identifying the interests of represented persons with those of others who resided in the same area.\textsuperscript{58} “[G]eographic units, such as counties and towns, came to be seen more as random collections of individuals than as cohesive communities,” with districts “merely an arrangement for the general convenience,” not political communities with a life of their own.\textsuperscript{59} States could account for the increasingly transient nature of the American population by shifting districts with the people, regardless of whether or not they shared common interests. In this manner, it was possible to avoid the “unequal, unfair, and unrepresentative” problem of “rotten boroughs” that existed in Great Britain under a pure form of territorial representation.\textsuperscript{60} Even with “shift-

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\item Government Proposed by the Late Convention; And to Several Essential and Necessary Alterations in It. In a Number of Letters from the Federal Farmer to the Republican (New York, 1787) [hereinafter \textsc{Federal Farmer Letters}], reprinted in Origins, supra note 55, at 276–77 (“where the elections ought to be regulated, otherwise to secure a representation from all parts of the community, in making the constitution, we ought to provide for dividing each state into a proper number of districts, and for confining the electors in each district to the choice of some men, who shall have a permanent interest and residence in it”); Essays of “Brutus” to the Citizens of the State of New-York, New York Journal (Oct. 18, 1787—April 10, 1788) [hereinafter Essays of “Brutus"], reprinted in Origins, supra note 55, at 330 (“Provision should have been made for marking out the states into districts, and for choosing, by a majority of votes, a person out of each of them of permanent property and residence in the district which he was to represent.”). \textsuperscript{58} See \textsc{Zagarrì}, supra note 36, at 57–60.

\item Id. at 58 (quoting South Carolina State Representative Joseph Alston) (emphasis in original). See also id. (“The people of New-Jersey, and not the counties, were designed to be represented in the legislature.”) (quoting William Griffith of New Jersey) (emphasis in original). James Wilson’s criticism of allocating each state an equal number of Senators without regard to population, used similar language: “Can we forget for whom we are forming a Government? Is it for men, or for the imaginary beings called States?” 1 \textsc{Farrand}, supra note 55, at 483 (emphasis in original).

\item \textsc{Zagarrì}, supra note 36, at 36–37. Unfettered corporate representation in Great Britain without regard for the population of represented places allowed “rotten boroughs” such as Old Sarum, with few inhabitants, to have as much parliamentary representation as Yorkshire, with nearly one million people. Id. at 37; P.J. Taylor & R.J. Johnston, Geography of Elections 30 (1979); Richard L. Morrill, Political Redistricting and Geographic Theory 342–44 (1981) [hereinafter Political Redistricting]. The Constitutional Framers sought to avoid similar problems in the new American republic by adjusting representation periodically to account for population changes. See U.S. Const. art. I, § 2, cl. 3 (“Representatives... shall be apportioned among the several States... according to their respective Numbers,” with decennial reapportionment and Representatives who “shall not exceed one for every thirty Thousand”); The Federalist No. 56, supra note 25, at 346–50 (James Madison) (contrasting the American and British methods of allocating representatives). See also Gordon S. Wood, The Creation of the
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ing districts,” however, representation remained grounded in geography, but for different reasons.

B. Geographical Representation: The Rise of Political Gerrymandering

Districts could remedy population inequalities, but their departure from the categorical use of representation by permanent geographical boundaries left legislative bodies without a principled method of allocating representatives. If geographically based districts were “merely arbitrary groupings of individuals,” then the contours of those districts could be manipulated for political ends. Use of single-member districts allowed the “normal majority party bias” to be “exaggerated by conscious partisan line skewing.” As a result, gerrymandering became widely practiced. An early example of gerrymandering occurred in Virginia in 1788, when the Anti-Federalist majority in the Virginia assembly placed Federalist James Madison’s home county into a predominately Anti-Federalist district in an unsuccessful attempt to prevent his election to the American Republic, 1776–1787, at 170–72 (W.W. Norton & Co. 1972) (1969) (describing efforts in several states to ensure equal proportions of representatives).

61. Some scholars argue that the Framers intended geographical districts to be approximately equal in population. See Andrew Hacker, Congressional Districting: The Issue of Equal Representation 5–14 (rev. ed. 1964); see generally Zagarr, supra note 36. See also supra notes 50–61 and accompanying text (describing constitutional provisions and support among the Constitutional Framers for districts of equal population). However, the actual practices in the states frequently resulted in severely malapportioned districts that were not corrected until the “one person, one vote” cases of the 1960s. See infra notes 97–102 and accompanying text.

62. Political scientists have referred to this as the “districting problem,” in which “for a single pattern of votes there will be several alternative election results in terms of seats, depending upon how constituency boundaries are drawn.” Taylor & Johnston, supra note 60, at 336. See also Peter J. Taylor et al., The Geography of Representation: A Review of Recent Findings, in Electoral Laws and Their Political Consequences 183–92 (Bernard Grofman & Arend Lijphart eds., 1986) [hereinafter Electoral Laws] summarizing the different effects of district boundaries on the number of seats won by a party).

63. Zagarr, supra note 36, at 59.

64. Dixon, supra note 46, at 462.

65. See Elmer C. Griffith, The Rise and Development of the Gerrymander (Arno Press 1974) (1907). The rise of political gerrymandering generally is attributed to the creation of an irregular district in Essex County, Massachusetts in 1812, that was signed into law by Governor Elbridge Gerry. See, e.g., Taylor & Johnston, supra note 60, at 30, 371–72; Richard L. Morrill, Political Redistricting and Geographic Theory 11 (1981) [hereinafter Political Redistricting]; Frank R. Parker, Racial Gerrymandering and Legislative Reapportionment, in Minority Vote Dilution, supra note 12, at 85. However, there is some evidence that districting for partisan advantage was used as early as 1732 in North Carolina, when the governor split precincts in order to gain control of the colony’s lower house. See Griffith, supra, at 28–29, 121. Furthermore, even the customary selection of representatives from counties and towns during the colonial period was not immune from the excesses of gerrymandering. As county and township lines were created and adjusted to follow settlers, the lines frequently were manipulated by colonial legislatures for partisan ends. See id. at 23–29.
district in an unsuccessful attempt to prevent his election to Congress. It soon became apparent that single-member districts lent themselves to electoral abuses that were just as inconsistent with securing the consent of the governed as purely geographical methods of representation.

The winner-take-all feature of American elections replicated the “same bias in multi-member districts” which could be “exaggerated by increasing the number of legislators elected in each district, e.g., use of six-member districts, or higher, rather than two-member districts.” Early congressional districting practices in the states demonstrate the problems created by multimember districts.

Many states used “general-ticket representation” or a single statewide district to elect multiple members of the House of Representatives. Under a system of “general-ticket representation,” all eligible voters in a state elect the entire congressional delegation. General-ticket elections were common until well into the twentieth century, when they primarily were used on a temporary basis for three reasons: (1) newly admitted states, (2) states with only two or three representatives, and (3) states that lost representatives after a decennial census and whose legislatures could not convene or agree upon a new districting plan. Federal law still seems to permit the use of general-ticket representation under certain circumstances until a state is redistricted following a decennial reapportionment.

Other states had election systems for Representatives that were at least partially based upon geographical representation, including “at-large

66. GRIFFITH, supra note 65, at 31-42; ZAGARI, supra note 36, at 122.
67. Shortly after the creation of the Essex County district from which the term “gerrymander” originated, a local newspaper referred to the party leaders responsible for the district and asked, “Would not such persons as readily profit by rotten boroughs as ever any British minister did?” GRIFFITH, supra note 65, at 9.
68. DIXON, supra note 46, at 462-63. See also infra notes 304-38 and accompanying text (describing winner-take-all rules).
69. HISTORICAL ATLAS, supra note 38, at 2. During the first fifty years under the Constitution, general-ticket elections were used for the election of an average of ten to twenty percent of all Representatives, with the zenith coming in the Third Congress, when 33 out of 105 members from six states were elected by general-ticket. CONGRESSIONAL ENCYCLOPEDIA, supra note 38, at 652. See also HISTORICAL ATLAS, supra note 38, at 4-5 (listing states using general-ticket method). Small states usually used the general-ticket method because their representatives typically came from the same party and were more unified than representatives elected from politically fractured large states, giving the small states more political clout in Congress. See ZAGARI, supra note 36, at 126-27.
70. HISTORICAL ATLAS, supra note 38, at 2.
71. See ZAGARI, supra note 36, at 4.
representation”73 and “plural district representation.”74 Each of these methods of election often were used not to effectuate representation by place or to achieve equal population, but instead were manipulated to deny the consent of disfavored political groups.75 For example, general-ticket representation could negate political opportunities for minority parties that had sufficient power to be competitive in single-member districts by allowing a majority party to win most, if not all, seats through a statewide election.76 In a similar vein, politically powerful cities and

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73. “At-large” elections in this context “refers to cases in which the majority of a state congressional delegation is elected from single-member, geographically defined districts but one, two, three, or four additional representatives are elected statewide.” CONGRESSIONAL ENCYCLOPEDIA, supra note 38, at 652. At-large representation therefore differs from general-ticket representation because in the former system at least some Representatives are elected from districts. Id. Mississippi was the first state to use the at-large system, with voters statewide electing one of its five Representatives to the 33rd Congress (1853–1855). HISTORICAL ATLAS, supra note 38, at 5. The practice typically was used on a temporary basis and was included in many federal apportionment laws beginning with the Apportionment Act of February 2, 1872, 17 Stat. 28, until Maryland, Ohio, and Texas elected the last three at-large Representatives to the 89th Congress in 1965. See id. at 6. At-large elections “usually occurred when the state legislature either (1) could not convene in time to perform redistricting, (2) could not agree on a new redistricting plan, (3) used this representative method in its new redistricting plan, or (4) decided not to redistrict.” CONGRESSIONAL ENCYCLOPEDIA, supra note 38, at 652.

74. “Plural district representation,” or “multimember” representation occurs when a “geographically defined district elects more than one person.” CONGRESSIONAL ENCYCLOPEDIA, supra note 38, at 652. “In most cases this was an attempt to keep the county unit as the entity of legal description and yet recognize the more populous areas that deserved greater representation,” and was particularly useful in states with large urban areas and “vast areas of virtual wilderness.” HISTORICAL ATLAS, supra note 38, at 4. This method of election was used for the first time in the Third Congress (1793–1795), when Massachusetts used multimember districts for the only time to elect 13 out of its 14 Representatives. Id. at 4–5. New Jersey used plural representation once during the Twelfth Congress (1811–1813) to elect all six of its Representatives. Id. at 5. Maryland elected two Representatives from a multimember district in every election except one between 1803 and 1843. Id. Pennsylvania used the method extensively between 1795 and 1843, electing as few as two and as many as fourteen Representatives from multimember districts. Id. Between 1805 and 1843, New York used plural districts to elect as few as two and as many as twelve of its Representatives. Id.

75. New Jersey’s use of general-ticket representation for its congressional elections illustrates how a party could attempt to manipulate the method of election for its own political ends. In 1796, a general-ticket election resulted in the majority Federalist Party winning all five congressional seats despite the presence of a large minority Republican Party. See ZAGAMI, supra note 36, at 115–16, 126. In 1798, the Federalists feared the growing power of the Republican Party and pushed through a gerrymandered plan of five single-member districts, resulting in the election of only two Federalists. Id. In 1800, the Federalists restored general-ticket elections, but all five congressional seats went to Republicans, who had become the majority party. Id.

76. HISTORICAL ATLAS, supra note 38, at 2; CONGRESSIONAL ENCYCLOPEDIA, supra note 38, at 652; DIXON, supra note 46, at 17. Similar reasoning applies to the use of at-large representation. See CONGRESSIONAL ENCYCLOPEDIA, supra note 38, at 652–53; HISTORICAL ATLAS, supra note 38, at 5. One example illustrates this point. Although fewer than one thousand votes separated the top Democrat from the lowest Republican in New Jersey’s six
counties abused plural district representation by creating multimember districts that diluted the political strength of other areas which otherwise had a sufficient population to elect a representative from their own single-member district.\(^7\)

Congress initially was unable to pass legislation to end these anti-democratic impulses. Although Congress has authority to mandate districting through its powers to regulate the election of its members under the Times, Places and Manner Clause,\(^7\) it failed to do so during the first fifty years after the Constitution was ratified.\(^9\) To a minimal degree, congressional inaction reflected deference given to the policy choices of the state legislatures.\(^8\) Political considerations were even more important. Beginning in 1800, large states sought to impose the "more fair and

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congressional seats in the 1832 and 1834 elections, the Democrats won all of the seats under the state's general-ticket method of election. See Robert Richie, *Full Representation: The Future of Proportional Election Systems*, 87 Nat'l Civic Rev. 85, 91 (1998). This was the very sort of political manipulation that Anti-Federalists had feared when the Constitutional Framers failed to include a specific requirement for elections from single-member districts. See *Federal Farmer Letters*, supra note 57, at 276–77; *Essays of "Brutus"*, supra note 57, at 329–31. See also *Origins*, supra note 55 (describing Anti-Federalist support for single-member districts).

\(^7\) Historical Atlas, supra note 38, at 4; *Congressional Encyclopedia*, supra note 38, at 652.

\(^8\) See U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the Places of chusing [sic] Senators."). One commentator has concluded that Congress has no authority to "commandeer" the states into using single-member districts under the Times, Places, and Manner Clause. See Paul E. McGreal, *Unconstitutional Politics*, 76 Notre Dame L. Rev. 519 (2001). Professor McGreal's conclusion is undermined by evidence showing the Framers' clear intent for districts to be used to elect Representatives. See *supra* notes 55–57 and accompanying text. See also *supra* note 58 (describing Anti-Federalist arguments against ratification of the Constitution because the Times, Places and Manner Clause gave Congress authority to mandate the type of federal elections held by the states). The political circumstances preventing the adoption and enforcement of federal districting requirements renders his reliance on the failure of Congress to require single-member districts prior to 1842 of little utility in evaluating the constitutionality of those requirements. See infra notes 80–85 and accompanying text.


\(^80\) See generally *Zagare*, supra note 36, at 106 ("Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd. all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures.") (quoting James Madison).
C. Geographical Representation: Attempts to Reform Discriminatory Districting Practices

In 1842, the changing political tide permitted the first federal districting requirements to be adopted. The Whigs were concerned that continued use of general-ticket representation would cost them their majority in both Houses of Congress in the upcoming elections. Likewise, many of the small states supported use of single-member districts when it became apparent that the large states might adopt the general-ticket method at their expense. The resulting legislation, the Apportionment Act of 1842, for the first time specified that states use geographically based, contiguous, single-member districts for congressional elections. Despite the Act's mandate to provide "fairer
representation and a chance for the minority" through single-member districts, some states still used general-ticket and at-large representation for their congressional delegations. These practices were not ended effectively until 1967, when the current districting law was adopted.

Congress later included two additional limitations on purely geographical methods of districting that had been subject to widespread abuse. In 1872, it prescribed that each district contain "as nearly as practicable an equal number of inhabitants." In 1901, federal legislation directed districts to be comprised of "compact territory." To meet these requirements, states continued to use geographic political units such as counties or towns as the "basic building block" of compact congressional districts. Some larger, more urban states also relied on other political features such as wards or man-made features including streets to achieve population equality. In the end, however, legislating specific redistricting criteria for congressional elections did not end gerrymandering, and actually may have increased it. At least one scholar has posited that the Apportionment Act of 1842 may have been responsible for increasing gerrymandering by compelling states that previously used the general-ticket or at-large methods of election to switch to single-member districts that were susceptible to the practice of gerrymandering.

87. GRIFFITH, supra note 65, at 10 (citation omitted).
88. See HISTORICAL ATLAS, supra note 38, at 4-6 (describing the persistent use of at-large and general ticket representation). Although these practices plainly violated federal law, Congress continued to seat representatives elected from the offending states after election contests regularly failed by partisan votes. See McGreal, supra note 78, at 618-30.
89. Act of Dec. 14, 1967, Pub. L. No. 90-196, 81 Stat. 581 (codified as amended at 2 U.S.C. § 2c) (providing that "there 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").
91. Apportionment Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 733, 734 (current version at 2 U.S.C. § 2c (1994)). The compactness requirement "targeted the practice of gerrymandering, that is, the drawing of congressional districts with odd or peculiar shapes, so as to favor the party or group in power, with results that seem to defy geography." CONGRESSIONAL ENCYCLOPEDIA, supra note 38, at 653. See also BUTLER & CAIN, supra note 3, at 157 ("Compactness is seen as one of the main defenses against gerrymandering"). Compactness was not required after passage of the Apportionment Act of June 18, 1929, 46 Stat. 21. See HISTORICAL ATLAS, supra note 38, at 7.
92. See HISTORICAL ATLAS, supra note 38, at 6.
93. Id. at 6-7.
94. The McKinley districts in Ohio that were created between 1878 and 1890 as a result of largely unsuccessful efforts to defeat then-Representative (and later President) William McKinley are a good example of how it still was possible to gerrymander a compact and contiguous district that complied with the requirements of the Apportionment Act of 1842. TAYLOR & JOHNSTON, supra note 60, at 372, 374.
95. See GRIFFITH, supra note 65, at 12; see also supra note 84 and accompanying text.
Gerrymandering abuses were confounded further by the limited use of reapportionment to address changing populations in districts. At the federal level, the failure of Congress to renew the mandate of equal population, districting, compactness, and contiguity in the Apportionment Act of 1929 allowed the states to return to a system of unbridled geographical representation for election of members of the House of Representatives. Similar problems existed in the state legislatures, where rural areas increasingly were unwilling to give up their political power to the growing cities. Omitting population as part of the basis for geographical districting led to two results that violated the basic principle of consent. The first defect was the same problem that could be created by general-ticket, at-large, and plural district representation: "majority tyranny, whereby a majority group gives itself disproportionate voting power in both the general election and the legislative body at the expense of the minority group." The second defect was "minority tyranny, whereby a minority group has disproportionate voting power—sometimes as high as one hundred times the voting power of other voters—allowing the minority group to elect a majority of representatives in the general election and to control the legislature."
In *Baker v. Carr* and its progeny, the Supreme Court entered the "political thicket" to address the inequities of malapportioned districts. The Court relied on the principle of "one person, one vote": the right of each individual to an equally weighted vote. A majority of the Court explained in *Reynolds v. Sims* that "[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests," with legislatures serving as "instruments of government elected directly by and directly representative of the people." However, the Court's characterization is somewhat misleading. *Baker* and the other "one person, one vote" cases did not repudiate group-based geographical representation. Rather, those cases merely rejected strict geographic districting of communities and regions without regard to population, which resulted in malapportioned districts that denied citizens of their right to "fair and effective representation." In this respect, the equal population principle in *Baker* is consistent with the intent of at least some of our

103. See, e.g., Bd. of Estimate v. Morris, 489 U.S. 688 (1989) (applying one person, one vote to New York City's Board of Estimates, comprised of elected presidents from the city's five boroughs, which had disparate populations, and three city officials elected at-large); Hadley v. Junior Coll. Dist., 397 U.S. 50 (1970) (applying one person, one vote to local government apportionment of administrative body); Avery v. Midland County, 390 U.S. 474 (1968) (applying one person, one vote to local government apportionment of legislative body); Reynolds, 377 U.S. at 534 (applying one person, one vote to state legislative districts); Wesberry v. Sanders, 376 U.S. 1 (1964) (applying one person, one vote to congressional districting).
105. Gray v. Sanders, 372 U.S. 368, 381 (1963) (striking down Georgia's county-unit system as unconstitutional and ordering the use of one person, one vote system).
106. The Court has required that "as nearly as is practicable one man's vote . . . is to be worth as much as another's" in congressional districts, *Wesberry*, 376 U.S. at 7–8, with even "de minimis level of population differences" requiring a sufficient justification. Karcher v. Daggett, 462 U.S. 725, 731 (1983) (upholding the concept that absolute population equality remain the utmost objective in reapportionment cases). State legislative districts follow a more lenient "substantially equal" standard, *Reynolds*, 377 U.S. at 568, permitting total variations from an "ideal" district as high as 16.4%. See *Mahan v. Howell*, 410 U.S. 315, 319 (1973). But see, Conner v. Finch, 431 U.S. 407 (1977) (holding that state legislative districts are still subject to the one person, one vote rule and reapportionment and probably will be struck down if the derivations exceed 10%).
108. *Id.* at 562.
110. *Reynolds*, 377 U.S. at 565–66; see also *id.* at 562 (describing population disparities among districts whereby "the votes of citizens in one part of the State would be multiplied by two, five, or 10 times while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable.")
Conversely, to the extent that legislators in this country have been elected by "the people," those voters have been grouped together by their geography and political affiliations and not their individual interests.112

The Supreme Court's elevation of group-based geographical criteria has not been limited to equal population cases. The Court also has relied upon geographical representation as the touchstone for other alleged violations of what the majority describes as the individual right to vote.113 For instance, Justice Stevens has suggested that a political gerrymandering claim requires a showing that the group in question has a "geographical distribution ... sufficiently ascertainable that it could have been taken into account in drawing district boundaries."114 Similarly, a minority group

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111. See supra notes 49–60 and accompanying text. But see Baker, 369 U.S. at 301 (Frankfurter, J., dissenting) ("The notion that representation proportioned to the geographic spread of population is ... 'the basic principle of representative government' is, to put it bluntly, not true.").


113. See generally Shaw II, 517 U.S. at 917 ("To accept that [a remedial] district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority as a group and not to its individual members. It does not."). But see Miller, 515 U.S. at 947 (Ginsburg, J., dissenting) ("In adopting districting plans ... States do not treat people as individuals. Apportionment schemes, by their very nature, assemble people in groups. States do not assign voters to districts based on merit or achievement, standards States might use in hiring employees or engaging contractors [i.e., individuals]. Rather, legislators classify voters in groups—by economic, geographical, political, or social characteristics—and then 'reconcile the competing claims of [these] groups.'") (quoting Davis v. Bandemer, 478 U.S. 109, 147 (1986))); See also Shaw I, 509 U.S. at 681–82 (Souter, J., dissenting) ("In districting ... the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others .... 'Dilution' ... refers to the effects of districting decisions not on an individual's political power viewed in isolation, but on the political power of the group); Davis v. Bandemer, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part, dissenting in part) ("The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."). For additional views on the whether the right to vote is an individual right, group right, or both, see generally Deconstructing the Obstructionist Vision, supra note 7, at 452–69; Tyranny of the Judiciary, supra note 13, at 495–96 n.240.

114. Karcher, 462 U.S. at 754 (Stevens, J., concurring). The Supreme Court recognized a constitutional claim for political gerrymandering in Davis v. Bandemer, 478 U.S. at 109. However, the viability of this type of gerrymandering claim is dubious. See generally Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1988) (three-judge court) (rejecting challenge of California's 1981 congressional redistricting plan by California Republicans because they had not been "shut out" of the political process in the same manner as racial minorities who suffered discriminatory effects), aff'd, 488 U.S. 1024 (1989). Only one successful Bandemer challenge has been brought. See Republican Party v. Hunt, 841 F. Supp. 722 (E.D.N.C.) (granting preliminary injunction to Republican party on claim that method of electing state superior court
alleging vote dilution\(^{115}\) in violation of Section 2 of the Voting Rights Act\(^{116}\) must “demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.”\(^{117}\) The number of jurisdictions that have departed from at-large systems to single-member districts has soared as a result of the geographical standard applied to vote dilution claims.\(^{118}\)

Ironically, use of these race-conscious, geographically based districts to remedy vote dilution actually may enhance the exclusion of minority groups through gerrymandering susceptible to Shaw challenges.\(^{119}\) When majority-minority districts are struck down as violative of Shaw, minorities may find themselves with less representation under the Court’s “race neutral” principles, or, possibly, with no representation at all.

The enduring reliance on geographical representation has led to what has been described as the “unfinished reapportionment revolution:” a “reinvigorated dimension of maldistricting [that] can dilute the effective voting power of some individuals and magnify the real power of others, depending on their geographic location.”\(^{120}\) Although the mathematical

 judges diluted the voting franchise of Republican voters), aff’d as modified, 27 F.3d 563 (4th Cir. 1994).

 115. See generally Chandler Davidson, The Voting Rights Act: A Brief History, in Controversies in Minority Voting: The Voting Rights Act in Perspective 24 (Bernard Grofman & Chandler Davidson, eds., 1992) (“Ethnic or racial minority vote dilution may be defined as a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable majority group to diminish or cancel the voting strength of at least one minority group.

 116. 42 U.S.C. § 1973 (1994) (providing that a denial or abridgement of right to vote “on account of race or color” is established “if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation” to members of a protected minority group “in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice”).


 119. See Tyranny of the Judiciary, supra note 13, at 575–85; Deconstructing the Obstructionist Vision, supra note 7, at 462–69.

 120. Gordon E. Baker, The Unfinished Reapportionment Revolution, in Political Gerrymandering and the Courts 11, 24 (Bernard Grofman ed. 1990). Cf. Tyranny of the Judiciary, supra note 13, at 513 (“‘one person, one vote’ highlights the danger of the courts adopting inflexible standards. It actually can exaggerate majority factionalism, leading to majority tyranny in another form: the equipopulous gerrymander”) (emphasis in original).
standards established by the Supreme Court provide quantifiable measures to ensure that districts are approximately equal in population, they leave the most important question unanswered: How and where should districts be drawn? A majority of the Justices has been unable to provide a reasoned response to this intractable problem, ostensibly because districting practices vary from state to state and rest on inherently “political judgments” that some Justices profess they are unwilling to make. When

121. See generally City of Mobile v. Bolden, 446 U.S. 55, 90 (Stevens, J., concurring) (“nothing comparable to the mathematical yardstick used in apportionment cases is available to identify the difference between permissible and impermissible adverse impacts on the voting strength of political groups”). See also ZAGARII, supra note 36, at 121 (“even with population as a guide to creating districts, state legislators still lacked a rule that would help them determine where within the state to draw district lines”).

122. See generally Tyranny of the Judiciary, supra note 13, at 529–35 (discussing the problems posed by “geography process” claims, which “allege that election districts have been devised in a manner which prevents a group of voters from voting or having a meaningful say in the selection of those representatives who would be most amenable to representing those voters’ interests.”).

123. See Grofman, supra note 12, at 177–183; ALEXANDER J. BOYD, HANDBOOK OF UNITED STATES ELECTION LAWS AND PRACTICES 222–27 (1990) (citing Grofman). See also Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 749 (1964) (Stewart, J., dissenting) (“I do not pretend to any specialized knowledge of the myriad of individual characteristics of the several States. . . . I do know enough to be aware of the great variations among the several States in their historic manner of distributing legislative power”). For a comprehensive list of districting criteria used by the states for congressional and legislative districting, see NATIONAL CONF. ST. LEGIS., REDISTRICTING TASK FORCE, REDISTRICTING LAW 2000 chap. 4, Table 5 and app. G (1999), available at http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/Ch3part2.htm [hereinafter REDISTRICTING LAW].

124. See Holder, 512 U.S. at 894 (Thomas, J., concurring) (“Vote dilution cases have required the federal courts to make decisions based on highly political judgments—judgments that courts are inherently ill-equipped to make.”); Bandemer, 478 U.S. at 160 (O'Connor, J., concurring) (criticizing the plurality for making “a political judgment—in this instance, that district-based elections must be taken as a given”); id. at 184–85 (Powell, J., concurring in part, dissenting in part) (“federal judges are ill equipped generally to review legislative decisions respecting redistricting”); Reynolds, 377 U.S. at 620 (Harlan, J., dissenting) (denouncing the “one person, one vote” cases because “[t]hey present a jarring picture of courts threatening to take action in an area which they have no business entering, inevitably on the basis of political judgments which they are incompetent to make.”); Baker, 369 U.S. at 328 (Frankfurter, J., dissenting) (asserting that “the choice of elections at large as opposed to elections by district, however unequal the districts, is a matter of sweeping political judgment having enormous political implications, the nature and reach of which are certainly beyond the informed understanding of, and capacity for appraisal by, courts.”); Colegrove, 328 U.S. at 552 (plurality opinion) (rejecting voting claim challenging lack of compactness and unequal population of reapportionment plan because it was “of a peculiarly political nature and therefore not meet for judicial determination.”). Cf. Dixon, supra note 46, at 19 (“The courts are in the political thicket whenever they adjudicate and make any order relevant to apportionment. All apportionment being fully political, any order made by a court has a significant political impact.”). The reticence of some Justices to address so-called “political judgments” is “little more than a fatal misapprehension of the important role that judges must play in regulating the political process under the consent model of democracy.” Tyranny of the Judiciary,
the Court has been confronted with the question of how to identify an improper purpose in its racial gerrymandering cases, it has failed "to provide a sound analytical distinction between those actions based on race and those resulting from purely political motives."125

The difficulty of fashioning a workable standard to examine geographically based districts is understandable. As Robert Dixon has noted, "all districting is gerrymandering."126 Reliance of some commentators127 and the Court on "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" as "objective factors that may serve to defeat a claim that a district has been gerrymandered"128 cannot resolve the question. These criteria are far from neutral.129 The contours of political subdivisions often have resulted from past efforts to disenfranchise minorities or otherwise exclude them from receipt of

supra note 13, at 489. See also id. at 487–505 (describing the role of judges as referees in regulating the right to vote). When a Court declines to act when a violation of consent has occurred, it has made a substantive decision—the "majoritarian default" position "which says that the decision of the majority wins." Id. at 502.

125. Deconstructing the Obstructionist Vision, supra note 7, at 445.
126. Dixon, supra note 46, at 462; Taylor & Johnston, supra note 60, at 454 (concluding that it is "almost impossible to avoid" gerrymanders in the districting process). See also Gaffney v. Cummings, 412 U.S. 735 (1973), where the Supreme Court reached a similar conclusion:

It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. . . . Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena.

Id. at 752–53.

128. Shaw 1, 509 U.S. at 647. In Cromartie II, the Court again emphasized the import of districting criteria in determining whether a district constitutes an unconstitutional racial gerrymander. See 121 S. Ct. at 1466 (holding that "the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles").
governmental services. The “myth of compactness” also overlooks the effect that mandating geographically compact districts can advance the political interests of one party over another. Furthermore, the selection of particular “objective” geographical criteria over others itself is subjective. Different geographical features and values usually are traded off with one another to maximize the consent of one group at the expense of another. Geographical districting criteria simply cannot be applied neutrally or impartially.

Moreover, the strict use of geographical criteria such as compactness completely ignores the interests of voters, both individually and collectively. “Area-based” measures, which are “concerned only with the shape of a district,” are the most common ways of assessing compactness.

130. See Deconstructing the Obstructionist Vision, supra note 7, at 441 n.227; J. Morgan Kousser, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction (1999). Frequently, cities and towns are themselves non-compact as a result of annexation efforts that result in increased taxes and less demand for services. Under these circumstances, Butler and Cain have found it ironic “that manipulation for gain at one level is treated sacredly by [redistricting] reformers at another.” Butler & Cain, supra note 3, at 86–87.

131. Dixon, supra note 46, at 460–61. The categorical use of compactness as a “neutral” districting criteria may lead to the “packing” of geographically concentrated groups of racial and ethnic minorities into a small number of districts. See Lowenstein & Steinberg, supra note 129, at 21–27.

132. See Butler & Cain, supra note 3, at 65–90 (describing the values and trade-offs of various districting factors including geographic criteria).

133. See generally Baker, 369 U.S. at 324 (Frankfurter, J., dissenting) (positing that “in every strand of this complicated, intricate web of values [in the redistricting process] meet the contending forces of partisan politics”); Deconstructing the Obstructionist Vision, supra note 7, at 445 (arguing that color-conscious districting—which merely recognizes that so-called ‘neutral’ political factors often operate in anything but a color-blind manner—in most cases is completely subsumed by the overarching goal of allowing the majority to maintain its political dominance by the appropriate manipulation of these factors’); Lowenstein & Steinberg, supra note 129, at 8 (describing redistricting as “a political life-or-death issue” for elected officials).

134. See generally Dixon, supra note 46, at 18 (“[A]ll district lines drawn on an apportionment map are political lines in the sense that they group or separate partisans in the same area. This grouping and separation occurs whether or not the reapportioner is aware of what he is doing.”). So-called “neutral” and “non-partisan” reapportionment commissions cannot eliminate these problems. See Grofman, supra note 12, at 124–26; Lowenstein & Steinberg, supra note 129; Bruce E. Cain, Perspectives on Davis v. Bandemer: Views of the Practitioner, Theorist, and Reformer, in Political Gerrymandering and the Courts, supra note 120, at 117, 137; R.J. Johnston, Redistricting by Neutral Commissions: A Perspective from Britain, 72 Annals Ass’n Am. Geographers 457–70 (1982). Of course, some political scientists have indicated that problems posed by districting should not discourage attempts to reform the districting process. See Baker, supra note 120, at 24; Grofman, supra note 12, at 88–92; Lee Papayanopoulos, Compromise Districting, in Representation and Redistricting Issues 59 (Bernard Grofman et al. eds., 1982).

methods of quantitatively analyzing compactness that have been used in recent years are described in the following manner:

[A] "dispersion" measure, which captures how tightly packed or spread out a district is by calculating the ratio of the district's area to the area of the minimum circle that could circumscribe it, and a "perimeter" measure, which captures the irregularity or jaggedness of the district's border by calculating the ratio of the district's area to the square of the district's perimeter.\(^3\)

In other words, compactness is not seen as a means of obtaining consent, but instead is viewed purely from a standpoint of mathematical and geometrical precision that is ill suited for the political arena.\(^3\) Even alternative non-mathematical standards such as "functional compactness" rely on physical geography to a certain extent, albeit with some emphasis on


\(137\) See *Bushmanders & Bullwinkles*, supra note 136, at 75–76. Low measures of compactness also can obscure contorted boundaries resulting from physical features or borders of a jurisdiction over which a redistricting body has no control. See id. at 71–73.
how that geography actually affects representation. Elevation of geographical criteria such as compactness provides little guidance about the effect district lines have on the ability of voters to elect candidates of their choice and to receive fair and effective representation. Ironically, the tremendous weight that has been placed on compactness undercuts the Reynolds Court's admonition that representation must be based upon the choices of individual voters, and not mere geography. In short, despite attempts to reform discriminatory districting practices, representation continues to be driven by trees or acres, not people.

D. Alternatives to Geographical Representation

This discussion has shown that territorial representation in the United States frequently is at odds with the fundamental premise upon which our Republic was built: that all powers of government must be derived from the consent of the governed. That does not mean that geographically based methods of election never can be employed effectively to elect a truly representative government. In many cases, they can.

For example, New Hampshire has the largest elected representative body in the world after the British House of Commons and the United States House of Representatives. Four hundred state representatives are elected from a mixture of single-member and multimember districts, some with as few as 2,800 people. The resulting legislature is very

138. "Functional" compactness analyzes the distribution of a district's population in relation to such features as topography (mountain ranges, rivers, bays, etc.), lines of communication and transportation, recognized neighborhoods, and local government boundaries, asks whether candidates or legislators could explain to their constituents the boundaries of their districts in simple, common-sense terms, based on recognizable geographic referents. Hebert et al., supra note 136, at 128. See also Bernard Grofman & Lisa Handley, Identifying and Remedying Racial Gerrymandering, 8 J.L. & POLCIS 345, 389 (1992) (suggesting that functional compactness is the preferable way to determine if a proposed majority-minority district is geographically compact); infra notes 209-10, 251-63 and accompanying text (discussing the related concept of "communities of interest").

139. See generally Karcher, 462 U.S. at 751, 756 (Stevens, J., concurring) (asserting that state compactness requirements are not "judicially manageable" and "have been of limited utility because they have not been defined and applied with rigor and precision"); Grofman, supra note 12, at 85 ("There are many different ways of applying a compactness requirement but none is generally accepted as definitive.").

140. See supra notes 103-13 and accompanying text.

141. See generally Dixon, supra note 46, at 460 ("[A] rigid compactness-contiguity rule shifts attention from the realities of party voting to mere physical geography. Indeed, it would undercut the spirit of Chief Justice Earl Warren's oft-quoted statement about, 'people, not trees or acres,' being the representational concern. . . .").


143. Id.

144. Id.
representative of the state's demographics, with "many seats ... held by women, students, and senior citizens." As a general rule, however, it is difficult—if not impossible—for an interest-driven majority to avoid adopting a districting plan or other system of geographical representation that does not disproportionately enhance its own political power at the expense of some political, racial, or ethnic minority group.

Consequently, proportional and semi-proportional methods of election have been proposed as a solution to the failings of geographical representation. Alternative voting systems using modified at-large methods of election eliminate difficulties posed by the "one person, one vote" mandate because the entire legislative body is elected from what amounts to a single, multimember district. By the same token, gerrymandering becomes irrelevant under all proportional systems, making it unnecessary to engage in a standardless inquiry about whether districts are "compact" enough or sufficiently preserve political subdivisions and other geographical features. In this manner, electoral results are said to reflect a choice by all voters, rather than the pre-determined decisions of the "majority," which may be a simple plurality, or even a select few. Although each of these reasons has some merit, they do not respond fully to

145. *Id.*
146. See *supra* notes 63–78 and accompanying text; *infra* notes 322–38 and accompanying text.
147. See *supra* note 8; *infra* notes 210–21, 352–58 and accompanying text.
148. That is, at-large elections conducted by using proportional or semi-proportional methods of election, such as cumulative voting, limited voting, and the single transferable vote. See *supra* notes 14–24 and accompanying text.
149. See *Amy*, *supra* note 8, at 52–53. See also Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1057 n.3 (1958) ("The only system based entirely on population, without regard to geography, would be one of proportional representation."). Justice Stewart explained how this result is consistent with the one person, one vote cases:

Those cases established that the Equal Protection Clause guarantees the right of each voter to "have his vote weighted equally with those of all other citizens." The Court recognized that a voter's right to "have an equally effective voice" in the election of representatives is impaired where representation is not apportioned substantially on a population basis. In such cases, the votes of persons in more populous districts carry less weight than those of persons in smaller districts. There can be, of course, no claim that the "one person, one vote" principle has been violated in this case, because the city ... is a unitary electoral district and the ... elections are conducted at large. It is therefore obvious that nobody's vote has been "diluted" in the sense that word was used in the *Reynolds* case.

151. See *infra* Part IV.
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the question of whether it is desirable to attempt to reconcile departures from geographical representation with the integral role that geography has played—and continues to play—in the relationship between elected officials and their constituents. That issue is addressed in the next Part.

III. RELATIONAL REPRESENTATION: CONSENT DEFINED BY CONSTITUENT SERVICE

The relationship between elected officials and their constituents is an important element of representation in this country. The basic premise for "relational representation" rests on consent defined by service to constituents: voters agree to elect a representative, in exchange for a reciprocal agreement by that representative to address their individual and collective needs. 152 Historically, this form of representation was tied closely to geography because an agent of the people was believed to represent the interests of individual voters at the same time that agent was responding to the demands of the community. 153 Moreover, people who were unable to elect a representative still had an official to whom they could send instructions and petition for relief from their grievances. 154 As the foundation for representation by "trees or acres" has been uprooted, however, the conceptual basis for relational representation increasingly has been called into question. 155 Nevertheless, the relationship between representatives and their constituents continues to shape the meaning of consent.

A. Representing Communities of Interest:
The Origins of Relational Representation

Like geographical representation, relational representation in the United States traces its origins to Great Britain. This aspect of consent

152. See Bruce Cain et al., The Personal Vote: Constituency Service and Electoral Independence 2 (1987) (explaining that contemporary state representatives are rewarded for ombudsman-like service) [hereinafter The Personal Vote]. See also Pitkin, supra note 35, at 112-43 (describing one aspect of representation as "acting for" the persons who are represented). The compact between residents of a particular area and their representative also requires the elected official to represent the interests of persons who did not or could not vote for her. See infra notes 185-93 and accompanying text.

153. See supra notes 37, 39-43 and accompanying text.

154. See generally John Phillip Reid, The Concept of Representation in the Age of the American Revolution 96-109 (1989); infra notes 182-84 and accompanying text. American colonials did not have relational representation because their inability to directly elect officials to the British Parliament deprived them of representatives who could receive their instructions and petitions for redressing their grievances. Reid, supra, at 134-35.

155. See infra notes 210-21 and accompanying text.
initially was derived from the doctrines of “shared interests,”156 “shared burdens,”157 and “virtual representation.”158 “Shared interests” allowed an individual to be represented if there was an elected member who shared the same economic, political, or social interest, and would protect it—regardless of whether or not the individual actually elected that member.159 “Shared burdens” required that elected officials be burdened by the same laws they imposed on their constituents (including persons who did not elect them), “sharing with them the consequences, costs, and hardships of the statutes they enacted, the taxes they imposed, and the penalties they decreed.”160 The doctrine of “virtual representation” says that persons who did not or could not elect a representative nevertheless still are represented indirectly by representatives in the legislative body who share the same interests and burdens.161 Virtual representation was tied closely to the British doctrine of “universal representation.”162

The American colonists modified these doctrines by tying them to “actual representation,” which requires that each voter have “an equal voice in or ability to affect the decision-making process.”163 In this manner, colonial views on relational representation marked a revolutionary departure from the prevailing British conception of how consent was to be obtained to protect the interests of the people. Americans returned to the “medieval forms of attorneyship in representation” previously used in Britain.164 Instead of representing the entire nation165 or colony,166 American officials were expected to address the interests of the local regions that had elected them.167

156. REID, supra note 154, at 45–48.
157. Id. at 48–50.
158. Id. at 50–53.
159. Id. at 45–48.
160. Id. at 48–50.
161. Id. at 50–53.
162. See supra notes 42–43 and accompanying text.
163. Tyranny of the Judiciary, supra note 13, at 499; See id. at 460–61, 498–500.
164. BAILYN, supra note 41, at 164. Under attorneyship,

[Local communities bound their representatives to local interests in every way possible: by requiring local residency or the ownership of local property as a qualification for election, by closely controlling the payment of wages for official services performed, by instructing representatives minutely as to their powers and the limits of permissible concessions, and by making them strictly accountable for all actions taken in the name of the constituents.]

Id. at 162–63.
165. See supra notes 42–43 and accompanying text.
166. See WOOD, supra note 60, at 179–80.
167. See id. at 188–96; See also REID, supra note 154, at 96–109.
Americans also believed that resolution of parochial concerns required representatives who understood local needs. Elected officials were supposed to reside in the communities or districts that elected them so they would be “connected” with their constituents and have “particular knowledge of their affairs.” The Constitutional Framers agreed that a similar requirement was essential for representatives to the new national government, though to a much lesser extent than what was required for state and local governments. As a result, the United States Constitution incorporates a mandate that each Representative and Senator “be an Inhabitant of that State in which he shall be chosen.”

To a certain degree, departures from purely corporate forms of representation undermined the impetus to keep representatives close to their constituents. Nevertheless, many Americans were convinced that even if the interests of individuals no longer were seen as identical to the interests of their communities, districts still could be used to facilitate the relationship between federal representatives and their

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168. See Wood, supra note 60, at 188–96; Reid, supra note 154, at 56–57, 63–65, 82–84, 133–36; Zagari, supra note 36, at 19–21, 37–39, 112. See also The Federalist No. 56, supra note 25, at 346 (James Madison) (“It is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents.”).

169. The Federalist No. 56, supra note 25, at 349–50 (James Madison) (criticizing the British House of Commons because many of its members cannot “add anything either to the security of the people against the government, or to the knowledge of their circumstances and interests” because they “do not reside among their constituents, are very faintly connected with them, and have very little particular knowledge of their affairs”); See supra note 57.

170. The Anti-Federalists argued that residency requirements included in the Constitution did not go far enough to protect the relationship between representatives and their constituents. They were concerned that the number of Representatives was too small to ensure adequate knowledge of local affairs and a sufficient connection with their constituents, and would result in the over-representation of wealthier interests at the expense of the “middling” classes. See generally Bernard Manin, The Principles of Representative Government 108–31 (1997); Herbert J. Storing, What the Anti-Federalists Were For 17–18 (1981); George Mason, Objections to the Constitution of Government Formed by the Convention, reprinted in Origins, supra note 55, at 255–56; Essays of “Brutus,” supra note 57, at 322–24, 328–29. The Federalists responded to such criticism by arguing that it was unnecessary for federal representatives to have the “intimate” sort of local knowledge required of state and local representatives. See The Federalist No. 10, supra note 25, at 83 (James Madison); Manin, supra, at 108–31; Zagari, supra note 36, at 101–03.

171. U.S. Const. art. I, § 2, cl. 2; id. at art. I, § 3, cl. 3. Of course, the recent election of former First Lady Hillary Rodham Clinton as a United States Senator from New York demonstrates that the constitutional provision for residency of federal candidates is not a very onerous requirement to meet.

172. See generally Manin, supra note 170, at 129 (“From the very beginning, it was clear that in America representative government would not be based on resemblance and proximity between representatives and represented.”). See also supra note 37 and accompanying text (describing “purely corporate” forms of representation).
constituents. Of the seven states that divided themselves into districts for the first congressional election in 1788 required that representatives be residents of the districts that elected them, with three of those states also including durational residency requirements of one to three years. Of course, residency requirements no longer are permissible in congressional elections, and representatives sometimes live outside of their districts (usually as a result of redistricting). On the other hand, durational residency requirements are widely used for local and state offices. In addition, some jurisdictions with at-large methods of election have residency districts, whereby candidates run for a numbered seat determined by their residence. Reliance on residency requirements to foster relational representation remains a distinctly American quality of democracy that few nations share.

B. Representing Communities of Interest: The Contemporary American System

The contemporary use of district-based representation provides many advantages for securing relational representation. Its strongest attribute is that it creates certainty—constituents and representatives easily

176. See Deconstructing the Obstructionist Vision, supra note 7, at 453 n.294 (discussing various instances of congressional and state legislators excluded from their districts as a result of partisan gerrymandering).
177. See Bott, supra note 123, at 59–67. Many of the interests asserted by state and local jurisdictions to support durational residency requirements for candidates are the same as those relied upon by the Constitutional Framers. Compare id. at 60–61 (summarizing reasons including candidate awareness of constituent needs, voters’ need for knowledge about candidates, and that a “candidate’s knowledge of the community and his/her exposure to the voters can be satisfied only if there is personal contact between the voters and the candidate”), with supra notes 169–72 and accompanying text (offering similar reasons for satisfying relational representation).
179. See POLITICAL REDISTRICTING, supra note 60, at 2.
can identify one another by determining their respective districts. \textsuperscript{180} Districts also allow everyone to be technically (if not actually) represented, including non-voters and losing voters. \textsuperscript{181} Even persons belonging to marginal groups that are too small to elect a representative under any method of election \textsuperscript{182} have a representative who is responsible for servicing their needs and considering their views. \textsuperscript{183} Finally, district

180. Justice Powell described the rationale for linking “voter identity” with political geography in the following manner:

“Most voters know what city and county they live in, but fewer are likely to know what congressional district they live in if the districts split counties and cities. If a voter knows his congressional district, he is more likely to know who his representative is. This presumably would lead to more informed voting.” It also is likely to lead to a representative who knows the needs of his district and is more responsive to them.

Karcher, 462 U.S. at 787 n.3 (Powell, J., dissenting) (quoting Carstens v. Lamm, 543 F. Supp. 68, 98 n.78 (D. Colo. 1982)). However, “voter identity” in the context of congressional elections “may be largely mythical,” as studies show that as little as one-third of all sampled persons could identify their congressional representative or their representatives’ political party, and many constituents are uninformed about their representatives’ positions on important policy issues. See Amy, supra note 8, at 178; See generally, The Personal Vote, supra note 152, at 1–2, 28–30.

181. See supra notes 152–54 and accompanying text. Of course, fair representation in the form of equal outcomes does not make up for the consistent denial of actual representation to minority groups. See Tyranny of the Judiciary, supra note 13, at 499–500; Deconstructing the Obstructionist Vision, supra note 7, at 480–81. See also Reclaiming the Civil Rights Vision, supra note 27, at 386–87 (describing the Civil Rights Movement’s denunciations of fair outcomes at the expense of actual representation as “tokenism”).

182. For example, a fringe group comprising less than five percent of the voting population would rarely, if ever, elect a candidate supported only by that group to a seven-member legislative body, even under proportional and semi-proportional methods of election. See infra notes 322–26 and accompanying text (discussing thresholds of exclusion and thresholds of representation). See also Paul L. McKaskle, Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States, 35 Hous. L. Rev. 1119, 1154–55 (1998) (describing an example of how under-representation is possible under cumulative voting).

183. See supra notes 185–93 and accompanying text. Bruce Cain et al., have explained the advantage of single-member districts over proportional or semi-proportional systems for providing relational representation:

Candidates who run at large or on national party lists in proportional representation systems are not formally responsible for representing a specific geographical area; they have no particular district to represent. By comparison, in single-member district systems representatives have geographical areas to call their own. These systems present an opportunity and create a motivation for relationships between represented and representatives that are more personal, particularistic, and idiosyncratic than in other kinds of systems.

The Personal Vote, supra note 152, at 8. Consequently, it is necessary to create some sort of electoral incentive under proportional or semi-proportional systems to encourage representatives to provide constituency service. See id. at 219–24.
elections have the added benefit of being simple to understand and to administer.\textsuperscript{184}

The mechanics of district-based relational representation may be illustrated through the example of the United States House of Representatives. Congressional districts provide each Representative with a geographic constituency comprised of all the people in the district\textsuperscript{185} and a political constituency within the district that actually supports and votes for the Representative.\textsuperscript{186} Every member of Congress has two primary roles (in addition to getting reelected): legislator and representative.\textsuperscript{187} The legislative role requires the elected official to consult with her constituents about their views and to explain her ultimate choices on particular pieces of legislation.\textsuperscript{188} The representative role entails "constituency service" by assisting individual constituents through casework and helping private and local governments in "coping with the federal government" in such areas as government benefits and obtaining information about agency procedures and the status of federally funded projects.\textsuperscript{189} Constituents apprise their Representatives of their views and needs either directly or indirectly through news stories and opinion polls.\textsuperscript{190} The Representative then is ex-

\textsuperscript{184} See Choosing an Electoral System, supra note 118, at 7. In contrast, alternative voting systems are inherently more complex. See generally Daniel R. Ortiz, Note, Alternative Voting Systems As Remedies for Unlawful At-Large Systems, 92 YALE L.J. 144, 155–56 (1982) (explaining some of the problems that the complexities of cumulative voting might pose for minority voters); Bushmanders & Bullwinkles, supra note 136, at 138–39 (outlining some of the complexities in reallocating surplus votes under the preference voting system used in Cambridge, Massachusetts); supra notes 14–22 and accompanying text (describing different alternative voting systems). For this reason, Representative Cynthia McKinney has urged other proponents of proportional representation to "keep it simple." See Cynthia McKinney, Keep It Simple, in Reflecting All of Us, supra note 8, at 35–39.


\textsuperscript{186} Id. at 127–29.

\textsuperscript{187} Id. at 6.

\textsuperscript{188} Id. at 122–23.

\textsuperscript{189} See id. at 134–35; The Personal Vote, supra note 152, at 50–76; Bruce Cain et al., Constituency Service in the United States and Great Britain, in Congress Reconsidered 109–30 (3d ed., Lawrence C. Dodd & Bruce I. Oppenheimer eds., 1985).

\textsuperscript{190} Most constituent inquiries come to Representatives by letters, with others coming by phone calls, walk-ins at the Representative's offices, or from in-person meetings. See Davidson & Oleszek, supra note 185, at 134. An increasing number of constituents communicate with their Representatives through electronic mail, facsimiles, and other electronic media. See generally Thomas B. Edsall, In Congress, They've Got Mail—Far Too Much of It, Wash. Post, Mar. 19, 2001, at A5 (reporting that "Senators get as many as 55,000 e-mails a month, and House members get up to 8,000, placing a tremendous burden on aides assigned to respond to a much smaller flow of regular mail"); James Rosen, House Heats from the People, RALEIGH NEWS & OBSERVER, Dec. 16, 1998, at A1; John Hughes, Delivering U.S. From E-Mail; Agencies Struggle to Filter Public's Electric Comments, Wash. Post, Apr. 6, 1999, at A21 (describing how Congress has looked for ways to restrict
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expected to consider the needs and political opinions of all her constituents.\(^{191}\)

For this reason, the Supreme Court often has cited relational representation as its basis for rejecting claims by disfavored minority groups alleging that they have been deprived of their consent under particular districting plans. In *Whitcomb v. Chavis*,\(^{192}\) the Court denied a challenge by Black voters to Indiana’s statewide legislative apportionment plan, resting its judgment on the winner-take-all feature of American elections and its effect on relational representation:

As the trial court saw it, ghetto voters could not be adequately and equally represented unless some of Marion County’s general assembly seats were reserved for ghetto residents serving the interests of the ghetto majority. But are poor Negroes of the ghetto any more underrepresented than poor ghetto [W]hites who also voted Democratic and lost, or any more discriminated against than other interest groups or voters in Marion County with allegiance to the Democratic Party, or, conversely, any less represented than Republican areas or voters in years of Republican defeat? We think not.\(^{193}\)

\(\text{the flow of constituent e-mails and faxes, which overwhelm their phone lines and computer systems).}

191. See *The Personal Vote*, *supra* note 152, at 85. Political constituencies tend to receive a disproportionate amount of a Representative’s attention, especially on legislative matters. See *Davidson & Oleszek*, *supra* note 185, at 127–29, 388–95. However, electoral motivations create a powerful incentive to address the needs of all constituents because even voters who support a representative’s opponents will be more inclined to vote for the representative and become members of her political constituency if the representative is responsive to their requests for constituent service. See *The Personal Vote*, *supra* note 152, at 77–84, 95–96, 213. Constituent service to all voters, irrespective of their partisan affiliations, also can provide representatives with electoral independence from her party and allow her to take unpopular positions on many issues. See *id*. at 9, 87, 197–98 (describing this quality of American government as the “personal vote” in which a “candidate’s electoral support . . . originates in his or her personal qualifications, activities, and record”).


193. *Id.* at 154. The Court elaborated on its reasoning by describing the effect of relational representation on losing voters under single and multimember district elections:

As our system has it, one candidate wins, the others lose. Arguably the losing candidates’ supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the laws since they have no legislative voice of their own. This is true of both single-member and multimember districts. But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called “safe” districts where the same party wins year after year.
Similar reasoning was applied to deny a racial gerrymandering claim brought by Hasidic Jews in United Jewish Organizations of Williamsburg, Inc. v. Carey. In Davis v. Bandemer, a plurality of four Justices provided the Court’s most unequivocal statement of relational representation. According to Justice White, “[a]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence the candidate as other voters in the district.”

But even the Court’s “adequate representation” theory has its limits. A cohesive majority—or even a simple plurality—can manipulate relational representation in a manner that disfavors political, racial, ethnic, and other minority groups. Frequently, this type of systemic malfunction occurs when a racially or politically driven group exploits election rules or geographical representation (whether through at-large or district elections) to obtain favorable legislative outcomes exclusively for themselves. For voters in the minority, the conventional methods of resolving these problems—recalling the representative or turning them out of office at the next election—are unavailable. When this happens, relational representation no longer exists. The Supreme Court acknowledged as much in Gingles, observing that “[n]ot only does ‘voting along racial lines’ deprive minority voters of their preferred representative in these circumstances, it also ‘allows those elected to ignore [minority] interests without fear of political consequences,’ leaving the minority effectively unrepresented.”

The Court has responded to violations of relational representation in two ways. One approach comes under established equal protection doctrine, which requires that “individuals be treated in a manner similar to others . . . [in] all governmental actions which classify individuals for different benefits or burdens under the law.” Clear evidence of substantial disparities in government services supports a claim under the Fourteenth

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194. United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. 144, 166 (1977) (plurality opinion) (“the individual voter in the district with a nonwhite majority has no constitutional complaint merely because his candidate has lost out at the polls and his district is represented by a person for whom he did not vote”).
195. Bandemer, 478 U.S. at 132 (plurality opinion).
196. Id.
198. See supra notes 62–78, 95–101 and accompanying text; infra notes 321–38 and accompanying text.
199. 478 U.S. at 48 n.14 (quoting Rogers v. Lodge, 458 U.S. 613, 623 (1982)).
A challenge to the method of election is another available avenue of relief. Unequal relational representation may be considered in vote dilution claims brought under Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments because of the negative impact that racial bloc voting has on the quality of representation that minorities receive. After all, "in a representative democracy, meaningful participation by minority groups in the electoral process is essential to ensure that representative bodies are responsive to the entire electorate."

The denial of equal political opportunities and relational representation to disfavored racial and ethnic minorities, raises the question of how to remedy such violations. Advocates of a narrow definition of the right to vote endorse the Shaw approach and argue that an offending jurisdiction should be required to adopt a new election system that excludes racial considerations altogether. Certain commentators and members of

201. See Tyranny of the Judiciary, supra note 13, at 537-46. I have referred to this type of representational problem as a "parliamentary process" claim, which can include "specific instances in which a voter's voice in government either is not present or not loud enough to prevent the legislative body from passing a law which discriminates against that voter and her group." Id. at 537-38. Because claims of disparate levels of services are outcome-oriented and implicate the political policy-making functions of government, courts are reluctant to grant relief absent the most compelling evidence of representational neglect. See id. at 541-43. See also Smith v. Winter, 717 E2d 191, 198 (5th Cir. 1983) (reasoning that "the right to an 'effective' vote refers to the citizen's right to make his voice heard in the electoral process, and not to the ability to command results in the public office").

202. See generally S. REP. NO. 417, 97th Cong., 2d Sess. 29 (1982), reprinted in 1982 U.S.C.C.A.N. at 207 (one of the factors that may be considered in assessing a vote dilution claim is "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group"); Gingles, 478 U.S. at 36-37 (citing the Senate Judiciary Committee Majority Report factors for violation of § 2). The Senate Report also provides that "[u]nresponsiveness is not an essential part of a plaintiff's case." S. REP. NO. 417, at 29 n.116, reprinted in 1982 U.S.C.C.A.N. at 207 n.116. The reason for this caveat is that lack of responsiveness often can be difficult to prove. See Lee County Branch of NAACP v. City of Opelika, 748 F2d 1473, 1480 n.11 (11th Cir. 1984) (noting the plaintiffs estimated that "80 percent of their time spent in developing and trying this case originally was devoted to the issue of responsiveness").

203. See Rogers, 458 U.S. at 625-26. Like Section 2 claims, unresponsiveness is not an essential element of a constitutional vote dilution claim. See id. at 625 n.9.

204. Breakdowns in relational representation can deprive minorities of benefits such as government jobs, adequate services, and responsive officials available to address their complaints. See Rogers, 458 U.S. at 625-27. For additional examples of how majority bloc voting can increase the lack of responsiveness by elected officials, see, e.g., White v. Regester, 412 U.S. 755, 769 (1973); Bolden, 446 U.S. at 98 (White J., dissenting); id. at 139 (Brennan J., dissenting); Goosby v. Town Bd. of Hempstead, 180 F3d 476, 495 (2d Cir. 1999), cert. denied, 528 U.S. 1138 (2000); Jenkins v. Manning, 116 F3d 685, 698 (3d Cir. 1997); Buckanaga v. Sisseton Indep. Sch. Dist. No. 54-5, 804 F2d 469, 477 (8th Cir. 1986); Perkins v. City of West Helena, 675 F2d 201, 210-11 (8th Cir.), aff'd, 459 U.S. 801 (1982).

205. Rogers, 458 U.S. at 640 n.21 (Stevens J., dissenting) (emphasis added).

206. See Deconstructing the Obstructionist Vision, supra note 7, at 419-52. As I have argued elsewhere, this approach poses significant problems and "is much more likely to support
the Supreme Court urge scrupulous application of "traditional districting criteria," particularly geographical compactness and maintenance of political subdivisions.\textsuperscript{207} Others support a more flexible view of districting parameters, including departures from strict views of compactness in favor of "communities of interest"\textsuperscript{208} or interest "enclaves."\textsuperscript{209} Finally, some proponents of alternative voting suggest that election systems that may not be geographically based at all should be used to facilitate individual voting choices.\textsuperscript{210} The remainder of this discussion focuses on the latter two approaches.

C. Representing Communities of Interest: The Utility of Proportional and Semi-Proportional Representation Models

Supporters of election reform take stock of the many weaknesses of geographical districting and the negative effects it has on actual and relational representation. If the use of geography as a proxy for consent had questionable legitimacy over two hundred years ago,\textsuperscript{211} it has even less validity today.\textsuperscript{212} In addition, relational representation in districts uses what Lani Guinier has referred to as a "top-down view of representation": the representative/constituent relationship is viewed strictly from the standpoint of the representative who services the needs of constituents, regardless of whether particular constituents ever are able to elect the representatives of their choice.\textsuperscript{213} Furthermore, districting de-emphasizes actual representation as the source of relational representation in favor of

\textsuperscript{207} See supra notes 128--29 and accompanying text. However, this approach has many problems of its own, not the least of which is its tendency to elevate mathematical precision and geography at the expense of actual representation of constituents. See supra notes 136--42 and accompanying text.


\textsuperscript{209} See, e.g., Lani Guinier, Tyranny of the Majority: Fundamental Fairness in Representative Democracy 71--156 (1994) [hereinafter Tyranny of the Majority]; Pildes & Donohue, supra note 1, at 251--56; Richie & Hill, supra note 150, at 9--29; The Way Out, supra note 8. See also McKaskle, supra note 182, at 1201--03 (discussing the advantages and disadvantages of proportional representation systems over geographically based single-member districts).

\textsuperscript{210} See supra notes 58--60 and accompanying text.

\textsuperscript{211} See supra notes 58--60 and accompanying text.

\textsuperscript{212} See Tyranny of the Majority, supra note 210, at 127--30; Alternative Ways Out, supra note 8, at 1900. See also Bushmanders & Bullwinkles, supra note 136, at 71 (asserting that "because of modern telecommunications, mass media, and the Internet, shape indexes say very little about how effectively candidates can campaign and serve constituents").

\textsuperscript{213} Tyranny of the Majority, supra note 210, at 131, 145--46.
virtual representation, contrary to our Republic's most cherished democratic principles. Under districting, the interests of non-voters and losing voters are deemed adequately represented by representatives elected by voters who share those same interests.

Proportional and semi-proportional representation systems make significant departures from district-based relational representation. On the one hand, proportional representation systems can eliminate the use of geographical representation completely through at-large elections. On the other hand, semi-proportional systems still may be geographically based by using modified election rules in multimember districts. Both systems allow "self-aggregation at the ballot box" in place of politically defined districts, thereby permitting each individual voter "to choose, by the way she casts her votes, who represents her." In this manner, the quality of relational representation actually may be increased for all voters through a "bottom-up view of representation" in which voters—not politicians—choose the persons who best represent their self-identified interests. As a result, each voter is able to define the nature of the representative/constituent relationship on his or her own terms. Replacing anachronistic methods of geographical representation with voter-centered alternative voting systems ultimately might provide greater substance to the meaning of relational representation.

Local governments are the strongest candidates for alternative voting systems because they are least likely to have any substantial interest in

216. See Still, supra note 12, at 253.
217. See id.
218. Supreme Court Destabilization, supra note 8, at 223–24.
219. Tyranny of the Majority, supra note 210, at 122. Therefore, alternative voting systems have the added benefit of moving away from the group-based approach criticized by the Supreme Court towards individual-oriented elections. See generally Deconstructing the Obstructionist Vision, supra note 7, at 452–69 (discussing and criticizing the Court's emphasis on individual approaches to remedy group harms).
220. Tyranny of the Majority, supra note 210, at 152. Guinier explains how cumulative voting may improve relational representation for voters:

The principle of one vote, one value . . . restores the link between representation and voting by ensuring that legislators represent unanimous, not divided, constituencies. Representation becomes the process of bottom-up empowerment based on self-defined expressions of interest . . . The legislative body can reflect fairly the range of options and interests within the public at large, including racial minorities who can be represented based on their electoral strength . . . [L]ocal political organizations may be given the space and the possibility of success. Such parties can fill the needs for political mobilization, voter education, and legislative monitoring that largely go unfilled in our current system.

Id.
using geographical methods of representation. In fact, at-large voting remains the most dominant method of election in American cities. Many municipalities long ago abolished geographical district or ward voting purportedly “as a praiseworthy and progressive reform of corrupt . . . government.” Some municipalities and counties either presently employ proportional or semi-proportional systems, or have used them in the recent past. Similarly, school boards frequently conduct elections at-

221. See, e.g., Amy, supra note 8, at 187.

222. See generally Heywood T. Sanders, The Government of American Cities: Continuity and Change in Structure, 1982 MUN. Y.B. 178, 179–80 (1982) (more than 66% of American cities elect city council members at-large and another 19% pair members at-large with district voting); Richard L. Engstrom & Michael D. McDonald, The Effect of At-Large Elections on Racial Representation in U.S. Municipalities, in ELECTORAL LAWS, supra note 62, at 203, 204 (describing the results of a survey indicating that in 83.6% of the largest central cities, “some of the members of the council are elected at large, and in 47.0% all of the members are elected at large”) (emphasis in original).

223. Bolden, 446 U.S. at 70 n.15 (plurality opinion). The “corruption” identified by reformers often was the specific representation of local or neighborhood interests. See Samuel P. Hays, The Politics of Reform in Municipal Government in the Progressive Era, in 2 NEW PERSPECTIVES ON THE AMERICAN PAST 148, 157 (S. Katz & S. Kutler eds. 1969); Edward C. Banfield & James Q. Wilson, City Politics 151 (1963). Cf supra notes 43–58, 170 and accompanying text (describing how the Constitutional Framers championed representation of local interests). Of course, the Progressive Movement’s reform of city government was not always intended to advance such benign purposes. In the southern states, it was used to subordinate Black political participation. See Randall Kennedy, Commentary, Persuasion and Distrust: A Comment on the Affirmative Action Debate, 99 HARV. L. REV. 1327, 1341 n.50 (1986); Engstrom & McDonald, supra note 222, at 206.

224. Cambridge, Massachusetts presently is the only major city that elects its council by single transferable voting. Grofman, supra note 12, at 163. Hartford, Connecticut and other Connecticut municipalities use limited voting, along with Philadelphia, most counties in Pennsylvania (which cast votes for two out of a possible three open seats), and Washington, D.C. Id. at 164; BUSHMANDERS & BULLWINKLES, supra note 136, at 140–41. The Chilton County, Alabama commission is a frequently cited example of a cumulative voting system. See Limited and Cumulative Voting in Alabama, supra note 18. More than 75 jurisdictions have adopted alternative voting systems to settle voting rights cases. Richie & Hill, supra note 150, at 14. For a discussion of some of these jurisdictions, see, e.g., Robert R. Brischetto & Richard L. Engstrom, Cumulative Voting and Latino Representation: Exit Surveys in Fifteen Texas Communities, 78 SOC. SCI. Q. 973 (1997) [hereinafter Latino Representation] (Texas city and school boards).

225. See Grofman, supra note 12, at 162–70; Richie & Hill, supra note 150, at 14–16; Leon Weaver, The Rise, Decline, and Resurrection of Proportional Representation in Local Governments in the United States, in ELECTORAL LAWS, supra note 62, at 139–53. Cincinnati, which used the single transferrable vote from 1925 until 1957 (when it was repudiated because of racial hostility towards Blacks, who fared well under the system), is one well known example of a major American city that has used an alternative voting system. See Robert J. Kolesar, PR in Cincinnati: From “Good Government” to the Politics of Inclusion?, in PROPORTIONAL REPRESENTATION AND ELECTORAL REFORM IN OHIO 160–208 (Kathleen L. Barber ed., 1995); AMY, supra note 8, at 133–36. Over two dozen cities have used the single transferable vote for at least a short period of time. Grofman, supra note 12, at 163. Several other cities, including New York, Indianapolis, Boston, and Philadelphia have elected
large, making it easier for them to employ modified election rules under either a proportional or semi-proportional system. The advantages of allowing individual voters in local government to elect representatives who are directly accountable to them likely would increase the quality of relational representation that they receive.

State legislatures and the House of Representatives pose a much more vexing problem. Both have a longstanding history of geographical representation, particularly through district elections. The vast majority of federal Representatives has been elected from single-member districts, which have been mandatory since 1967. States derive their representation from districts as well. Illinois, the one state that elected its state legislators under an alternative voting system, did so in combination with three-member districts. Today, every state uses some form of geographically based districts to elect their legislators.

The firmly entrenched nature of geographical representation for state and federal legislators, while not controlling, should not be dismissed out of hand. Use of multimember districts under modified councils by limited vote in the past. Id. at 163–64. Alamogordo, New Mexico used cumulative voting between 1987 and 1997. See Richard L. Engstrom et al., Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico, 5 J.L. & Pol. 469 (1989); The Way Out, supra note 8, at 341 n.34.


228. This is not to say that single-member districts cannot secure actual representation at the local level for all voters, including racial and ethnic minority groups. Proportional or semi-proportional systems are a viable alternative, however, especially where certain groups of voters have an unequal voice in electing officials and securing relational representation.

229. See supra notes 43–96 and accompanying text.

230. See Grofman, supra note 12, at 164. See also infra notes 448–59 and accompanying text (describing Illinois' experience using cumulative voting for legislative elections). Illinois presently elects all of its state representatives and senators from single-member districts. See Barone et al., supra note 142, at 96.

231. See Barone et al., supra note 142, at 96; Grofman, supra note 12, at 177–83.


233. See id.; Grofman, supra note 12, at 177–83. Six states (Arizona, Idaho, New Jersey, North Dakota, South Dakota, and Washington) presently elect all of their state representatives from two-member districts. See Barone et al., supra note 142, at 18–22, 92–95, 244–47, 274–78, 328–32, 378–82. Maryland and New Hampshire elect most of their representatives from multimember districts. See infra note 235. West Virginia is the only state that elects all of its Senators from multimember districts, using seventeen two-member districts. See Barone et al., supra note 142, at 384–85.
election rules would be the most consistent way to reconcile continued use of geographical representation with the adoption of alternative voting systems.\textsuperscript{234}

Of course, past experience also cautions against approaches that allow large constituencies to cast ballots for every legislator or representative of an elected body. Two examples will suffice to demonstrate this point. Between 1937 and 1947, the boroughs of New York City used the single transferable vote to elect members of its city council.\textsuperscript{235} In the first election under this system in 1937, the ballot in Brooklyn was over four feet long and included the names of 99 candidates.\textsuperscript{236} Thirty-one percent of all ballots in Brooklyn either were invalid or "exhausted" because "all designated candidates were either already elected or already eliminated." Many voters cast uninformed ballots, voting for a few candidates they knew and choosing other candidates grouped next to them.\textsuperscript{237} Although the single transferable vote was intended to allow all people to have a voice in city government, problems caused in the administration of elections ultimately allowed political parties to retain much of their power.\textsuperscript{238}

The defects of jurisdiction-wide elections are magnified when all voters of a state are allowed to cast ballots for every state legislator or Representative. In 1964, Illinois was forced to conduct at-large elections for the 177 members of its lower house after state officials were unable to adopt a reapportionment plan based upon population, as required by the

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\textsuperscript{234} A mixture of single-member and multimember districts presents another viable option. See Fortson v. Dorsey, 379 U.S. 433 (1965) (rejecting equal protection challenge to Georgia's use of a mixed plan for its state senators in which smaller counties were grouped together into single-member districts and larger counties elected candidates from multi-member districts). Two states presently make extensive use of a mixed districting plan. Most Maryland districts elect two or three representatives per district. See Barone et al., supra note 142, at 153–60. New Hampshire elects its four hundred representatives primarily from multimember districts: forty-one two-member districts, thirty-seven three-member districts, eleven four-member districts, four five-member districts, two six-member districts, and one district each containing seven, eight, nine, and eleven representatives. Id. at 228.

\textsuperscript{235} Ferdinand A. Hermens, Representation and Proportional Representation, in CHOOSING AN ELECTORAL SYSTEM, supra note 22, at 15, 20.

\textsuperscript{236} Id.

\textsuperscript{237} Id. at 21.

\textsuperscript{238} Id. According to Lani Guinier, the Democratic Party continued to control most of the seats on the city council, but "those elected were a different breed of Democrat" who were "beholden to the voters rather than to party bosses." Lani Guinier, Lift Every Voice: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE 264 (1998) [hereinafter Lift Every Voice]. The party bosses subsequently succeeded in eliminating the single transferable vote by capitalizing on anti-communist sentiments and characterizing proportional representation as "'un-American,' undemocratic, and a threat to the two party system." Id. at 265. Similar criticism has been leveled by opponents of broad protection for minority voting rights. See Deconstructing the Obstructionist Vision, supra note 7, at 409.
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A statute limited parties to nominations for no more than two-thirds of the seats (118 of the total) to ensure at least some representation from the minority party. The state used a “bed sheet ballot” that was up to one foot wide and three feet long to list the names and parties of all 236 candidates. Election results showed that eighty-five percent of voters only voted a single-party ticket, ten percent voted for a single party plus some others, and only five percent voted for individuals from both parties. The election resulted in a lower house with 118 Democrats and 59 Republicans. The 1964 election did not employ proportional or semi-proportional election rules. Nevertheless, it demonstrates the potential loss of relational representation under statewide elections, regardless of the particular voting rules that are employed. Uninformed voters had trouble identifying the names of their representatives, and could not establish any viable sort of constituent/representative relationship with officials who were responsible for servicing the needs and eliciting the views of every person in the state.

Similar problems might occur in congressional elections. In any single state, general-ticket elections have not involved elections for more than thirteen congressional seats at one time. One can well imagine the problems that would be created today under a general-ticket or at-large

239. See Dixon, supra note 46, at 165, 302.
240. Id. at 303; Taylor & Johnston, supra note 60, at 45. This has been described as a “winner-take-all-but-one-third” approach. Hacker, supra note 61, at 38.
242. Taylor & Johnston, supra note 60, at 45. Voters essentially were given three choices: vote only for a single–party’s 118 candidates; vote a single-party ticket and up to 59 other individual selections; or make up to 177 individual selections. Id.
244. The use of proportional or semi-proportional election rules do not necessarily prevent party collusion that may result in the overrepresentation of party interests. See infra notes 448–59 and accompanying text.
245. See Dixon, supra note 46, at 165; Hacker, supra note 61, at 38. In Chapman v. Meier, the Supreme Court raised similar concerns about the potential problems created by use of multimember districts:

First, as the number of legislative seats within the district increases, the difficulty for the voter in making intelligent choices among candidates also increases. Ballots tend to become unwieldy, confusing, and too lengthy to allow thoughtful consideration. Second, when candidates are elected at large, residents of particular areas within the district may feel that they have no representative specially responsible to them.

420 U.S. at 15–16 (citing Lucas, 377 U.S. at 731). For a contrary view, see generally Lakeman, supra note 22, at 41, 49–50 (asserting that multimember constituencies do not destroy relational representation, but enhance it by allowing individuals to chose their representatives who will actually represent their interests).
system in a state such as California, where nearly thirty-four million people will elect fifty-three Representatives. Shortcomings of pure forms of proportional representation for congressional elections also might include higher campaign costs that would have a disparate impact on the candidates of poorer constituencies, as well as depriving many voters of representatives who live close to them and understand their needs. Alternative voting systems probably would minimize some of the negative effects of statewide voting, by limiting the total universe of candidates to a smaller field of representatives who share the same interests as individual voters. Nevertheless, multimember districting appears to be better suited than statewide voting for the use of alternative systems in congressional elections, especially in more populated states like California.

It may be possible to rectify some of the representational problems created by geographical districting short of adopting an alternative voting system. In *Miller v. Johnson*, the Supreme Court recognized that "communities defined by actual shared interests" could be a legitimate districting criterion. Unfortunately, federal courts and some commentators have construed the term "communities of interest" narrowly.

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247. See Yochi J. Dreazen, *Census Shows Gains in South and West, Population Shifts Also Pare The Congressional Seats Of Midwest, Northeast*, WALL ST. J., Dec. 29, 2000, at A2 (noting that the ideal district under the 2000 Census will contain 625,000 people).

248. See Pamela S. Karlan, *A Bigger Picture, in Reflecting All of Us*, supra note 8, at 76-77.


250. Id. at 916.

251. See generally *Abrams*, 521 U.S. at 100 (indicating that Georgia's "small counties represent communities of interest" and therefore provided a good foundation for districts to remedy *Shaw* violation); *Venn*, 517 U.S. at 964 (plurality opinion) (maintaining that "manifestations of community of interest" include "shared broadcast and print media, public transport infrastructure, and institutions such as schools and churches"); *Id.* at 977 (plurality opinion) (finding that a section 2 district "that is reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny"). See also *Prosser v. Elections Bd.*, 793 F.Supp. 859, 863 (W.D.Wis. 1992) (three-judge court) (per curiam) (asserting that "[t]here is some although of course not a complete correlation between geographical propinquity and community of interests"). For an interesting discussion of the manner in which the Supreme Court has narrowed its definition of "communities of interest," see generally Nancy Maveety, *Representation Rights and the Rehnquist Years: The Viability of the "Communities of Interest" Approach*, in *The U.S. Supreme Court and the Electoral Process* 19-39 (David K. Ryden ed., 2000) (discussing various group based representations and a move away from a "community of interests").

252. E.g. Timothy G. O'Rourke, *Shaw v. Reno: The Shape of Things to Come*, in *Affirmative Action and Representation: Shaw v. Reno and the Future of Voting Rights* 43, 83 (Anthony A. Peacock ed., 1997) (defining the term as "roughly synonymous with 'recognition and maintenance of patterns of geography, social interaction, trade, political ties, and common interests,' as well as "unique or prevailing characteristics of places or regions ... or in terms of patterns of social or economic intercourse that are geographically identifiable") (quoting Grofman, *supra* note 12, at 87); Katharine I. Butler,
stressing physical proximity. As a result, the Miller Court indicated that a "State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests" such as "'liv[ing] together in one community.'" In contrast, when a racial group is geographically dispersed a majority of the Court considers districting based upon political interests arising from the group's racial identity and collective experiences as inherently improper.

Like geographical representation, relational representation has become defined by trees or acres, not people.

An approach more consistent with the meaning of consent is to regard "communities" not just as physical places, but also as "transcendent" groups tied together by race, interest, or both. Several Justices have emphasized the merits of such an approach, which enhances representational knowledge and responsiveness. Justice Souter acknowledged that relational representation often can be better obtained on the basis of racial identity instead of geography because "racial groups, like all other groups, play a real and legitimate role in political decisionmaking." Furthermore, Justice Ginsburg has observed that "[t]o
accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines" because "ethnicity itself can tie people together" even if they have "divergent economic interests." Therefore, Justice Ginsburg asserted that ethnicity often is a better foundation for representation than geographical proximity. Even Justice Kennedy, who wrote the majority opinion in Miller, conceded that race or ethnicity could serve as the basis for a community of interest if a minority group has been subject to residential segregation. Of course, districting based upon communities of interest might lead to districts that lack compactness or contiguity. This result is not particularly troubling because relational representation requires recognition of actual community interests loosely associated with, but not driven by, geography.

For many elected offices, districting remains the method of representation most consistent with our traditional conceptions of consent. By the

up with race to deny some room for a theory of representative democracy allowing for the consideration of racially conceived interests.” *Id.*

258. *Miller*, 515 U.S. at 944–45 (Ginsburg, J., dissenting). *Accord Abrams*, 521 U.S. at 112 (Breyer, J., dissenting) (concluding that “it seems clear that rural and urban African American voters who live near each other might share important common interests”). Justice Ginsburg further noted the disparate treatment of Hispanics and African Americans arising from *Shaw's* failure to recognize the connection between race and interest. *See generally Miller*, 515 U.S. at 947 (Ginsburg, J., dissenting) (“If Chinese-Americans and Russian Americans may seek and secure group recognition in the delineation of voting districts, then African Americans should not be dissimilarly treated.”).

259. *See U.S. Tr. Oral Arguments, 2000 WL 1742700, at *39–40, Cromartie II, No. 99-1864 & 99-1865 (U.S. Nov. 27, 2000) (responding to counsel’s assertion that splitting cities is “irreconcilable” with “communities of interest,” Justice Ginsburg observed that “I can think of some areas of this city that might have more in common with areas of, say, Boston than with each other. Take the difference between Anacostia and Northwest in Washington, D.C. in the same city but perhaps it’s a greater commonality of interest with other cities, with similar populations . . . .”).


262. *See Vera*, 517 U.S. at 1049 (Souter, J., dissenting) (“Although it is the law of the Constitution that representatives represent people, not places or things or particular interests, the notion of representative democracy within the federalist framework presumes that States may group individual voters together in a way that will let them choose a representative not only acceptable to individuals but ready to represent widely shared interests within a district.”). A broader construction of "communities of interest" also has the salutary effect of avoiding unprincipled attempts to separate race from politics and other interests demanded by *Shaw*. *See, e.g., Vera*, 517 U.S. at 1060 (Souter, J., dissenting); *Deconstructing the Obstructionist Vision*, supra note 7, at 445–48; Pildes & Niemi, supra note 136, at 578, 585–86. *See also Peter J. Rubin*, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. Pa. L. Rev. 1 (2000) (suggesting other ways in which the Court might adjust its approach in *Shaw* to provide a sounder basis for applying strict scrutiny to alleged cases of racial gerrymandering).
same token, districts can enhance relational representation for all constituents—winning voters, losing voters, and non-voters alike—by creating a direct tie between an individual representative and his or her constituents that allows the representative to "serve an 'ombudsman' role ... between their constituents and government agencies." The continued relevance of geography to meaningful relationships between constituents and their representatives also dictates that the boundaries of districting be shaped by the interests of voters. As a result, a more malleable approach to communities of interest should be adopted, permitting interest-based districting not necessarily resulting in compact districts or strict maintenance of political subdivisions. The Supreme Court followed this approach in *Lawyer v. Dep't of Justice* and used evidence of communities of interest to sustain the constitutionality of an irregularly shaped congressional district in *Cromartie II*. Other courts have reached similar conclusions where there they found evidence of "functional compactness." However, if the

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263. Pildes & Donoghue, supra note 1, at 294. See also The Personal Vote, supra note 152, at 2, 8, 88, 101, 213; supra notes 155, 186–93 and accompanying text (describing the "ombudsman" role of representatives).


[C]ompliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain of its redistricting criteria. For example, criteria which require the jurisdiction to make the least change to the existing district boundaries, follow county, city, or precinct boundaries, protect incumbents, preserve partisan balance, or in some cases, require a certain level of compactness of district boundaries may need to give way to some degree to avoid retrogression.

*Id.* at 5,413.

265. 521 U.S. 567, 581 (1997) (upholding state senate district in which the constituents "regard[ed] themselves as a community" and there was evidence that the district was "the poorest of the nine districts in the Tampa Bay region and among the poorest districts in the State, whose [W]hite and [B]lack members alike share a similarly depressed economic condition ... and interests that reflect it"). It remains to be seen, however, whether the Court would be willing to accept an irregularly shaped district comprised primarily of Hispanics or African Americans. For the reasons discussed supra notes 256–63 and accompanying text, as long as residents of a district share common interests, the fact that they are members of a particular racial or ethnic group should be of no moment.

266. See 121 S. Ct. at 1462 (finding that North Carolina's Twelfth Congressional District "joined three major cities in a manner legislators regarded as reflecting 'a real commonality of urban interests, with inner city schools, urban health care ... problems, public housing problems.' " (citation omitted)).

prevailing judicial paradigm persists in mandating scrupulous application of geography and color-blindness at the expense of voter interests, then departures from districting may be necessary. Only then will relational representation continue to have any value.

IV. MAJORITARIAN REPRESENTATION: CONSENT DEFINED BY NUMBERS

Majority rule is the polar star of our democratic system, resting on the belief that popular sovereignty is satisfied by adopting those policy decisions most preferred by the people.268 Today, the principle of majority rule is so firmly established that most Americans simply take it for granted as an inevitable attribute of republican government. Of course, this assumes that the will of the majority actually can be determined. This supposition raises many questions. Who comprises the “majority”? At what stages of the political process is the majority obtained? How long does a majority last? How much of a majority is necessary before there is sufficient consensus? Is it possible for something less than a majority to determine policy? In sum, it is necessary to determine whether at any given time, majority rule actually reflects the will of most of the people. If it does not, then continued use of majority rule as a mechanism to obtain consent becomes much more tenuous.

A. MAJORITARIAN REPRESENTATION: FALLING SHORT OF THE FRAMERS’ IDEAL

When the constitutional Framers created the new American government, they were confronted with the question of how to best obtain the consent of the governed. Past experience under the Articles of Confederation made it clear that if consent meant one thing, it was not unanimity, which would make the government unworkable.269 Instead, the accepted view of republican government that grew out of the Enlightenment allowed for less support to maintain the social contract with the people.270 The Founding Fathers settled on majority rule, which constitutionally balanced traditional reapportionment principles), aff’d, 515 U.S. 1170 (1995).

269. Article 13 of the Articles of Confederation required that any amendment to the articles “be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.” The Articles of Confederation art. XIII (1777), reprinted in Origins, supra note 55, at 18. The effect of the unanimity requirement made it difficult, if not impossible, to amend the Articles. No amendments were adopted because at least one state always held out. See R. Randall Bridwell, The Power: Government by Consent and Majority Rule in America 17 (1999).
270. John Locke explained the basis for using majority rule to obtain consent from the people in a republic:
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already was used in the colonies. As James Madison argued, “in republican government the majority however composed, ultimately give the law.” To the Framers, it seemed self-evident that majority rule is a “fundamental principle of free government” because they believed that “the law of the majority is the natural law of every society of men.” Consequently, Thomas Jefferson concluded that the “first of all lessons in importance” is that “the will of society enounced by the majority of a single vote [is] as sacred as if unanimous.”

Elections are the primary means to determine the will of the majority. However, to the extent that elections measure consent, they “do not establish it for long” because “[m]asses of people do not make clear-cut, long-range decisions.” As a result, the Framers believed it essential to

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For when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the majority. For that which acts any community being only the consent of the individuals of it, and it being one body must move one way, it is necessary the body should move that way whither the greater forces carries it, which is the consent of the majority; or else it is impossible it should act or continue one body, one community ... and so everyone is bound by that consent to be concluded by the majority ... [T]he act of the majority passes for the act of the whole, and of course determines, as having by the law of nature and reason the power of the whole.


272. ORIGINS, supra note 55, at xiv. See also THE FEDERALIST No. 22, supra note 25, at 146 (Alexander Hamilton) (describing majority rule as the “fundamental maxim of republican government, which requires that the sense of the majority should prevail”).
273. THE FEDERALIST No. 58, supra note 25, at 361 (James Madison).
274. THE POLITICAL WRITINGS OF THOMAS JEFFERSON 83 (Edward Dumbauld ed., 1985) (emphasis in original). See also id. (“The first principle of republicanism is that the lex majoris parties is the fundamental law of every society of individuals of equal rights.”).
275. Id. at 83-84.
obtain the consent of the people through regular and frequent elections. The House of Representatives, the more democratic of the two branches of the national legislature, reflects the popular majority through biennial elections. Recurring elections were a necessary means to ensure that Representatives followed the instructions they were given by their constituents and supported “an habitual recollection of their dependence on the people.” All too often, though, the regular elections of legislators at all levels of government are less a reflection of majority rule than the product of anti-democratic influences and the decisions of a minority of the eligible voters.

From the outset, the principle of majority rule that Madison and the other Framers advanced was not as democratic as it appears. The “People” from whom a “majority” was derived did not include every single person. The “lowest and most ignorant of mankind” were excluded.

277. See 1 Farrand, supra note 55, at 360–62 (June 21, 1787) (noting observations by several delegates that “[t]he people were attached to the frequency of elections”); THE FEDERALIST No. 37, supra note 25, at 227 (James Madison) (positing that “[t]he genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those entrusted with it should be kept in dependence on the people by a short duration of their appointments”); THE FEDERALIST No. 52, supra note 25, at 327 (James Madison) (asserting that “[f]requent elections are unquestionably the only policy by which this dependence and sympathy [of the government on the people] can be effectually secured”).

278. See U.S. CONST. art. I, § 2, cl. 1. See also THE FEDERALIST No. 52, supra note 25, at 325–30 (James Madison); THE FEDERALIST No. 53, supra note 25, at 330–36 (James Madison) (outlining the reasons why Representatives were to be elected every two years). By comparison, members of the less democratic Senate are elected to six year terms. See U.S. CONST. art. I, § 3, cl. 1. The Framers adopted longer terms for the Senate to create institutional stability to counterbalance the House, which was subject to a “rapid succession of new members” who were more likely to have “a change of opinions; and from a change of opinions, a change of measures.” THE FEDERALIST No. 62, supra note 25, at 380 (James Madison).

279. THE FEDERALIST No. 57, supra note 25, at 352 (James Madison).

280. Some pundits have suggested that non-voting really is a form of voting because it tacitly endorses the status quo. See generally George F Will, Op/Ed, Voting Blocks, WASH. POST, Sept. 5, 1991, at A21 (arguing that “low turnouts are signs of social health. . . . When society is not riven by deep fissures about fundamental questions, nonvoting may be passive consent, reflecting contentment”); Eric A. Posner, Symbols, Signals, and Social Norms in Politics and the Law, 27 J. LEGAL STUD. 765, 785 (1998) (noting similar comments by other political commentators). Of course, this view does not consider that electoral defects may have caused people to stay away from the polls in the first place. See TYRANNY OF THE MAJORITY, supra note 210, at 236–37 n.212. For example, sustained patterns of racially or politically polarized voting or the present effects of past discrimination may be responsible for voter “apathy” among members of voting minorities, who effectively are shut of the political process. See, e.g., Teague v.Attala County, 96 F.3d 283, 293–95 (5th Cir. 1996), cert. denied, 522 U.S. 807 (1997); United States v. Marengo County Comm'n, 731 F2d 1546, 1574–75 (11th Cir.), cert. denied, 469 U.S. 976 (1984).

from the "important business" of voting. 282 Blacks, women, men without property, Indians, and children generally fell into this class. 283 Denial of suffrage to these individuals was accepted because they "did not have standing in law equal to that of freemen." 284 One historian has estimated that on the eve of the Revolution, between 50 to 80 percent of adult White males were eligible to vote, and because they comprised 20 percent of the population "only 10 to 16 percent of the whole population" was eligible to vote. 285 Under such circumstances, if every eligible voter turned out to cast a ballot, then the "majority" described by the Framers may have included as little as five to eight percent of the total population. Electoral decisions could be made by a minority, but with the imprimatur of majority consensus.

Broader suffrage has not altered this result, though it is less extreme today. 286 Voter turnout in the United States consistently is among the lowest of the democratic nations in large part because political results often are pre-determined in safe districts. 287 One study showed that this country ranked twenty-third out of twenty-four countries in the percentage of

DEMOCRACY IN THE UNITED STATES (2000); VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY: ESSAYS ON THE HISTORY OF VOTING AND VOTING RIGHTS IN AMERICA (Donald W. Rogers ed., 1992). See also Morgan, supra note 271 (positing that the Founding Fathers invented the "American people" as the basis for the new representative government); Elisha P. Douglass, Rebels and Democrats: The Struggle for Equal Political Rights and Majority Rule During the American Revolution (1955) (describing the struggle of commoners for universal manhood suffrage during the American Revolution).

282. Wood, supra note 60, at 168.

283. See Tyranny of the Judiciary, supra note 13, at 461–62; R. Darcy et al., Women, Elections and Representation 8–9 (1987) [hereinafter Women, Elections and Representation]. The denial of consent to Blacks was cured implicitly through the adoption of the Reconstruction Amendments, although history proved that such constitutional protections were illusory when all three branches of government failed to prevent—and in some cases even cooperated in—the continued political, social, and economic subjugation of Blacks. See also Tyranny of the Judiciary, supra note 13, at 469–87. Similarly, the right of women to consent to their government was recognized by ratification of the Nineteenth Amendment. See U.S. Const. amend. XIX, cl. 1 (declaring that the right to vote cannot be denied to women).


285. Wood, supra note 60, at 167. This figure is only slightly higher than the approximately ten percent of the population in Great Britain eligible to vote during the same period. See Reid, supra note 154, at 52, 54–55.

286. Even today, a number of what I have referred to elsewhere as "structural process" or "pure process" barriers effectively bar political participation by certain groups of people in the United States, such as non-citizens, minors, insane persons, non-residents, and convicted felons. See Tyranny of the Judiciary, supra note 13, at 519–20.

287. See generally Francis Fox Piven & Richard A. Cloward, Why Americans Still Don't Vote (2000) (asserting that the lack of political competition has been intentionally fostered by the two major political parties and has contributed to non-voting).
Turnout among eligible voters.\textsuperscript{288} Turnout for the November 2000 Presidential election was barely over fifty percent, roughly comparable to other recent Presidential elections.\textsuperscript{289} President George W. Bush, who lost the popular vote and narrowly won the Electoral College, was elected by slightly more than twenty-four percent of all eligible voters.\textsuperscript{290} Typically, turnout for state and local elections is even lower.\textsuperscript{291} If majority rule means anything, it is not a decision by a majority of eligible voters, a point that even its strongest supporters acknowledge.\textsuperscript{292} Actual majorities simply are not required because they can be extraordinarily difficult to produce\textsuperscript{293} and decisions of those persons who actually vote is deemed a sufficient measure of popular consent.\textsuperscript{294} As a result, true mandates of the people rarely, if ever, materialize.

\textsuperscript{288} See id. at 189. Eligible voters refers to citizens of voting age. See id. See also Ruy A. Teixeira, \textit{The Disappearing American Voter} 8 (1992) (discussing findings that voter turnout in the United States trails that of most other democracies).


\textsuperscript{292} See Richard D. Parker, \textit{“Here, the People Rule”: A Constitutional Populist Manifesto} 68–69 (1994).

\textsuperscript{293} See Douglas W. Rae, \textit{The Political Consequences of Electoral Laws} 25 (1967).

\textsuperscript{294} The Supreme Court’s recent statutory construction of a majority vote requirement in \textit{Gutierrez v. Ada}, 528 U.S. 250 (2000), demonstrates the conventional reasoning for
Use of majority rule as a measure of consent is undercut further by the failure to apply it uniformly as a rule of decision at every critical stage of the political process. With the rise of political parties, the party nomination process has become an indispensable part of determining the persons who shall serve as representatives of the people. However, majority rule in candidate selections often may be rendered illegitimate through the exclusion of racial or ethnic minorities from party primaries and non-partisan slating processes. If these problems are not present, candidate nominations still might not reflect the views of a majority of voters or even a majority of the party members. Consent is not obtained from "the people" when the majority of voters are denied the right to participate fully at the point where representatives actually are chosen.

The districting process presents another key area where majority rule is absent. Arguably, majority rule is obtained when a majority of the members of a districting body accountable to the people adopts a particular districting plan. However, this contention is undercut by the

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295. See generally United States v. Classic, 313 U.S. 299, 318 (1941) (reasoning that the "right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative").


297. "A nonpartisan slating group is defined as an organization whose purpose is to recruit candidates, nominate them, and campaign for their election to office in a nonpartisan election system." Chandler Davidson & Luis Ricardo Fraga, Nonpartisan Slating Groups in an At-Large Setting, in MINORITY VOTE DILUTION, supra note 12, at 119. Candidate-slating allows local citizen groups to combine their support for a "slate" of candidates for various offices, effectively making a nonpartisan slating group the "gatekeeper to public office." Id. at 120. Non-partisan slating groups often have been used to select elected officials without eliciting any support from racial and ethnic minorities. See id. at 119–43; Tyranny of the Judiciary, supra note 13, at 523–29.

298. See infra notes 414–21 and accompanying text.

299. See Tyranny of the Judiciary, supra note 13, at 523–29; V.O. Key, JR., SOUTHERN POLITICS IN STATE AND NATION (1949) (noting low voter turnout in the South, the "one-party system" of Democratic Party domination and disenfranchisement of Black voters). A party nomination often is tantamount to election, making it especially important for all voters to have an opportunity to participate in the nomination process. See Martin Shapiro, Interest Groups and Supreme Court Appointments, 84 Nw. U. L. Rev 935, 938 (1990).
tendency of districting to enhance the political fortunes of parties and their candidates by correspondingly limiting the choices of voters.\(^{300}\) Even if neutral criteria could be applied,\(^{301}\) voters are constrained in their ability to aggregate themselves according to their interests because geographical district boundaries restrict their opportunities to do so.\(^{302}\) And therein lies the fundamental problem with districts in most jurisdictions. In the truest sense, majority rule is not possible because the most important political decisions—where to draw the district lines and how those lines will affect prospective candidates—already have been made before a single voter casts a ballot.\(^{303}\)

Furthermore, majority rule usually is not required in elections. In the United States, consent typically is secured through “winner-take-all” electoral laws, in which “the person with the most votes wins.”\(^{304}\) Winner-take-all elections can be used under both majority and plurality-based systems, leading to results “not necessarily based on overall majorities, although it may produce them.”\(^{305}\) Under plurality-based systems, also referred to as “first-past-the-post” and “relative majority” systems, a single candidate must obtain more votes than her strongest single opponent, but not necessarily a higher total than all of her opponents combined.\(^{306}\) The objective of plurality winner-take-all elections only decides a winner, and does not have to correspond with strict majority rule.\(^{307}\) Plurality systems actually can submerge the popular will by permitting a politically powerful minority to regularly elect its chosen candidates.

Majority vote requirements can correct this problem by ensuring that the threshold of at least fifty percent plus one of the

\(^{300}\) See supra notes 63–78, 127–47 and accompanying text. See also Vera, 517 U.S. at 963 (plurality opinion) (describing a districting process in which “[t]he final result seems not one in which the people select their representatives, but in which the representatives have selected the people” (quoting Vera v. Richards, 861 F.Supp. 1304, 1334 (S.D.Tex. 1994))).

\(^{301}\) See supra notes 127–35 and accompanying text.

\(^{302}\) See supra notes 135–41, 211–20 and accompanying text.

\(^{303}\) See infra notes 335–38 and accompanying text.

\(^{304}\) TAYLOR & JOHNSTON, supra note 60, at 40.

\(^{305}\) Id.

\(^{306}\) RAE, supra note 293, at 25–26. The mathematical expression of a plurality-based electoral system demonstrates that Party A has a plurality where \(ta > tn\), with \(t\) representing the actual party totals and \(n\) representing the strongest competition to A. Id. at 26.

\(^{307}\) Id. at 26–27. See also R.J. Johnston, Seats, Votes, Redistricting, and the Allocation of Power in Electoral Systems, in CHOOSING AN ELECTORAL SYSTEM, supra note 22, at 60–63 [hereinafter Allocation of Power] (summarizing other defects of plurality win systems).
voters turning out is met, usually through runoff elections. However, runoffs are uncommon in the United States for most local, county, and state offices and are not used at all in general elections for the President and members of Congress.

Other electoral rules sometimes guarantee the success of the majority's candidate, including prohibitions against single-shot or bullet voting and the use of designated or numbered posts in at-large or multimember systems. Bullet or single-shot voting allows a minority group to vote for one or a few of several candidates in a multiple-office election and thereby have the effect of a weighted vote system by depriving “other candidates of votes relative to the group's preferred candidate.” Prohibitions on bullet or “anti-single-shot voting” invalidate ballots on which a voter has not marked a choice for every office. Designated post or numbered place requirements allow “the voter only one vote to cast per candidate per place” on the ballot. Like anti-single shot mechanisms, a numbered place requirement “destroys the voter's ability to withhold votes from his candidate's competition.”

Frequently, such rules have been employed to exclude racial minorities from the political process because absent sufficient crossover voting, a minority group is precluded from ever electing the candidates of their choice. In , the Supreme Court recognized the potentially harmful effects of majority vote requirements and similar electoral devices and concluded that the presence of these electoral devices could be considered in evaluating vote dilution claims under Section 2 of the

308. See note 293, at 23. The mathematical expression of a system using a majority vote requirement is as follows:

\[ t > \frac{v}{2} \] or \[ t = \frac{v}{2} \] where \( t \) is any single party or candidate's share of the total vote and \( v \) is the total vote returned in any district. Id. A majority vote means “that the winning party has defeated the entire field of opposition; no combination of opponents can match its numerical strength.” Id. at 24.


310. See note 293, at 24; Davidson, supra note 309, at 6. Only twenty percent of all cities have majority vote requirements for their council elections. Id.

311. Davidson, supra note 309, at 6–7.

312. Id. at 7.

313 Id. at 6; see City of Rome v. United States, 446 U.S. 156, 184 n.19 (1980) (quoting U.S. Comm'n on Civ. Rts., The Voting Rights Act: Ten Years After 206–08 (1975)).


315. Id. at 7.

316. Id.

Voting Rights Act. Furthermore, dilutive majoritarian mechanisms have provided the foundation for successful claims by racial minorities under the Constitution. The Supreme Court also has permitted conditioned preclearance of election plans under Section 5 of the Voting Rights Act through elimination of a majority-vote requirement. In light of the scarce and potentially discriminatory use of electoral arrangements to ensure the majority prevails, the interest in maintaining majority-based electoral rules becomes much more questionable.

Plurality-based geographical districts fare little better because they misrepresent the degree of popular support for particular candidates. Single-member plurality elections have the highest "threshold of exclusion" of the most common types of election systems used in democracies. Under this type of system, the threshold of exclusion is one-half, meaning that if an alliance of parties or a single strong party obtains all votes not won by the prevailing party "it may fail to win such a seat even with as much as half the vote." Moreover, the possibility that the two major political parties will lose seats to a strong third party creates a tremendous incentive for them to collude in shutting the third party out altogether. Political parties that control the districting process in a plu-

318. See 478 U.S. at 56.
320. See City of Port Arthur, Tex. v. United States, 459 U.S. 159 (1982); See also Deconstructing the Obstructionist Vision, supra note 7, at 435 (Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, "requires certain jurisdictions with a history of racial discrimination to demonstrate that changes affecting voting do not have the purpose or effect of discriminating against certain racial and language minority groups").
321. See Allocation of Power, supra note 307, at 60–63.
322. Douglas Rae et al., Thresholds of Representation and Thresholds of Exclusion, 3 COMP. POL. STUD. 479, 486 (1971) [hereinafter Thresholds of Representation]. "Thresholds of exclusion" analysis measures "how large a share of the vote can be attained by a party which, nevertheless, fails to win a seat." Id. at 480. This analysis reverses the basis for thresholds of representation analysis, which asks "How little support can possibly earn a party its first parliamentary seat?" Id. at 479 (citing Stein Rokkan, Elections: Electoral Systems, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 16–20 (1968)). Electoral formulas (plurality or majority, semi-proportional, or proportional) and average district magnitude (the average number of representatives elected from each district) are the two most important variables influencing thresholds of exclusion. See Rae, supra note 293, at 19–39; Arend Lijphart, Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies, 1945–1990, at 10–14 (1994).
323. Thresholds of Representation, supra note 322, at 481.
324. See generally id. at 485 ("In other words, it will 'pay' two or more established parties to either form alliances or 'trade districts'—if they have a wish to exclude a small party from representation."). Single-member districting encourages complicity between the Democratic and Republican in evenly divided jurisdictions to maintain partisan balance, which may lead to highly irregular districts. See generally Cromartie I, 526 U.S. at 549 (noting that in redrawing its congressional districts to comply with the mandate in Shaw II, North Carolina legislators sought "to preserve the existing partisan balance" of six De-
rality system usually cannot refrain from using thresholds of exclusion to increase their own political power at the expense of other parties and the interests of individual voters.325

The process of excluding the consent of large numbers of voters is facilitated through the presence of wasted votes resulting from winner-take-all elections.326 It is easy to conceive of wasted votes cast by “filler people” included in a district solely to meet equal population requirements with no reasonable chance of electing their candidate of choice.327 But the concept of wasted votes really goes much further, encompassing any “votes that do not contribute to the actual election of a candidate.”328 As a result, even a person who has voted for the winning candidate has wasted their vote if the candidate did not need their vote to be elected.329 Gerrymandering and other districting practices exploit wasted votes for partisan advantage.330 This flaw might be more palatable under a majoritarian or plurality system if it did not amplify the possibility that majority rule would not be achieved.

Moreover, single-member plurality districts have a predilection for defining consent solely by numbers without regard to the will of the people. This characteristic of district elections causes dramatic distortions to the level of voter support for each candidate. On the one hand, “the plurality system can reward strong parties out of all proportion to the size of their margins by giving the same reward to parties with 1 percent margins as to those with 50 percent margins.”331 When this occurs, “exaggerated majorities” may appear.332 Parties with a bare majority of

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326. See Lakeman, supra note 22, at 42–43.
329. See Tyranny of the Majority, supra note 210, at 129; The Way Out, supra note 8, at 342. See also Laurence H. Tribe, American Constitutional Law 1075 (2d ed. 1988) (“any vote in excess of a majority (or a plurality) is in a sense wasted”). This variety of “wasted votes” for candidates commonly is referred to as “surplus votes.” See Richard Brifault, Lani Guinier and the Dilemmas of American Democracy, 95 Colum. L. Rev. 418, 436 n.62 (1995) (book review).
331. Rae, supra note 293, at 27.
332. See Amy, supra note 8, at 29–33.
votes may capture most or all of the legislative seats, submerging a large portion of the electorate in a manner grossly disproportionate to their voting strength.333

On the other hand, a plurality system can result in “manufactured majorities” in which “election procedures give a party that receives less than 50 percent of the vote more than 50 percent of the seats in the legislature.”334 When manufactured majorities appear, which has happened quite frequently in American history, minority rule results.335 Over two hundred years ago, the Anti-Federalists objected to the possibility that Congress would use its powers to regulate the election of its members and manipulate majority rule through districting and voting precinct placement to secure minority rule by the wealthy elite.336 Their concerns have not been too far off the mark. However, the plurality districting practices and electoral rules of the state and local governments, not Congress, have been responsible for these democratic failings. Manufactured majorities undermine the premise that majority rule should at least be present to select members of the legislative body.337

Even when a plurality election results in an actual majority of voters electing their representatives, majority rule still may not be achieved. The

333. See generally Bandemer, 478 U.S. at 130 (plurality opinion) (stating that “[i]f all or most of the districts are competitive—defined . . . as districts in which the anticipated split in the party vote is within the range of 45% to 55%—even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature.”); Whitcomb, 403 U.S. at 134 n.11 (describing how the combined use of multimember, winner-take-all elections in Marion County, Indiana caused Republicans to lose all fifteen seats in the 1964 state legislative election “though they received 48.69% of the vote”).

334. Amy, supra note 8, at 33.

335. See id. at 36–39.


The proposed Congress may make the whole state one district, and direct, that the capital . . . shall be the place for holding the election; the consequence would be, that none but men of the most elevated rank in society would attend, and they would as certainly choose men of their own class . . . . They may declare that those members who have the greatest number of votes shall be considered as duly elected; the consequence would be that the people, who are dispersed in the interior parts of the state, would give their votes for a variety of candidates, while any order, or profession, residing in populous places, by uniting their interests, might procure whom they pleased to be chosen—and by this means the representatives of the state may be elected by one tenth part of the people who actually vote. This may be effected constitutionally . . . .

Id. See also Federal Farmer Letters, supra note 57, at 276 (raising similar concerns).

337. See G. Bingham Powell, Jr., Elections as Instruments of Democracy: Majoritarian and Proportional Visions 77 (2000). See also Gordon v. Lance, 403 U.S. 1, 6 (1971) (recognizing “that state officials are normally chosen by a vote of the majority of the electorate”)

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American conception of popular sovereignty dictates that "majority support ought to be not only necessary but also sufficient for enacting laws." Nevertheless, nonmajoritarian mechanisms present in our system of government may foster the adoption of legislation that does not reflect the will of the people. The Constitution includes a variety of supermajority requirements that depart from simple majority rule in the legislative process. Furthermore, several parliamentary rules used in both branches of Congress allow a minority of legislators to block bills. For example, the Senate's filibuster rule requires a vote of at least three-fifths of Senators duly chosen and sworn to close debate and force a vote on an

338. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 135 (1989) (emphasis in original). This minimum requirement of majority rule was present from the foundation of our country. The first rules adopted by the Constitutional Framers included a majority quorum requirement and a majority vote requirement. See generally 1 Farrand, supra note 55, at 7–8 ("A House, to do business, shall consist of the Deputies of not less than seven States; and all questions shall be decided by the greater number of these which shall be fully represented; but a less number than seven may adjourn from day to day."). The Quorum Clause of the Constitution requires a majority of each house to be present to do business. See U.S. CONST. art. I, § 5, cl. 1. There is no comparable constitutional requirement for legislation to be passed by majority vote. Some of the Framers argued that such a requirement was implicit in the Constitution to avoid transferring power "to the minority." The Federalist No. 58, supra note 25, at 361 (James Madison). See also The Federalist No. 22, supra note 25, at 147 (Alexander Hamilton) (arguing that to "give a minority a negative upon the majority (Which is always the case where more than a majority is requisite to a decision) is, in its tendency, to subject the sense of the greater number to that of the lesser number."); The Federalist No. 62, supra note 25, at 378 (James Madison) (describing how legislation cannot "be passed without the concurrence, first, of a majority of the people" in the House of Representatives, "and then of a majority of the States" in the Senate); The Federalist No. 75, supra note 25, at 453 (Alexander Hamilton) (asserting that all provisions which require more than the majority of any body to its resolutions have a direct tendency to embarrass the operations of the government and an indirect one to subject the sense of the majority to that of the minority").

339. See generally Frank B. Cross, Institutions and Enforcement of the Bill of Rights, 85 CORNELL L. REV. 1529, 1552 (2000) (describing nonmajoritarian components "including age restrictions on voting and service in office, term limits for the President, the state-based representation scheme of the Senate, and a myriad of organizing rules for the branches of the legislature, such as committee and chairman powers and filibuster rules").

340. See U.S. CONST. art. I, § 3, cl. 6 (two-thirds vote of Senators present necessary for impeachment conviction); U.S. CONST. art. I, § 5, cl. 2 (two-thirds vote of the Senate or House necessary to expel a member); U.S. CONST. art. I, § 7, cl. 2–3 (two-thirds vote of both houses required to override presidential veto); U.S. CONST. art. II, § 2, cl. 2 (two-thirds vote of Senators present necessary for ratification of treaties); U.S. CONST. art.V (two-thirds vote of both houses necessary to amend Constitution, with amendments effective upon ratification by three-quarters of the state legislatures).

issue provided that a quorum is present.\textsuperscript{342} In addition, in 1995 the House of Representatives adopted a rule that barred passage of income tax rate increases without approval of at least sixty percent of the voting members.\textsuperscript{343} Many states have similar procedural rules.\textsuperscript{344} The failure to abide by majority rule in elected bodies does not necessarily render legislative acts unconstitutional.\textsuperscript{345} However, it does create a slippery slope in which it becomes much more difficult to justify the selection of one required level of legislative support over another to represent the will of the people.\textsuperscript{346}

Other characteristics of American democracy foster legislative and electoral decisions that do not satisfy majority rule. Representatives may exercise their own independent judgment on issues inconsistent with the views of most of their constituents.\textsuperscript{347} The way issues are framed and presented to the people also can affect their views, making it possible to derive majority support for a measure most voters actually oppose.\textsuperscript{348} Plu-

\begin{footnotesize}
\begin{enumerate}
\item See \textsc{Congressional Quarterly, Inc., Congressional Quarterly's Guide to Congress}, 68-A (4th ed. 1991). The House of Representatives does not have a filibuster rule. Instead, the Rules Committee has the authority to schedule the amount of time for debate and the dates for votes. \textit{Id.} at 90.
\item See \textit{generally} Gordon v. Lance, 403 U.S. at n.6 ("We intimate no view on the constitutionality of a provision requiring unanimity or giving a veto power to a very small group").
\item See generall\textit{ly} Akhil Reed Amar, \textit{The Consent of the Governed: Constitutional Amendment Outside Article V}, 94 Colum. L. Rev. 457, 503 (1994) ("Once majority rule is abandoned, there is no logical stopping point between, say, a 50% plus two rule, and a 99.9% rule") (emphasis omitted).
\item See Davidson & Oliszew, \textit{supra} note 185, at 122–23. The question of whether representatives are mere delegates who follow the mandate of a majority of their constituents or act as trustees who may exercise independent judgment has been an enduring debate in democratic theory. See \textit{Pitkin}, \textit{supra} note 35, at 144–89.
\item See \textit{Kenneth J. Arrow, Social Choice and Individual Values} (1951). For an example of how semantics can affect popular support for a measure such as affirmative action, see \textit{Deconstructing the Obstructionist Vision}, \textit{supra} note 7, at 417 n.73.
\end{enumerate}
\end{footnotesize}
rality electoral rules further enhance the likelihood that adopted policies only demonstrate the views of the minority.\textsuperscript{349} Considering the many ways in which our election system fails to reflect popular consent at all stages of the political process, it is not surprising that public policy often does not reflect majority rule.\textsuperscript{350}

**B. The Limits of Proportional Representation:**

*Allocation of Seats vs Allocation of Power*

Regular departures from majority rule demonstrate the inherent limitations of trying to obtain majority support in a pluralistic society. For this reason, critics of winner-take-all elections argue that proportional and semi-proportional systems are better suited for representing the popular will because more voters decide election results.\textsuperscript{351} Without districting and party nominations, they contend that all voters may participate in the stage of the electoral process where the winner actually is determined.\textsuperscript{352} Self-aggregation of voters under proportional election rules reduces the number of wasted votes that occur under single-member district elections.\textsuperscript{353} Furthermore, thresholds of exclusion are lowered as the number of representatives elected from districts increases, decreasing the possibility of exaggerated or manufactured majorities under increased party competition.\textsuperscript{354} Generally, women and minorities fare better under proportional electoral rules designed to better reflect the nation's diverse population.\textsuperscript{355} More political choices and opportunities may even lead to greater interest and participation among all voters.\textsuperscript{356} Consequently,
proportional representation may increase the likelihood that an elected body as a whole reflects the will of the majority, even if the election of its individual members does not. Yet, proportional and semi-proportional models cannot avoid the possibility that minority groups which achieve electoral success proportionate to their voting strength nevertheless might have little, if any, substantive policy-making power in the legislative body. Fair "allocation of seats" does not guarantee "fairness in the allocation of power" or "more responsive, accountable, and representative government." If a particular group has a majority of the seats in a legislature, it may have little incentive to deal with minority groups that have achieved proportional representation. Likewise, a minority group with a plurality of seats is more apt to bargain with groups that have sufficient seats to create a coalition with a voting majority. In this sense, proportional representation systems may replicate the "token representation" that some commentators have suggested occurs in majority-minority single-member districts. This shortcoming is inevitable in our system of government as long as majority rule is required in the legislative body.

Conversely, election of members of a political minority may have an important instrumental influence. Their participation can introduce views into the legislative body that otherwise might not be considered. If the deliberative process is functioning properly, it may be possible to convince France, and New Zealand and lower turnout in Poland, which uses proportional representation); Pildes & Donoghue, supra note 1, at 290–91 (observing that after cumulative voting was adopted in Chilton County, Alabama, White turnout "remained stable" and Black turnout initially decreased). Recent studies suggest that proportional representation may increase turnout between 9 and 12%. See also Arend Lijphart, Unequal Participation: Democracy's Unresolved Dilemma, 91 POL. SCI. REV. 1, 7 (Mar. 1997); Arend Lijphart, Democracies: Forms, Performance, and Constitutional Engineering, 25 EUR. J. POL. RES. 1, 4–8 (1994).

However, proportional representation systems do not invariably lead to more representative government. One study of western governments found that "[t]he most representative plurality system, the United States House of Representatives, is at least as proportional as seven of the seventeen PR systems" Rose, supra note 290, at 74–75. Rose also found that the most proportional PR system, Austria, achieved only slightly more representative results than the plurality system used to elect Representatives in the United States. See id. at 75.

See, e.g., Choosing an Electoral System, supra note 118, at 6–7; Allocation of Power, supra note 307, at 65–69.

Allocation of Power, supra note 307, at 64.

Id.

Id.

See id. at 65.

political opponents that the minority's proposed course of action is the best one to follow.363

Arguably, modified parliamentary rules can avoid this problem by ensuring that minority group representatives are able to exercise political power commensurate with the voting strength of their constituency. These types of legislative rules have been described as "procedural advantages protected from arbitrary change that enable members of the minority party to amend, debate, or obstruct the majority agenda. A procedural advantage confers on a member or group of members preferential access to the legislative process at a particular stage of the game."364 John C. Calhoun's proposal for a "concurrent majority" in place of "numerical" or "absolute" majorities in legislative bodies is one example of such an approach.365 According to Calhoun, this form of "minority veto" would give each group "the power of self-protection" over those issues that affect it the most.366 Similarly, Lani Guinier has proposed the use of legislative cumulative voting or additional "supermajority voting" requirements that "would be used to reduce to a proportionate level the disproportionate power [White voters or representatives currently enjoy]."367 In this manner,

363. See Deconstructing the Obstructionist Vision, supra note 7, at 489–92; see also Tyranny of the Judiciary, supra note 13, at 450 n.19.
364. Binder, supra note 341, at 21 (emphasis omitted).
365. See John C. Calhoun, A Disquisition on Government (Richard K. Cralle ed., Peter Smith New York, 1943) (1853). Calhoun described the difference between numerical majorities and concurrent majorities in the following manner:

[O]ne regards numbers only, and considers the whole community as a unit, having but one common interest throughout; and collects the sense of the greater number of the whole as that of the community. The other, on the contrary, regards interests as well as numbers, considering the community as made up of different and conflicting interests, as far as the action of the government is concerned; and takes the sense of each, through its majority or appropriate organ, and the united sense of all, as the sense of the entire community. The former of these I shall call the numerical or absolute majority; and the latter, the concurrent, or constitutional majority. I call it the constitutional majority, because it is an essential element in every constitutional government, be its form what it may.

Id. at 28.
366. Id. at 35, 48–49.
367. Tyranny of the Majority, supra note 210, at 260 n.119. Legislative cumulative voting would allow all groups of representatives proportionate voting power by "plumping votes to express the intensity of constituent preferences on some issues and trading votes on issues of constituent indifference." Id. at 108. Alternatively, Guinier suggested requiring "a supermajority vote on issues of importance to the majority or its equivalent, a minority veto on critical minority issues." Id. Professor Guinier indicated that this form of legislative decision-making could mirror the jury deliberation process, in which outcomes reflect legislative consensus rather than merely the views of the numerical majority. See id. at 107. Guinier was subject to caustic criticism for these suggestions when she was nominated as
modified parliamentary rules are said to be more likely to produce results consistent with the interests of all the people.

Altering legislative rules of decision causes considerable difficulties under our system of government. Existing supermajority rules are used sparingly for narrow categories of extraordinary actions to avoid regular disruptions in the legislative process and to focus public attention on particular issues. When the rules are invoked they can lead to results not only inconsistent with the will of the people, but also antithetical to principles of good government or even basic civil rights. Minority vetoes present the additional quandary of deciding which minorities have a veto consistent with principles of equal protection, not to mention the difficulty of establishing when the veto may be exercised. Moreover, minority veto or supermajority requirements increase the chances that measures that do not have the support of a majority of the people will become the rule, rather than the exception. This creates the real possibility of a “counter-majoritarian default,” which has the potential to be equally antithetical to democratic principles as its majoritarian counterpart.

The perceived threat that counter-majoritarian election rules and parliamentary procedures pose to traditional American notions of popular sovereignty underlies many of the Supreme Court’s decisions. Justice Stewart explicitly concluded in his *Bolden* plurality opinion that “[t]he Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.” Instead, the Court has viewed districting as an acceptable “middle ground between winner-take-all statewide elections and proportional representation for political parties.” Requiring anything more than simple

368. For example, although a majority of the American people support campaign finance reform, for the past decade legislation to achieve this goal has been blocked repeatedly in the United States Senate by the minority’s use of the filibuster. See Helen Dewar & Ruth Marcus, *Campaign Reform Proposals Grow*, WASH. POST, Mar. 16, 2001, at A10.

369. See *Binder*, supra note 341, at 191–95; Fisk & Chemerinsky, supra note 341, at 199–200 (describing the use of filibusters by Southern Senators in the 1940s and 1950s to prevent passage of civil rights legislation).

370. Under the “majority default” position of constitutional law, “when a court declines to act at all in a particular instance, it also has made a substantive decision . . . one which says that the decision of the majority wins.” *Tyranny of the Judiciary*, supra note 13, at 502. For criticism of this “non–approach” to constitutional law, see *id.* at 502–04, 507–08.

371. *Bolden*, 446 U.S. at 75–76 (plurality opinion).

372. *Bandemer*, 478 U.S. at 159 (O’Connor, J., concurring). See also *Gaffney*, 412 U.S. at 753 (“The very essence of districting is to produce a different—a more ‘politically fair’—
majority rule generally is seen as anti-democratic because it provides insufficient representation to the majority.\textsuperscript{373} Chief Justice Warren's description of the equal population principle explains this reasoning:

Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.\textsuperscript{374}

Departures from majority rule also do not provide a rule of decision for distinguishing between minority groups seeking representation.\textsuperscript{375} Therefore, the Court has been willing to defer to majoritarian principles, even where it gives the majority a disproportionate share of political power,\textsuperscript{376} or denies third parties an opportunity to succeed.\textsuperscript{377} According to Justice Scalia, the Court must abide by the "eminently democratic principle that—except where constitutional imperatives intervene—the majority rules."\textsuperscript{378}

The Court's stated approach to resolving the limitations of majoritarian government is consistent with the views of the Constitutional Framers on the subject.\textsuperscript{379} Generally speaking, the will of the majority must prevail. Deviations from strict majoritarianism are permissible when voters are treated unequally in either the political

result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats.

\textsuperscript{373} See generally Gordon, 403 U.S. at 6 ("Certainly any departure from strict majority rule gives disproportionate power to the minority.").

\textsuperscript{374} See Reynolds, 377 U.S. at 565. See also id. at 576 (expressing apprehension at "frustrat[ing] ... the majority will through minority veto in the house not apportioned on a population basis"); Lucas, 377 U.S. at 751 (Stewart, J., dissenting) ("so long as a State's apportionment plan reasonably achieves ... effective and balanced representation of all substantial interests, without sacrificing the principle of effective majority rule, that plan cannot be considered irrational").

\textsuperscript{375} See generally Bolden, 446 U.S. at 123 (Marshall, J., dissenting) ("A requirement of proportional representation would indeed transform this Court into a 'super-legislature' ... and would create the risk that some groups would receive an undeserved windfall of political influence.").

\textsuperscript{376} See supra notes 194–97 and accompanying text.

\textsuperscript{377} See Timmons v. Twin Cities Area New Party, 520 U.S. 351, 379 (1997) (Stevens, J., dissenting) ("Nothing in the Constitution prohibits the States from maintaining single-member districts with winner-take-all voting arrangements" even though these elements have a disparate impact on third parties); infra notes 427–36 and accompanying text.

\textsuperscript{378} Cal. Democratic Party v. Jones, 120 S. Ct. 2402, 2413 (2000). See also Reynolds, 377 U.S. at 566 ("Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures.").

\textsuperscript{379} See Tyranny of the Judiciary, supra note 13, at 465–69.
process or outcomes determined on an unconstitutional basis. Balancing majority rule with its discriminatory effects requires judicial determination of whether winner-take-all rules have interact with other election features to deny minority groups equal access to the political process. For example, the Court may have envisaged that certain configurations of multimember districts may be unlawful because of "their winner-take-all aspects, their tendency to submerge minorities and to overrepresent the winning party." Constitutionalism constrains judicial intervention to those circumstances when majoritarian institutions fail to provide for and respect the "'democratic' conditions—of equal status for all citizens."

The present Court has departed from its constitutional role by significantly altering its definition of "equality" in Shaw and its other voting decisions. Some critics of these decisions argue that the problems that Shaw poses to representative government may be avoided by adopting alternative voting systems that do not require geographical-based districting. But proponents of proportional representation systems promise more than they can deliver by seeking "to remedy inequality of consideration within the legislative process" without "judicial monitoring." One may disagree with the incoherent reasoning and results of the racial gerrymandering cases—and there is a lot to disagree with—but there simply is no way to avoid the important role that the courts must play in the regulation of consent. Majority rule, in whatever form, must be tempered by the vigilant gaze of members of the third branch of government.


381. Whitcomb, 403 U.S. at 158–59. See also id. at 165 (Harlan, J., separate opinion) (observing that "past decisions have suggested that multi-member constituencies would be unconstitutional if they could be shown 'under the circumstances of a particular case ... to minimize or cancel out the voting strength of racial or political elements of the voting population'" (quoting Fortson, 379 U.S. at 439)).


383. See Deconstructing the Obstructionist Vision, supra note 7; Tyranny of the Judiciary, supra note 13, at 561–609.

384. See supra note 8.


386. See generally Tyranny of the Judiciary, supra note 13, at 465–69, 487–505 (describing the courts as "judicial referees" over the democratic process).
V. Two-Party Representation: Consent Defined by Major Party Affiliation

Two-party government is another dominant attribute of our representational system. Political parties are not entitled to representation in their own right. Instead, parties act as intermediaries between the people and their representatives. In this way, they “serve as a vehicle for making their members’ voices more effective in the electoral process and in many cases, help to shape their members’ preferences.” Although certain qualities of partisan affiliation facilitate consent, the dominance of the two major parties over political campaigns and policy agendas also may lead to results antithetical to the representational interests of the people. The question remains whether the benefits of two-party government may be achieved under alternative election rules designed to provide more equitable representation without unduly limiting the political choices of individual voters.

A. The Evolution of the Two-Party System

On the surface, the Founding Fathers’ decidedly negative views of party politics made it seem unlikely that political parties would play any role in obtaining the consent of the people. Madison described political parties in terms of “factions” of citizens “who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” Alexander Hamilton similarly articulated how the “spirit of party” would “infect all political bodies” with “persons in the national legislature willing enough to arraign the measures and criminate the views of the majority.” In a like manner, George Washington decried the “baneful effect” of parties and their “common and continual mischiefs” which were “sufficient to make it the interest and duty of a wise people to discourage and restrain it.” Far from providing a reliable mechanism for securing popular sovereignty, these comments suggest parties were more likely to corrupt it.

389. The Federalist No. 10, supra note 25, at 78 (James Madison).
Yet, the Founding Fathers also were pragmatic in recognizing the inevitability of political parties in republican government. According to Madison, human nature prevented the removal of the causes of faction, making it necessary to control its effects.392 Minority factions were not difficult to constrain because the principle of majority rule could limit their influence.393 Majority factions, however, posed significant dangers to the “public good.”394 Madison believed that the threat of majority factionalism could be removed through separating the powers of each branch of government from one another and creating an intricate system of checks and balances that would limit any single group from exercising unfettered political power.395 In this way, political parties could develop and aggregate people together to form a government without destroying its representational foundation or permanently shutting out particular groups of voters.

The utility of political parties was apparent from the earliest days of our Republic. During the Constitutional Convention of 1787 and subsequent debates over ratification, Federalists and Anti-Federalists focused attention of the people on issues that helped to shape the new national government.396 Partisan labels such as “Federalist” and “Republican” facilitated the ability of voters to readily identify the respective positions of politicians in the earliest elections.397 The parties themselves actively courted public opinion, debating important issues in the press to win popular support for their political platforms and legislative agendas.398 Political associations were formed to organize groups of supporters and mobilize turnout for contested elections.399 Parties made determination of consent more manageable by bringing like-minded voters together to select their representatives.400 As one historian has observed, political par-

392. The Federalist No. 10, supra note 25, at 80 (James Madison). Madison explained that the causes of faction could only be eliminated “by destroying the liberty which is essential to its existence” or “by giving to every citizen the same opinions, the same passions, and the same interests.” Id. at 78.

393. See id. at 81.

394. Id.


396. See Wood, supra note 60, at 471–564. See, e.g., supra notes 57–58 and accompanying text; The Federalist, supra note 25; Origins, supra note 55; Storing, supra note 170 (Illustrating some of the public arguments made by Federalists and Anti-Federalists regarding the Constitution and method of government to be used in the new Republic).

397. See The Law of Democracy, supra note 388, at 188.


400. See, e.g., The First Party System: Federalists and Republicans (William N. Chambers ed., 1972); William N. Chambers, Political Parties in a New Nation: The American Experience, 1776–1809, 14–16 (1963); Noble E. Cunningham, Jr., The Jeffersonian Repub-
ties fostered representative government by "providing orderly means of determining the majority's will and enabling conflicting forces to settle their differences peacefully."401

These early political activities did not immediately result in a strong two-party system. Political affiliations initially were much more informal and localized, and did not evolve into the more organized form we commonly associate with parties until the Jacksonian Era in the 1830s.402 As these groups grew to national prominence, the widespread use of winner-take-all plurality elections for state legislatures and the House of Representatives produced an environment favorable to development of two major parties.403 Plurality voting creates a "tendency for a two-party system to develop in the sense that, out of an unlimited number of parties, only two can expect either to win a majority of seats, or to be the strongest opposition, with a chance to win an absolute majority in the next election."404 This tendency is sustained by the presence of large numbers of wasted votes under district-based plurality elections, which


403. See LIJPHART, supra note 322, at 20. Henry Droop, an English barrister and nineteenth century proponent of proportional representation, is credited with explaining how plurality voting supported creation of strong two-party system in Great Britain and the United States. See William H. Riker, Duverger's Law Revisited, in ELECTORAL LAWS, supra note 62, at 19, 22-23. Maurice Duverger popularized this conclusion through what has become known as "Duverger's law": "(1) the plurality method tends to lead to a two-party system; (2) proportional representation tends to lead to a system of many mutually independent parties; (3) the two-ballot majority system tends to produce multipartyism tempered by alliances." Maurice Duverger, Which is the Best Electoral System?, in CHOOSING AN ELECTORAL SYSTEM, supra note 22, at 31, 35 [hereinafter Which is the Best Electoral System?] (quoting and translating MAURICE DUVERGER, INSTITUTIONS POLITIQUES ET DROIT CONSTITUTIONNEL: TOME I, LES GRANDS SYSTÈME POLITIQUES 144 (Paris: Presses Universitaires de France 16th ed. 1980)]. Duverger's law does not mean that use of a plurality win system necessarily assures a two-party government. See Arend Lijphart, Trying to Have the Best of Both Worlds: Semi-Proportional and Mixed Systems, in CHOOSING AN ELECTORAL SYSTEM, supra note 22, at 207, 208 [hereinafter Trying to Have the Best of Both Worlds]; Proportionality by Non-PR Methods, supra note 255, at 121 (citing Canada and Nigeria as examples of nations using a plurality election rule without a strong two-party system).

404. Ferdinand A. Hermens, Representation and Proportional Representation, in CHOOSING AN ELECTORAL SYSTEM, supra note 22, at 15, 22.
exaggerate political support and "maintain the impression of two widely supported parties even when this is illusory."405

The interaction of these various electoral features has fostered two-party representation at most levels of our government. With the exception of Unionist Andrew Johnson, every American President since 1853 has been a member of either the Democratic or Republican Parties.406 Today, the Democratic and Republican Parties dominate the governorships,407 state legislatures,408 and Congress.409 In contrast, local jurisdictions tend to have less of an interest in maintaining the major party system. The same reform movements in the early twentieth century that led to the abolition of ward elections410 caused many municipalities to distance themselves from party politics.411 As a result, most cities use nonpartisan elections.412 Nevertheless, two-party representation remains the general rule for American politics.

405. Peter C. Fishburn, Social Choice and Pluralitylike Electoral Systems, in ELECTORAL LAWS, supra note 62, at 193, 201–02. See also supra notes 321–38 and accompanying text (describing the problem of wasted votes under winner-take-all elections).


409. As a result of the November 2000 general election, Republicans have a 221–211 majority over Democrats in the House of Representatives with two independents and one vacancy. Jim VandeHei & Shailagh Murray, Bush's Ability to Exploit Democrats' Rifts Could Be Key to Advancing His Agenda, WALL ST.J., Jan. 3, 2001, at A16. Democrats have a narrow 50–49 plurality in the Senate after James Jeffords of Vermont announced that he was leaving the Republican Party to become an independent. John Lancaster & Helen Dewar, Jeffords Tips Senate Power, Democrats Prepare to Take Over as Vermont Senator Quits GOP, WASH. POST, May 25, 2001, at A1.

410. See supra note 223 and accompanying text.


412. See id. at 226–27; Nancy Northup, Note, Local Nonpartisan Elections, Political Parties and the First Amendment, 87 COLUM. L. REV. 1677, 1677–84 (1987). The usage of nonpartisan elections in municipalities varies considerably by region. Over two-thirds of all cities in the Northeast have nonpartisan elections, compared to fewer than ten percent of all cities in the Western states. See Cassel, supra note 411, at 227.
B. Inherent Conflict?: Whether Maintaining a Two-Party System and Obtaining Majority Consent are Mutually Exclusive

The political hegemony of the two major parties at the federal and state levels is sustained by their ability to control the entryway to legislative bodies in a manner that does not necessarily correspond with majority rule. The party nomination process has become an indispensable part of determining the individuals who shall serve as representatives of the people. Parties are free to make the ultimate decisions about which candidates best represent their interests and hence the interests of voters, sometimes without any input from party members. The breakdown of popular sovereignty in the nomination process is compounded by the overwhelming power of incumbency, disparate campaign finances, and special interest groups to select the candidates who actually are presented to the voters at elections. After these anti-democratic forces have influenced the candidate selection process, parties market their choices to voters as the best options to implement policies that they favor. In this way, parties and antidemocratic influences may define the scope of consent, with elections frequently serving as little more than instrumental and formalistic means to arrive at seemingly preordained results.

The 2000 Presidential election demonstrates the use of nominating procedures to curb the popular selection of party nominees. Texas Governor George W. Bush widely was regarded as the Republican Party's presumptive nominee long before the primary season began, largely due

413. See supra note 295.
415. In recent years, about two percent of all federal Representatives and ten percent of all Senators failed to secure their party's nomination. See Davidson & Oleszek, supra note 185, at 76. Once nominated, incumbents are all but guaranteed of reelection. Between 1946 and 1984, an average of approximately 91 percent of all incumbents in the House of Representatives and 75 percent of all incumbents in the Senate were reelected. Id. at 62. Incumbents in state legislatures are reelected at similar rates. See Women, Elections and Representation, supra note 283, at 176-77.
417. See Daniel R. Ortiz, Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties, 100 Colum. L. Rev. 753, 759-62 (2000) (arguing that parties have departed from their role as "superagents" of voters in the political market and become "producers" that market their political product to the voters).
to his fundraising success and support from the Party elite. In contrast, although Republican Senator John McCain captured the public imagination with his populist, dark horse candidacy and won over Democrats and independents alike, he failed to capture his party's nomination when he encountered closed primaries that effectively disenfranchised most of his supporters. Furthermore, large numbers of the Republican faithful in many states never had an opportunity to cast a meaningful vote because their elections were late in the primary process after Bush already had been anointed the nominee. The 2000 election shows that instead of determining the will of the people, the party nomination process actually is more likely to guide or even suppress it.

Paradoxically, the pernicious effects of the two-party system also are its strongest attributes. Parties perform many valuable services for voters, such as providing information about issues and candidates, monitoring the performance of elected representatives, and when necessary, disciplining representatives who do not follow the instructions of their constituency. By maintaining tight control over representatives at every stage of the electoral process, the two major parties are able to produce "stable and strong majorities" in legislative bodies. Concomitantly, both parties have an overpowering interest in becoming "people's parties" which appeal to

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418. See Dan Balz, McCain's Rise Alters Dynamics of Race, WASH. POST, Nov. 6, 1999, at A1. Many of Bush's strongest competitors, including Elizabeth Dole, Lamar Alexander, and Dan Quayle, were eliminated several months before the first vote was cast. See id. Elizabeth Dole cited her inability to compete with Bush's fundraising as the reason for her withdrawal, stating that "perhaps I could handle 2 to 1 [difference in campaign funds] or even 10 to 1, but not 80 to 1." Ruth Marcus, Dollars Dictate Field's Early Exits, WASH. POST, Oct. 21, 1999, at A1.

419. See Dan Balz, New Challenges Become Clear, WASH. POST, Feb. 23, 2000, at A1. Closed primaries limit voter participation to "party members who have been affiliated with the party for some specified amount of time," typically through requirements that a voter register with a party by a registration deadline scheduled before the primary. Charles E. Borden, Primary Elections, 38 HAUV. J. ON LEGIS. 263, 264-65 (2001). For competing views on the merits of open primaries as the basis for support of party candidates such as McCain, compare George F. Will, The Hijacking of the Primaries, WASH. POST, Apr. 30, 2000, at B7, with Dana Milbank, What the Bush Guys Don't Realize: The Open Primary Is No Threat; It Might Empower Their Party, WASH. POST, Mar. 5, 2000, at B1.

420. See David S. Broder, Coordinated Primaries? 2 Parties Conferring on Change for 2004 Presidential Race, WASH. POST, Mar. 16, 2000, at A7. Efforts by some Republicans to institute a four-month progressive primary system under which smaller states would hold their primaries first in February followed by states of increasing size in March, April, and May failed when their proposal was defeated at the Republican National Convention in July 2000. See David S. Broder, GOP Scraps Plan to Alter Primary Schedule, WASH. POST, July 29, 2000, at A6.


422. Which is the Best Electoral System?, supra note 403, at 37.
voters with a wide range of views, the decision between them being made by the 'floating' vote in the center.\textsuperscript{423} Over time, the two parties tend to become more centrist, adhering to moderate positions supported by the greatest number of people to remain in power.\textsuperscript{424} Transitions from one party to another are orderly and do not result in significant disruptions in the legislative process. Therefore, political scientists generally agree that two-party plurality systems such as the one used by the United States promote stable one-party rule.\textsuperscript{425}

The Supreme Court has concluded that the political stability created by our two-party system is an important value that should be protected.\textsuperscript{426} Many of the Court's decisions foster two-party government, even if it comes at the expense of individual voters or third parties to participate in the electoral process.\textsuperscript{427} Provisions restricting ballot access to parties with "a significant modicum of support" are permissible, although such requirements limit the ability of minor parties to place their candidates before the voters.\textsuperscript{428} Independent candidates may be denied ballot positions if they have been registered or voting members of a political party for a certain period prior to the general election.\textsuperscript{429} Individual voters likewise may be prevented from voting for a party's nominee if they fail to register as party members a reasonable time before a primary election.\textsuperscript{430} Furthermore, while the states may mandate that candidates be selected prior to a general election through either primary elections or party conventions,\textsuperscript{431} they cannot proscribe the role of the

\textsuperscript{423} Hermens, supra note 404, at 22.
\textsuperscript{424} See id.; The Law of Democracy, supra note 388, at 261–62; Alexander M. Bickel, Reform and Continuity 22 (1971).
\textsuperscript{425} See Choosing an Electoral System, supra note 118, at 6.
\textsuperscript{426} See generally Timmons, 520 U.S. at 367 ("The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system."); Rutan v Republican Party of Ill., 497 U.S. 62, 107 (1990) (Scalia, J., dissenting) (describing the "stabilizing effects" of a two-party system as "obvious"); Bandemer, 478 U.S. at 144–45 (O'Connor, J., concurring) ("There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government.").
\textsuperscript{427} See generally Burdick v.Takushi, 504 U.S. 428, 441 (1992) (describing voting as the most precious right in a free country, but indicating that "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system").
\textsuperscript{428} Jenness v. Fortson, 403 U.S. 431, 442 (1971). For similar holdings, see, e.g., Munro v. Socialist Workers Party, 479 U.S. 189 (1986); American Party of Tex. v. White, 415 U.S. 767 (1974). However, the Supreme Court has limits to how far it is willing to go to promote the two-party system to encourage political stability. See Williams v. Rhodes, 393 U.S. 23 (1968) (striking down state election laws that made it virtually impossible for any third party candidate to qualify on a ballot).
\textsuperscript{430} See, e.g., Rosario v. Rockefeller, 410 U.S. 752 (1973).
\textsuperscript{431} See, e.g., American Party of Tex., 415 U.S. at 781; Storer, 415 U.S. at 731–35.
parties or decide which voters actually are allowed to participate in the selection process. It is of little consequence to the Court that these decisions constrain majority rule by offering "ambassadors" whose "positions are predetermined." Instead, the Court views the need to avoid fractures in the two major parties—and thereby promote stability—as a paramount interest that cannot be sacrificed.

In contrast, some proponents of proportional representation underscore "breaking the two-party monopoly" as one of their principal objectives. Their disagreement with the Court therefore rests upon the greater premium that they place on more representative government over the stable and effective government that two-party government is said to produce. According to this view, legislative bodies must reflect the interests and opinions of all voters, not just those in the majority. It is widely accepted that proportional and semi-proportional systems do a


433. See Cal. Democratic Party v. Jones, 120 S. Ct. 2402 (2000) (declaring unconstitutional California's blanket primary, which allowed voters to cast ballots for any candidate regardless of their political affiliation); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) (invalidating state law which required primary voters to be registered members of that party, to the extent the law conflicted with Republican Party's rule permitting independent voters to cast ballots in the Party's primary); Democratic Party of United States v. Wis. ex rel. La Follette, 450 U.S. 107 (1981) (striking down Wisconsin's open primary, which allowed voters to cast ballots for any candidate regardless of their party and required party delegates to vote in accordance with the primary results). According to the Court, a non-party "voter who feels himself disenfranchised" by nomination rules requiring party membership "should simply join the party." Jones, 120 S. Ct. at 2413.

434. Jones, 120 S. Ct. at 2408.

435. See generally Storer, 415 U.S. at 736 ("California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system." (citing The Federalist No. 10, supra note 25, at 77-84 (James Madison)). The Court's protection of the two-party system is grounded in its preference for district-based elections. See Robert G. Dixon, Jr., Fair Criteria and Procedures for Establishing Legislative Districts, 9 Pol'y Stud. J. 839, 841 (1981); supra notes 104-18 and accompanying text.

436. Amy, supra note 8, at 76-98. See also Richie & Hill, supra note 150, at 6, 18-20 (arguing that political progressives need multiparty politics that would be fostered under proportional representation).

437. See, e.g., Choosing an Electoral System, supra note 118, at 6; Which is the Best Electoral System?, supra note 403, at 35-36; Weaver, supra note 225, at 191-95.

438. See generally John Stuart Mill, On Representative Government 187 (H.B. Acton ed., J.M. Dent & Sons Ltd. 1972) (1861) ("The pure idea of democracy, according to its definition, is the government of the whole people, equally represented."). As Mill explained, in "a really equal democracy, every or any section would be represented, not disproportionately, but proportionately. A majority of the electors would always have a majority of the representatives; but a minority of the electors would always have a minority of the representatives." Id. at 278.
better job of achieving that goal than geographically based majority or plurality systems. In the process, proportional and semi-proportional forms of representation tend to support "the multiplication of parties" by lowering the threshold of exclusion so that more voters with distinct interests are able to participate in government. Where this occurs, proponents of alternative methods of election concede there is a possibility that those methods "may undermine consensus, exacerbate tension, and destabilize the political system."

Nevertheless, proportional representation and stable party government are not necessarily mutually exclusive. Several nations that use proportional methods of election have been able to produce long-standing two-party governments. In addition, while adoption of proportional representation systems has encouraged multiple parties in most European countries, it does not necessarily mean that our existing two major parties would be supplanted by a host of new ones. As Bernard Grofman has noted, "generalizations about proportional representation based on European party-list experience are of very limited applicability to understanding the American use" of alternative voting systems. The Democratic and Republican Parties probably would continue to dominate elected legislative and congressional offices even under proportional or semi-proportional election rules. Therefore, concluding that alternative voting

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439. See, e.g., Which is the Best Electoral System?, supra note 403, at 36; Allocation of Power, supra note 307, at 67–68. But see William H. Riker, Electoral Systems and Constitutional Constraints, in CHOOSING AN ELECTORAL SYSTEM, supra note 22, at 103, 105–06 (arguing that plurality systems represent minorities as well as proportional representation). By the same token, single-member districting achieves more proportional results than winner-take-all at-large elections. See supra notes 69–102, 373 and accompanying text.

440. Thresholds of Representation, supra note 322, at 482. See also supra note 403 (describing Duverger's law). Countries using proportional representation systems have an average of eight political parties. Rose, supra note 290, at 79.

441. Tyranny of the Majority, supra note 210, at 153. At the same time, however, Professor Guinier concludes that the "exclusiveness" fostered by winner-take-all elections "is a greater evil." Id. According to Guinier, when all voters are allowed to have meaningful participation in the political process, "everyone can win something" and "genuine consensus is possible." Id.

442. See Maurice Duverger, Duverger's Law: Forty Years Later, in ELECTORAL LAWS, supra note 62, at 71–76 (describing the tendency of Austria, Germany, and Ireland to have stable two-party systems despite proportional election rules that shift governmental control between several parties).

443. See generally Note, Affirmative Action and Electoral Reform, 90 YALE L.J. 1811, 1830–31 (1981) (observing that although most Western European nations adopted proportional representation in the early twentieth century, "[t]he change was not followed by a marked increase in the number of parties in any of the countries").


445. According to one commentator, this result likely will occur because of the political differences between the United States and countries presently employing proportional or semi-proportional methods of election:
systems used in other countries are “contrary to most general concepts of a democratic two-party system,” overestimates the effects of proportional voting schemes.6

Illinois’ experience with cumulative voting for elections of its lower house between 1870 and 1980 demonstrates that a strong two-party system can coexist with some forms of proportional or semi-proportional methods of election.47 Illinois adopted cumulative voting to reduce sectionalism and to provide representation to the minority Democrats in its southern counties and the minority Republicans in its northern counties.48 To achieve these goals, Illinois maintained geographically based representation by apportioning the state into senatorial districts that elected one senator and three representatives.49 Each voter was given three votes which could be cast in a variety of ways: all three votes for a single candidate (called a “three shooter” or “plumping”), one and one-half votes for two candidates, one vote for three candidates, or two votes for one candidate and one vote for a second candidate.50 The system was effective in fulfilling its objectives, with representation in the state House

First, two dominant parties already exist. Second, proportional representation would have no effect on electing the President, U.S. Senators, Governors, or other single-member statewide officers. The only successful route for election to these higher positions would remain . . . by nomination by one of the two current dominant parties (i.e., Democrats or Republicans). Any ambitious politician would likely be frozen out of any chance to achieve one of these higher offices if associated with a third party. This situation would tend to discourage development of long lasting third parties.

McKaskle, supra note 182, at 1199 n.327. See also id. at 1180 n.252 (concluding that even under single transferable voting, “Democrats and Republicans are not likely to be dislodged from their politically dominant position”); Lijphart, supra note 322, at 15 (observing that “presidentialism tends to discourage multipartism”).


447. See Weaver, supra note 225, at 198–99. In 1980, Illinois voters eliminated cumulative voting in favor of single-member districts after the proposal to change the method of election was joined with a proposal to decrease the size of the lower house as part of voter backlash for a legislative pay raise that had been enacted. Id. at 199; Lift Every Voice, supra note 238, at 266.

448. See, e.g., Weaver, supra note 225, at 198; Jack Sawyer & Duncan MacRae, Jr., Game Theory and Cumulative Voting in Illinois: 1902–1954, 56 AM. POL. SCI. R. 936, 936–37 n.8 (1962); George S. Blair, Cumulative Voting: An Effective Electoral Device in Illinois Politics 1–11, 127 (1960). According to Blair, the aim of the plan was “minority representation rather than proportional representation.” Id. at 6. Cumulative voting was adopted as “a device for the maintenance of a strong two-party system and a means of reflecting the relative strength of those two parties in the General Assembly.” Id.

449. Blair, supra note 448, at v, 6.


451. Blair, supra note 448, at v, 6, 127.
of Representatives usually providing a better reflection of the relative statewide strength of the two major parties than in the winner-take-all elections held for state Senate seats. Consequently, cumulative voting in Illinois actually led to "greater legislative stability" than in other state legislatures because there tended to be fewer significant shifts in the party composition of the General Assembly.

Still, if the purpose of adopting an alternative voting system is to enhance individual voting decisions, then the strengths of the cumulative voting system in Illinois also were its greatest weaknesses. Tight party control over the nominating process was one price of maintaining strong two-party rule. The real contests for legislative seats shifted to primary elections, where the major parties colluded by having the majority party nominate two candidates and having the minority party nominate one candidate. Although third parties fared better under this system than earlier methods of election, in most elections they failed to elect any representatives. Party discipline exercised by the party elite tended to be as great, if not greater, than party manipulation of single-member district elections in other states. For this reason, proponents of proportional and semi-proportional election systems give Illinois very mixed reviews.

452. See id. at 75–86, 130, 132, 137.

453. Id. at 134–35. For this reason, Robert Dixon has described the form of cumulative voting used in Illinois as "an American two-party version" of proportional representation. Dixon, supra note 46, at 524.

454. See Wiggins & Petty, supra note 450, at 355 (finding that "[d]istrict representative committees have put a damper on general election competition by refusing to allow full slates [of candidates] to be nominated, even in areas where they occupy a rather dominant status in terms of voter support" because of fear that they would lose seats through diluted voting or due to inter-party collusion).

455. See Blair, supra note 448, at 64–66, 106, 129, 133–34; Wiggins & Petty, supra note 450, at 345, 349–61. See also Hermens, supra note 404, at 29 (observing that a three-member constituency "increases the chances for women and the representatives of minorities" but "encourages a major party to align itself with a minor one"). The collaboration of the two major parties often caused Illinois to have a smaller average number of candidates per seat under its cumulative voting system than states using winner-take-all single-member districts. See Blair, supra note 448, at 50–57. As a result, Illinois tended to have a much higher number of uncontested elections for its state legislature than other states, averaging 53 percent in three selected elections between 1928 and 1948. See id. at 55–56. The Democratic Party had the greatest tendency to underestimate its voting strength or to engage in "setups," or "elections in which voters are denied a choice among candidates," particularly in Chicago and urban Cook County. Wiggins & Petty, supra note 450, at 355–62.

456. See Blair, supra note 448, at 79–85.

457. See id. at 63–66, 106. This party control left voters in more than one-third of all multimember districts with any meaningful decision in the selection of their representatives. See Ruth C. Silva, Relation of Representation and the Party System to the Number of Seats Apportioned to a Legislative District, 17 W. Pol. Q. 742, 753–55 (1964).

458. Compare Amy, supra note 8, at 186 (criticizing the cumulative voting system used in Illinois because it ensured "representation only for the largest minority political
The Illinois example demonstrates that some party control of the election process may be necessary under alternative voting systems to ensure minority success. Political scientists recognize that the multiplicity of minority parties under proportional systems in other countries frequently transfers decision-making authority for selecting government leadership from voters to party leaders.\[459\] In a similar manner, semi-proportional election methods such as cumulative voting may require transferring the ultimate selection of a minority group's preferred representative to an informal slating organization\[460\] or formal party hierarchy to limit the number of minority candidates.\[461\] Otherwise, "when two or more minority candidates are running and minority voters divide their votes among them, there is a chance that no minority candidate will be elected."\[462\]

Party organization can be beneficial in helping minority groups achieve their representational goals even in proportional or semi-proportional systems.

Nevertheless, proportional representation may be difficult to reconcile with two-party government elected from single-member or even multimember districts.\[463\] Illinois' use of three-member districts with cumulative voting election rules shows that it is possible for a semi-proportional system to approximate plurality results under a two-party system. Yet, this result "follows proportional representation methods but not the proportional representative principle."\[464\]

See also Dieter Nohlen, *Two Incompatible Principles of Representation*, in *Choosing an Electoral System*, supra note 22, at 83, 85 (describing majority/plurality and proportional systems as "two incompatible principles of representation" that are "antithetical" to one another "politically, systematically, and with regard to the history of ideas").
offices must continue to be based on two-party representation, opportunities to achieve truly representative bodies under proportional or semi-proportional systems become much more limited. Moreover, limiting voter choices under proportional or semi-proportional methods of election to achieve stable two-party government may replicate the very defects of majority or plurality systems that alternative voting systems are said to cure. When this occurs, it makes it harder to respond to arguments by supporters of existing single-member, winner-take-all elections that "[i]f it works, don’t fix it."465

VI. CONCLUSION

American democracy rests on the principle that government must be derived from the consent of the people. However, the principle attributes of our electoral system often fail to fulfill that promise. Geographical representation uses districting criteria that may have little connection with the actual interests of voters. Relational representation resulting from geographically based districts permits representatives, not voters, to define the boundaries of their relationship with constituents. Majoritarian representation, which is supposed to promote popular sovereignty, either is not present at all stages of the political process or exploits winner-take-all elections from districts to overrepresent particular groups of voters. Two-party representation fostered by majority or plurality election rules secures stability by limiting voter choices. Elections are a means to achieve political ends that often are inconsistent with the principle of consent.

In contrast, alternative voting systems can facilitate the ability of all voters to give or withhold their consent to the government. But in doing so, they may make significant departures from the methods of securing consent traditionally used in the United States. Geographical districting either is forsaken entirely under proportional systems or is reduced through use of multimember districts under modified semi-proportional election rules. While more voters are able to elect representatives who are responsive to their needs, relational representation is altered in a manner that may leave non-voters and losing voters without any representation at all. There is a greater opportunity for elections to reflect the popular will under truly proportional systems, but no guarantee that minority interests will not be suppressed in legislative bodies absent departures from major- ity rule. Although two-party government is possible under proportional or semi-proportional election rules, individual voting choices cannot be advanced without reducing party control. Alternative voting systems may do a better job of allowing more voters to elect candidates of their choice,

but not without sacrificing many established aspects of our representative
government.

This does not mean that alternative voting systems are to be rejected
out of hand because they depart from traditional characteristics of Ameri-
can democracy. Some jurisdictions have little if any interest in maintaining
single-member districts or at-large winner-take-all elections. Local gov-
ernments are suitable prospects for proportional or semi-proportional
elections because the majority of localities already elect their representa-
tives at-large in plurality-win, non-partisan elections. They also are
more apt to avoid problems in the administration of elections and better
facilitate relational representation through smaller constituencies that elect
fewer representatives. In addition, many places presently employ alterna-
tive voting systems or have used them in the past. With the exception of
the lower house of the Illinois legislature, all alternative voting systems
adopted in this country have been at the local level. Consequently, local
governments are the strongest candidates for alternative voting systems.

It is more difficult to reconcile proportional and semi-proportional
systems with congressional and state legislative elections, where
geographically based two-party representation is much more firmly
entrenched. Statewide at-large elections are not a viable option. ALternatively, some commentators have proposed that three-member
districts like those used in Illinois could be adopted consistent with
accepted notions of geographical and two-party representation. Use of

466. See supra notes 222–28, 411–13 and accompanying text.

467. There are exceptions to this rule, however. For instance, the use of the single
transferable vote in a large city such as New York City may face many practical
problems in the administration of elections. See supra notes 235–39 and accompanying text.
The problems that may arise illustrate the importance of assessing the specific needs and condi-
tions of a local government to determine whether alternative voting systems are viable.
See, e.g., Weaver, supra note 225, at 191–92; Which is the Best Electoral System?, supra note
403, at 36; Nohlen, supra note 463, at 89.

468. See supra notes 225–26 and accompanying text.

469. Compare Karlan, supra note 248, at 77–78 (cautioning that proponents of alterna-
tive voting systems “need to be more modest in our goals,” focusing on “local
experimentation” that ultimately might influence national changes to the current system),
with Richard H. Pildes, Principled Limits on Racial and Partisan Redistricting, 106 Yale L.J.
2595, 2555 (1997) (arguing that while “local governments in the United States are making
greater use of these alternatives . . . it is unrealistic to view as promising the political pros-
tpects for significant change in this direction, particularly at the state and national levels”).

470. See supra notes 240–50 and accompanying text.

471. See Richie & Hill, supra note 150, at 26–29; BUSHMANDERS & BULLWINKLES, supra
note 136, at 146–48. See also Dixon, supra note 46, at 50 (maintaining that a “modified
proportionality, leaving intact the basic two-party system would . . . be more in accord
with twentieth-century pluralism than the one-party tendencies which conventional dis-

trict systems exhibit”); Rein Taagepera, The Effect of District Magnitude and Properties of Two-
Seat Districts, in CHOOSING AN ELECTORAL SYSTEM, supra note 22, at 91, 101 (asserting that
an alternative voting system such as cumulative voting would undercut majoritarian representation, although it might result in government that is better able to achieve majority rule than single-member districts. Presumably political parties could offset departures from current election rules by being more receptive to recruiting candidates and obtaining support from minority groups needed to achieve electoral success.

Application of a more flexible “communities of interest” approach under single-member districts can achieve the same result, without the attendant deprivation of relational representation to some persons that may exist under proportional or semi-proportional elections. Communities of interest have the added advantage of being more consistent with state and federal districting practices, and therefore are more likely to be adopted by politically motivated legislators reticent to give greater control over the election process to third parties or individual voters. Furthermore, until federal and state laws mandating single-member district elections are repealed or invalidated, it would be futile to attempt to adopt proportional or semi-proportional representation. In the current political environment, such changes seem unlikely. Interest-based districting is a happy medium between current election systems and alternative voting systems, especially for congressional and state elections.

Districting on the basis of communities of interest does little good, however, if the Supreme Court is unwilling to permit it. Under such circumstances, alternative voting systems arguably must be adopted if fair and equal representation of all voters—especially racial minorities—is to be achieved. Nevertheless, alternative systems are not a panacea for all of the problems created by Shaw. They may resolve certain defects of our current electoral system, while introducing some new ones of their own. In addition, they cannot remedy the damage done to our system

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472. See supra notes 352–58 and accompanying text.
473. See supra notes 453, 457 and accompanying text (describing the increased electoral success of women and minorities in cumulative elections to elect representatives to the Illinois legislature).
474. See supra notes 251–63 and accompanying text.
475. See generally Akhil Reed Amar, Lottery Voting: A Thought Experiment, 1995 U. Chi. LEGAL. E 193, 201 (1995) (observing that “cumulative voting achieves a multiparty system, or at least opens up that possibility—and that’s why it probably will not be adopted, because politicians elected under the current two-party system don’t want to create that wedge for would-be competitors”).
476. The Court has given mixed signals on whether communities of interest may be the basis for districting even where it results in irregularly shaped districts. See supra notes 251–63 and accompanying text.
477. See generally Ferejohn, supra note 356, at 47 (“There is little question that [single-member district] systems have some real defects, especially with regard to representation of minorities. But [proportional representation] systems have weaknesses too and it is no
by a judiciary unwilling to fulfill its constitutional role in the political process. In this sense, the Supreme Court already has redefined American democracy in its racial gerrymandering cases.

It is unclear whether the new judicial paradigm enunciated in the Shaw cases will persist. If it does, then “the time to consider alternatives other than race-conscious districting” may have arrived. But any consideration of the appropriate alternatives should take into account the specific meaning of representation in the United States. It also is important to recognize that any model for obtaining the consent of the governed will be imperfect. If we are willing to accept the value trade-offs inherent in changing the method of election from a majoritarian or plurality system to a proportional or semi-proportional system, then some alternative voting systems may fit the bill.

478. See Tyranny of the Judiciary, supra note 13.

479. The Court’s recent opinion in Cromartie II indicates that there are five justices willing to place some limits on the reach of the Shaw doctrine. See generally 121 S. Ct. at 1462 (concluding that “the Constitution does not place an affirmative obligation on the legislature to avoid creating districts that turn out to be heavily, even majority, minority. It simply imposes an obligation not to create such districts for predominately racial, as opposed to political or traditional, districting motivations”). It remains to be seen whether the Court actually will impose a “demanding” burden of proof on all Shaw plaintiffs in the future, as the Cromartie II opinion suggests. See id. at 1458 (quoting Miller, 515 U.S. at 928 (O’Connor, J., concurring)).

480. Pildes & Donoghue, supra note 1, at 241.