

## ABOLISH DISTRICTS

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People are talking about gerrymandering. Partisan gerrymandering, racial gerrymandering, prison-based gerrymandering.<sup>1</sup> Gerrymandering jigsaws, gerrymandering art shows, gerrymandered news.<sup>2</sup> When gerrymandering hits every major media outlet from *The New York Times* to *The Wall Street Journal* to *The Economist* to *Rolling Stone*, it's a problem.<sup>3</sup> When it hits *The Daily Show*, it's a national disgrace.<sup>4</sup>

As a Virginian, I come from a long line of gerrymanderers, but what we are seeing today would make even Patrick Henry blush.<sup>5</sup> Today's gerrymandering has made a mockery of our de-

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<sup>1</sup> ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY (2013); Luke Rosiak, *Gerrymandering Partisan Lock: Shape of Things to Come*, WASH. TIMES (Nov. 22, 2012), <http://www.washingtontimes.com/news/2012/nov/22/partisan-lock-shape-of-things-to-come/>; What is Racial Gerrymandering and Why Should I care? SOUTHERN COALITION FOR SOCIAL JUSTICE (Oct. 11, 2013), <http://www.southerncoalition.org/what-is-racial-gerrymandering-and-why-should-i-care/>; *Districting by Pigmentation*, NEWSWEEK (July 7, 2010), <http://www.newsweek.com/districting-pigmentation-194474>; *Prison-Based Gerrymandering*, N.Y. TIMES (Sept. 26, 2013), [http://www.nytimes.com/2013/09/27/opinion/prison-based-gerrymandering.html?\\_r=0](http://www.nytimes.com/2013/09/27/opinion/prison-based-gerrymandering.html?_r=0).

<sup>2</sup> See Chris Kirk, *Can You Solve Slate's Gerrymandering Jigsaw Puzzle?*, SLATE (Aug. 21, 2013), [http://www.slate.com/articles/news\\_and\\_politics/map\\_of\\_the\\_week/2013/08/gerrymandering\\_jigsaw\\_puzzle\\_game\\_put\\_the\\_congressional\\_districts\\_back\\_together.html](http://www.slate.com/articles/news_and_politics/map_of_the_week/2013/08/gerrymandering_jigsaw_puzzle_game_put_the_congressional_districts_back_together.html); *Daily Show Jason Jones and the Art of Gerrymandering*, KICK! MAKING POLITICS FUN (Dec. 11, 2013), <http://rackjite.com/daily-show-jason-jones-art-gerrymandering/>; David Carr, *It's Not Just Political Districts, Our News is Gerrymandered, Too*, N.Y. TIMES (Oct. 11, 2013), <http://www.nytimes.com/2013/10/12/business/media/when-our-news-is-gerrymandered-too.html>.

<sup>3</sup> See Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES (Feb. 2, 2013), <http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html?pagewanted=all>; *The Gerrymander Scandal*, WALL ST. J. (Nov. 7, 2001), <http://online.wsj.com/article/SB1005097828258686800.html?dsk=y>; M.S., *How Can Republicans be Both Safer and More Numerous?*, THE ECONOMIST (Oct. 3, 2013), <http://www.economist.com/blogs/democracyinamerica/2013/10/gerrymandering>; Tim Dickinson, *How Republicans Rig the Game*, ROLLING STONE (Nov. 11, 2013), <http://m.rollingstone.com/politics/news/how-republicans-rig-the-game-20131111>.

<sup>4</sup> *American Horrible Story – Gerrymandering*, THE DAILY SHOW (Dec. 10, 2013), <http://www.thedailyshow.com/watch/tue-december-10-2013/american-horrible-story--gerrymandering>.

<sup>5</sup> Political lore maintains that Patrick Henry became the first gerrymanderer when he redesigned a 1789 Virginia congressional district in an attempt to help James Monroe defeat James Madison, but recent scholarship calls this account into question. See Thomas Rogers Hunter, *The First Gerrymander?: Patrick Henry, James*

mocracy in ways the Framers could not even dream about. And I'm close to convinced that there's no way to cabin its destruction.

So just as a thought experiment, I allowed myself to work off a clean slate—to set aside the system we have today and think creatively about whether a solution to this conundrum might exist, and what that solution might be; and then, *if* there was some sense as to what the right answer was, well maybe then we could start figuring out how to get there. Here's what I came up with: abolish districts.

Part I explains how bad the gerrymandering problem is, why it's beyond fixing, and what I see as the crux of the problem—single-member, winner-take-all districts. Part II moves from problem to preferred solution—abolish single-member districts and replace them with multi-member districts that utilize choice voting (aka single transferable voting), or even limited or cumulative voting systems, instead. Part III offers thoughts about how all this might happen. It's short. The main insight is that the federal statute that precludes states from trying such systems is unconstitutional, and even a Supreme Court disinclined to enter political thickets may well agree. But it bears repeating that the focus of this essay is not the how, but the what. What is the right answer, if even there is one? This is a thought experiment, a conversation starter. So let's get started.

## I. WHAT'S ALL THE FUSS ABOUT?

Four million votes. That's the going estimate of how many votes were wasted—"diluted" in election law speak—by gerrymandering in the 2012 election.<sup>6</sup> The entire point of gerrymandering is diluting votes. The opposition party's votes are crammed into districts that ensure the opposition party's candidate will win by overwhelming margins—often 60% or more—which also ensures that those votes are not in play in other districts where they could actually matter.<sup>7</sup> Meanwhile, the controlling party's votes are spread across districts with just enough partisan tilt—typically 15-30%—to ensure that the controlling party's candidate will win no matter how many of the opposing party's voters show up.<sup>8</sup> Welcome to the world of gerrymander-

*Madison, James Monroe, and Virginia's 1788 Congressional Districting*, 9 EARLY AM. STUDIES: AN INTERDISCIPLINARY J. 781 (2011).

<sup>6</sup> See Steve Coll, *Building a Better Democracy*, THE NEW YORKER (Jan. 10, 2013), <http://www.newyorker.com/online/blogs/comment/2013/01/ending-gerrymandering-and-building-a-better-democracy.html> (discussing findings of Princeton Election Consortium).

<sup>7</sup> See *How Can Republicans be Both Safer and More Numerous?*, *supra* note 3.

<sup>8</sup> See *id.*

ing, where the name of the game is wasting the opposition party's votes, while making the most of yours.

The 2012 election hurled gerrymandering into the spotlight when it showed just how devastating the practice can be—but the domino that started it all fell two years earlier. In 2010, a Republican election sweep at the state level coincided with the decennial census to give the GOP unprecedented power in redrawing congressional district boundaries.<sup>9</sup> “Democrats will not soon recover from what happened to them on a state level last night,” bragged the former executive director of REDMAP, the GOP's Redistricting Majority Project.<sup>10</sup> He was right.

In the 2012 elections, Democratic congressional candidates received around 1.4 million more votes than their Republican counterparts, but Republicans lost only 8 seats in the House of Representatives, leaving them with a 33-seat advantage.<sup>11</sup> The Princeton Election Consortium concluded that 26 of those 33 seats were gerrymandered; that is, without gerrymandering, the GOP still would have had a majority in the House, but it would have been a 5-seat advantage rather than 33.<sup>12</sup>

The state stats tell the tale. In Pennsylvania, Democratic candidates for the House received 83,000 more votes than Republican candidates, but Republicans won 13 of the state's 18 seats.<sup>13</sup> In North Carolina, Democratic candidates received 81,000 more votes than Republican candidates, but Republicans won 9 of the state's 13 seats.<sup>14</sup> In Michigan, Democratic candidates received 240,000 more votes than Republican candidates, but Republicans won 9 of the state's 14 seats.<sup>15</sup> In Wisconsin, Democrats received 43,000 more votes than Republicans, but Republicans won 5 of the state's 8 seats.<sup>16</sup> And in Maryland, Democrats proved they could play the gerrymandering game too—Democratic candidates for the House received 750,000 more votes than Republicans (around 63% of Maryland's popular vote) but won 7 of the state's 8 congressional seats.<sup>17</sup>

<sup>9</sup> See Dickinson, *supra* note 3 (noting that in the 2010 election “the GOP seized full-party control of 21 state governments—up from nine the previous year and enough to put the party in charge of redistricting 173 House seats.”).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*; *How Can Republicans be Both Safer and More Numerous?*, *supra* note 3.

<sup>12</sup> See Dickinson, *supra* note 3; see also Coll, *supra* note 6 (noting that without gerrymandering, the Republican advantage “would have been so narrow that Democrats would have been able to get bills passed if they could hang together and get a handful of defectors from the other side.”).

<sup>13</sup> Dickinson, *supra* note 3.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See UNITED STATES HOUSE OF REPRESENTATIVES ELECTIONS IN MARYLAND, 2012, [http://en.wikipedia.org/wiki/United\\_States\\_House\\_of\\_Representatives\\_elections\\_in](http://en.wikipedia.org/wiki/United_States_House_of_Representatives_elections_in)

All told, 47 of the representatives elected in 2012 won their district by a margin of 60% or more—18 Republicans, 29 Democrats.<sup>18</sup> And 134 won by margins in the 15-30% safe zone, also known as the “golden mean”—92 Republicans, 42 Democrats.<sup>19</sup> Both parties are gerrymandering their way into Congress; Republicans are just better at it.

“That’s messed up,” my 10-year-old says about the vote-seat mismatch,<sup>20</sup> and it is—but gerrymandering messes us up in other ways too. In a world where so-called “safe seats” dominate the political landscape, the competition that candidates have to worry about is not in the general election, but in the party primary that comes before it—and that means the constituency that matters is not the public, but the party base. That in turn creates a race to the ideological extremes, with elected representatives quietly admitting that they’d like to be more moderate, but can’t for fear of getting “primaried.”<sup>21</sup>

The result is a hot mess. Voters lack choice. Representatives are more responsive to parties than to the people they are supposed to represent. And the resulting body politic has little incentive for bipartisanship and compromise; indeed, the incentives all run the opposite way. Politicos warn that this is especially dangerous for American democracy because our decentralized structure affords opportunities for hardliners to grind government to a halt, as last fall’s shutdown made painfully obvious.<sup>22</sup> Meanwhile, moderate Republicans complain that Democrats aren’t the only ones hurt by gerrymandered Republican districts; extreme right-wing Republicans alienate them too, they say, and are tearing the GOP apart.<sup>23</sup>

[Maryland, 2012](#) (reporting popular vote tallies and results of election in aggregate and by seats).

<sup>18</sup> *How Can Republicans be Both Safer and More Numerous?*, *supra* note 3.

<sup>19</sup> *Id.*

<sup>20</sup> I credit Jessica Lain for the clarity that grown-ups sometimes lack.

<sup>21</sup> Yes, it’s a verb. See Mark Silva, *Getting Primaried: The Dreaded Verb*, BLOOMBERG POLITICS (Dec. 14, 2012), <http://go.bloomberg.com/political-capital/2012-12-14/getting-primaried-the-dreaded-verb/>; see also Robert Draper, *The League of Dangerous Mapmakers*, THE ATLANTIC (Sept. 19, 2012), <http://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/2/> (noting that there are some Republicans “who would be inclined to be more moderate, if they didn’t have to fear a primary challenge.”).

<sup>22</sup> See Ian Reifowitz, *First, Kill All the “Gerrymander-ers”*, HUFFINGTON POST (Oct. 1, 2013), [http://www.huffingtonpost.com/ian-reifowitz/first-kill-all-the-gerrymanderers\\_b\\_4017385.html](http://www.huffingtonpost.com/ian-reifowitz/first-kill-all-the-gerrymanderers_b_4017385.html) (noting that “extremism . . . is especially dangerous because of the way our Congress was designed to function—namely that, absent a landslide victory, one party can make it virtually impossible to get anything done, even the most basic tasks like paying our bills on time.”).

<sup>23</sup> See comment following Coll, *supra* note 6 (“Don’t assume that only Democrats are disenfranchised in Gerrymandered Republican districts. Moderate Republicans in those districts that produce extreme right wing Republican office holders are also marginalized.”); *id.* (“The creation of unassailable super-majority GOP districts has hurt Republicans as well as the nation. Answerable only to the few and the extreme,

Unfortunately, there's no end in sight. Gerrymandering used to be about entrenching incumbents; it was a gentlemen's agreement that allowed parties on both sides of the aisle to protect their own from competitive elections.<sup>24</sup> Nowadays gerrymandering is about controlling the country, which means the stakes are higher and so is the level of politics involved. "He who controls redistricting can control Congress," wrote Karl Rove in 2010<sup>25</sup>—a recognition that has brought unprecedented involvement of the national GOP in how local lawmakers draw their maps.<sup>26</sup> "We have taken the initiative to retain a team of seasoned redistricting experts that we will make available to you at no cost," wrote GOP leadership to state legislators in the wake of the 2010 elections.<sup>27</sup> Some states took the help; at least one other, Texas, saw it as a naked power grab.<sup>28</sup> Interestingly, one

these Tea Party representatives have no incentive to work even within their own party for compromise, or for the good of the country, which is why the GOP lacks national coherence. The only thing the House Republicans seem capable of producing is unseemly fighting...").

<sup>24</sup> See Dickinson, *supra* note 3; Arch Puddington, *To Renew American Democracy, Eliminate Gerrymandering* (Oct. 9, 2013), <http://www.freedomhouse.org/blog/renew-american-democracy-eliminate-gerrymandering#.UwGV0fMo7IU>.

<sup>25</sup> Karl Rove, *The GOP Targets State Legislatures*, WALL ST. J. (Mar. 4, 2010), <http://www.rove.com/articles/219?tr=y&aid=6021231>.

<sup>26</sup> REDMAP was initiated in the last 5 years. Here's what its website had to say:

As the 2010 Census approached, the RSLC [Republican State Leadership Committee] began planning for the subsequent election cycle, formulating a strategy to keep or win Republican control of state legislatures with the largest impact on Congressional redistricting as a result of reapportionment. That effort, the REDistricting MAjority Project (REDMAP), focused critical resources on legislative chambers in states projected to gain or lose Congressional seats in 2011 based on Census data.

The rationale was straightforward: Controlling the redistricting process in these states would have the greatest impact on determining how both state legislative and congressional district boundaries would be drawn. Drawing new district lines in states with the most redistricting activity presented an opportunity to solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade.

2012 REDMAP Summary Report (Jan. 4, 2013), THE REDISTRICTING MAJORITY PROJECT <http://www.redistrictingmajorityproject.com/>.

<sup>27</sup> See Dickinson, *supra* note 3 (quoting former REDMAP executive director's letter)

<sup>28</sup> According to one Texas Republican, the Republican National Committee (RNC) leadership consisted of "incredibly brilliant people who tend to think they're right, and if you don't agree with them, they don't put much effort towards convincing you," a dynamic that "rubbed raw with the leadership here in Texas." In the end, the Texas legislature basically told the GOP, "We're Texas, and we're gonna handle our maps"—and they did, but the result was a disaster. See Draper, *supra* note 21 (discussing friction between Texas and the RNC over who would control redistricting, and the litigation that followed Texas's reckless redistricting on its own).

scholar has argued that partisan gerrymandering is a safeguard of federalism because of the tremendous power that state officials wield over congressional elections<sup>29</sup>—and that would be true, if it weren't for the fact that national party leaders are seizing it for their own.

Exacerbating the problem is the fact that gerrymandering today is not only more important, but also easier to do. With the advent of mapping software and block-by-block census data, gerrymandering has become an incredibly sophisticated—and accurate—enterprise, allowing elected officials to create districts with just about any political configuration they like.<sup>30</sup> (See the Appendix for a sampling of their work).<sup>31</sup> The result is an inexorable drive towards more safe seats. As it currently stands, less than 100 of the House of Representatives' 435 seats are competitive—i.e., not controlled by one of the parties—and that number is dwindling.<sup>32</sup> Political analysts estimate that in the 2014 mid-term elections, 211 of the 234 House seats currently held by Republicans will be safe seats—a whopping 90%.<sup>33</sup>

Now that's entrenchment, and the Republicans aren't finished yet. The next move on the RNC agenda is to extend the gerrymandering that won them the House to presidential elections. How? By replacing the winner-take-all approach to Electoral College votes with apportionment according to congressional districts instead—an approach currently used by two states.<sup>34</sup> Proposals have already been advanced in a half-dozen states that swing Democrat in presidential elections but are controlled by Republican state legislatures.<sup>35</sup> The move would make electing a Democrat for president difficult, if not impossible, even with a landslide of the popular vote.

What to do. Thus far, gerrymandering reform has involved both bipartisan and nonpartisan commissions in the redistricting process, with limited success.<sup>36</sup> “There's no such

<sup>29</sup> See Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859 (2010).

<sup>30</sup> See Draper, *supra* note 21; Puddington, *supra* note 24.

<sup>31</sup> For those who can't get enough, see also *The 10 Most Gerrymandered Districts in America* (Aug. 15, 2013), <http://www.buzzfeed.com/qsahmed/the-10-most-gerrymandered-districts-in-america-dh45>; *The Top Ten Most Gerrymandered Congressional Districts in the United States* (Nov. 11, 2010), <http://pjmedia.com/zombie/2010/11/11/the-top-ten-most-gerrymandered-congressional-districts-in-the-united-states/>.

<sup>32</sup> See Draper, *supra* note 21.

<sup>33</sup> See Reifowitz, *supra* note 22.

<sup>34</sup> See Dickinson, *supra* note 3.

<sup>35</sup> See *id.*

<sup>36</sup> See John Fund, *Next Year's Gerrymandering Free-For-All*, WALL ST. J. (Nov. 5, 2010) <http://online.wsj.com/news/articles/SB10001424052748703506904575592760982146100>

thing as nonpartisan,” claims one GOP gerrymandering consultant,<sup>37</sup> and I suspect he is right. Redistricting requires choices, and choices create winners and losers. We might be able to minimize the influence of politics in redistricting, but I have little confidence in our ability to depoliticize the process.<sup>38</sup> Recognizing the point, the Supreme Court says it cannot come up with judicially manageable standards for reigning in gerrymandering.<sup>39</sup> And gerrymandering shows no signs of reigning in itself. Houston, we have a problem.

As I see it, the crux of the problem is not gerrymandering, or even redistricting—it’s districting itself. The artificially constructed nature of congressional districts is what makes manipulating district borders possible. And our single-member, winner-take-all electoral system is what makes manipulating those borders worthwhile. Even in its natural state, the results are not pretty. Minority party voters get no representation, even if they carry 49% of the vote.<sup>40</sup> Racial minorities need specially drawn districts to be heard.<sup>41</sup> Entrenchment and self-dealing are rampant.<sup>42</sup> And then there are all the distortions that drawing those districts a strategic way—gerrymandering—brings.

(noting that for the 2010 census cycle, Republicans will control redistricting in at least 195 districts, Democrats will control redistricting in 65, the parties will share control in 86, and nonpartisan commissions will control the process in 88 districts); see also *Did the California Citizens Redistricting Commission Really Create More Competitive Districts?*, FAIR VOTE, <http://www.fairvote.org/research-and-analysis/blog/did-the-california-citizens-redistricting-commission-really-create-more-competitive-districts/> (showing that California’s citizen redistricting commission had no effect on competitiveness of elections in California’s districts); John Avlon, *Lawmakers Pledge to Reform, But Gerrymandering Keeps Getting Worse*, THE DAILY BEAST (Mar. 19, 2012), <http://www.thedailybeast.com/articles/2012/02/19/lawmakers-pledge-to-reform-but-gerrymandering-keeps-getting-worse.html> (noting that Arizona’s governor tried to keep the state’s independent redistricting commission from drawing district lines that “elevated competitiveness over other goals.”)

<sup>37</sup> See Draper, *supra* note 21.

<sup>38</sup> See *supra* note 36; Justin Buchler, *The Inevitability of Gerrymandering: Winners and Losers Under Alternative Approaches to Redistricting*, 5 DUKE J. CONST. L. & PUB. POL’Y 17, 18 (2010) (“Thus, all redistricting plans can be considered “gerrymanders” and an apolitical redistricting algorithm is impossible. Moreover, because the delegation of redistricting authority affects the algorithm that will be used, it follows that...the choice of delegation is itself a choice between winners and losers, and apolitical redistricting is fundamentally impossible.”); Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts*, in REPRESENTATION AND DISTRICTING ISSUES 7, 8 (Bernard Grofman et al. eds., 1982) (“There is a sort of vague impression...that something called nonpartisanship can be built into the districting process. My own experience tells me that although I may find nonpartisanship in heaven, in the real world...there are no nonpartisans....”).

<sup>39</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 267 (2004).

<sup>40</sup> See Rob Richie and Andrew Spencer, *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, From City Councils to Congress*, 47 U. RICH. L. REV. 959, 964 (2013) (discussing asymmetry in representation of winner-take-all voting systems).

<sup>41</sup> See Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.

<sup>42</sup> See Avlon, *supra* note 36.

They say the road to hell is paved with good intentions, and single-member, winner-take-all districts prove the old adage true. Single-member districts emerged as a more democratic means of choosing representatives than the at-large state elections that prevailed in the United States through the 1840s.<sup>43</sup> Under at-large systems, majorities swept every seat, leaving large portions of the electorate without a voice.<sup>44</sup> Dividing at-large elections into smaller, single-member districts was intended to promote representation of these other viewpoints.<sup>45</sup> But single-member districts are not the only alternative to an at-large voting system. And in today's computerized world, they are not the most sensible choice.

## II. ABOLISH DISTRICTS

To flush out the alternatives to single-member, winner-take-all districts, let's first take a closer look at the at-large elections they replaced. In at-large elections, all candidates appear on a ballot together, and voters may cast as many votes as there are open seats.<sup>46</sup> Thus, if a state has 5 congressional seats, voters in an at-large election could cast one vote each for up to 5 candidates. The top 5 vote-getters win the election. Political parties operating under such a system typically offer a slate of candidates for that party, resulting in a landslide for the majority party in the state.<sup>47</sup> As an example, New Jersey's at-large election for 6 House of Representatives seats in 1830 resulted in Republicans winning all 6 seats, with vote totals ranging from 50-52% of the popular vote.<sup>48</sup> Democrats were completely shut out, despite winning around 49% of the vote.<sup>49</sup>

The civil rights era showed that at-large elections were effective in denying representation not only to voters of minority parties, but to voters of minority races as well. Indeed, federal legislation requiring the use of single-member districts arose in part as a response to efforts by Southern states to return to at-large elections in order to deny racial minorities the power of their vote.<sup>50</sup> Single-member districts could ensure representation of racial minorities by allowing for the creation of "majority-minority" districts—districts drawn so that racial minorities could elect their candidate of choice.<sup>51</sup> Despite the Supreme

<sup>43</sup> See Richie and Spencer, *supra* note 40, at 963.

<sup>44</sup> See *id.* at 964.

<sup>45</sup> See *id.* at 963-64.

<sup>46</sup> See *id.* at 962.

<sup>47</sup> See *id.* at 964.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> See *id.* at 965-67.

<sup>51</sup> See *id.* at 968, 971.



Court's misgivings about race-based gerrymandering, majority-minority districts remain the primary way of ensuring minority representation in Congress today.<sup>52</sup>

But what an odd way to go. Majority-minority districts rely on residential segregation to give racial minorities voice, which means minorities outside those geographic boundaries are out of luck. These districts are also in deep tension with the integrative ideal of the civil rights movement,<sup>53</sup> and at least according to some, result in "token representation rather than real empowerment."<sup>54</sup> There's got to be a better way.

And there is. Election reformers today are touting three modified at-large voting systems: limited voting, cumulative voting, and choice voting.<sup>55</sup> All three abandon the notion of single-member, winner-take-all districts, and thus all three have certain advantages. No district lines to administrate, manipulate, litigate. State-wide elections mean voters get more choice. And eliminating the winner-take-all system gives voice to minority viewpoints (racial and otherwise). Each system does so in a slightly different way.

Limited voting offers a twist on at-large elections in that voters cannot cast as many votes as there are open seats.<sup>56</sup> Thus, in an election for 5 congressional seats, voters might be given only one vote (or two, or three, or four) rather than the 5 they would get in an ordinary at-large election. The more limited the votes, the less able the majority is to single-handedly determine the top 5 vote-getters for those seats.<sup>57</sup> Majority voters will have to make choices, creating room for minority voters to influence election outcomes in their preferred way.

Limited voting has been adopted to resolve dozens of voting rights challenges, and is commonly touted as an improvement upon race-based districting.<sup>58</sup> But it is not without down-

<sup>52</sup> See *id.* at 968, 971; *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (reviewing racial gerrymandering under strict scrutiny standard, even if drawn "for remedial purposes").

<sup>53</sup> See Dana R. Carstarphen, *The Single Transferrable Vote: Achieving the Goals of Section 2 Without Sacrificing the Integration Ideal*, 9 YALE L. & POL'Y REV. 405 (1991).

<sup>54</sup> Richard L. Engstrom, *The Single Transferable Vote: An Alternative Remedy for Minority Vote Dilution*, 27 UNIV. SAN. FRAN. L. REV. 781, 783 (1992). See also Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and a Theory of Black Electoral Success*, 89 MICH. L. R. 1077 (1991).

<sup>55</sup> See *Modified At-Large Voting Systems*, Center for Voting and Democracy: Fact-sheet, FAIR VOTE, <http://archive.fairvote.org/pr/ALmodified.htm> (last visited Feb. 14, 2014).

<sup>56</sup> See *id.*; Engstrom, *supra* note 54, at 784.

<sup>57</sup> See Engstrom, *supra* note 54, at 784.

<sup>58</sup> See Richie and Spencer, *supra* note 40, at 986, 988; Theodore S. Arrington and Gerald L. Ingalls, *The Limited Vote Alternative to Affirmative Districting*, 17 POL. GEO. 701 (1998), available at <http://www.sciencedirect.com/science/article/pii/S0962629897000693> (presenting statistical findings of the use of limited voting to resolve voting rights cases).

sides. Limited voting invites strategic choices as voters consider where to spend their limited votes. This dynamic is most easily seen where each voter has only one vote (although it is present in every limited voting system to some degree). Under the one-vote scenario, rational voters might vote for their first choice candidate—but if they think their favorite will be one of the top vote-getters anyway, they may throw their vote to a second, or even third-choice candidate instead.<sup>59</sup> Limited voting also presents the possibility that where multiple candidates are vying for a minority group's vote, the votes are too dispersed to elect even one of the minority group's preferred candidates.<sup>60</sup> In short, limited voting may increase the representation of minority viewpoints (and empirical work suggests that it does),<sup>61</sup> but it does not solve the problem and creates new ones in its place.

Cumulative voting aims to ameliorate the downsides of limited voting by allowing voters to cast as many votes as there are open seats, and more than one vote for any given candidate. Thus, in an election with 5 open seats, voters could cast one vote for five candidates, or five votes for one candidate, or any combination in between.<sup>62</sup> Here again, the top 5 vote-getters win. Cumulative voting allows minority voters to stack their votes, increasing their ability to influence the outcome of elections without diluting the majority's voting strength.<sup>63</sup> Cumulative voting also reduces the need for strategic voting, as voters may distribute their votes among as many or few candidates as they desire.<sup>64</sup>

Like limited voting, cumulative voting has emerged as a preferred alternative to the creation of majority-minority districts in voting rights cases, and has proven successful in increasing

<sup>59</sup> The reverse is also true; where voters think their first choice may not garner enough votes, they may opt to spend their vote(s) on less desirable, but more viable, candidates instead.

<sup>60</sup> See Richie and Spencer, *supra* note 40, at 987 (“For example, suppose racial minority voters make up 25% of a jurisdiction that has a history of racially polarized voting and that uses limited voting or cumulative voting to elect a five-member city council. With a threshold of exclusion of 17%, either one or two of the minority voters' candidates of choice should be elected. However, by running two candidates, they risk electing zero candidates of choice, because if the 25% vote is split evenly between the two candidates, neither would be elected.”).

<sup>61</sup> See Arrington and Ingalls, *supra* note 58, at 723 (“In the period before the implementation of limited voting, 36% of all minority candidates won; in the period after limited voting 68% won.”).

<sup>62</sup> See Engstrom, *supra* note 54, at 784-85; see also Arrington and Ingalls, *supra* note 58, at 715 (noting that in a 7-seat race using cumulative voting, “if the voter chooses two candidates, then each one receives 3.5 votes”).

<sup>63</sup> See Engstrom, *supra* note 54, at 785.

<sup>64</sup> See Richard L. Engstrom, *Is Cumulative Voting Too Complex? Evidence From Exit Polls*, 27 STET. L. REV. 813, 826-27 (1998).

the representation of minority viewpoints of all varieties.<sup>65</sup> Even so, cumulative voting remains vulnerable to tactical voting and dilution where numerous candidates are vying for a particular group's vote.<sup>66</sup> In addition, cumulative voting may exacerbate a problem that limited voting has too—wasted votes. In an election with 5 open seats, any candidate receiving 20% of the vote will qualify as one of the top 5 vote-getters.<sup>67</sup> But in cumulative and limited voting systems, a candidate may receive 30, 40, even 50% of the vote instead, wasting votes that could make a difference elsewhere and allowing for candidates who receive an extremely small portion of the vote, but who are still among the top 5 vote-getters, to win a seat. That's why I prefer choice voting instead.

Choice voting—also known as the “single transferrable vote” (STV)—allows voters to cast only one vote, but then allows that vote to transfer from candidate to candidate according to each voter's order of preference. Voters rank their candidates of choice, choosing as few or as many as they wish to potentially get their vote. When a candidate reaches the threshold votes necessary to qualify as one of the top vote-getters in the election (again, roughly 20% of the vote in an election with 5 open seats),<sup>68</sup> the candidate is declared a winner and all surplus votes beyond that threshold are transferred to voters' second choice candidates. If no candidate meets the winning threshold, then the last place candidate is eliminated and that candidate's votes are transferred to voters' next choice. The counting and shuffling process repeats until all open seats have been filled, which is why choice voting is also known as instant runoff voting.<sup>69</sup> Perhaps a simpler explanation from an election reform website would help:

Each candidate puts out a box.

A voter puts his ballot in his favorite candidate's box.

The ballots are counted.

<sup>65</sup> See Engstrom, *supra* note 54, at 788; Richie and Spencer, *supra* note 40, at 986.

<sup>66</sup> See Engstrom, *supra* note 54, at 783 (“In a limited or cumulative voting election . . . a dispersion of the minority vote across two or more minority candidates could be fatal to the election of any minority candidate.”); Richie and Spencer, *supra* note 40, at 987 (“[B]oth cumulative voting and limited voting are vulnerable to issues with vote-splitting where too many like-minded candidates run.”).

<sup>67</sup> Actually, the percentage is slightly less than that, and slightly more complicated to figure out. See *infra* note 68.

<sup>68</sup> See *Single Transferable Vote*, ACCURATE DEMOCRACY, [http://www accuratedemocracy.com/d\\_stv.htm](http://www accuratedemocracy.com/d_stv.htm) (last visited Feb. 15, 2014) (“To win 1 of 5 seats requires the top rank on only one-fifth of the ballots or 20%.”). But that's a rough estimate; the actual number is calculated using the “Droop quota,” which is as follows: Total votes/((number of seats) + 1) + 1. See Engstrom, *supra* note 54, at 788.

<sup>69</sup> *Choice Voting*, [http://daviswiki.org/choice\\_voting](http://daviswiki.org/choice_voting) (last visited Feb. 15, 2014).

If the box gets enough ballots, it wins. . . .  
 If a round of counting ballots finds no winner, the box with the fewest votes is eliminated. Its ballots go to each voter's next (2<sup>nd</sup>) choice . . . .  
 If a candidate gets more than enough votes, the extra votes got to each supporter's next choice.<sup>70</sup>

Choice voting is more complicated than limited and cumulative voting systems, but those who have it say it's easy enough to administer.<sup>71</sup> Voters rank their candidates, votes get tallied, and computer software does the rest.<sup>72</sup>

Choice voting is my preferred alternative universe for several reasons. First, it eliminates the strategy that plagues limited and cumulative voting systems.<sup>73</sup> Voters can vote for their top choice without worrying that their vote will be wasted on candidates who either do not need it to win, or could not win even if they had it. Second, choice voting minimizes the possibility that competition among minority candidates will knock them out of the running for a seat.<sup>74</sup> Because votes are transferrable, voters can support a number of minority candidates in a single election, just not at the same time. Third, choice voting maximizes representation of the electorate. Indeed, of the three modified at-large voting systems, choice voting is widely recognized as the most reliable way to ensure that election results reflect voters' preferences.<sup>75</sup>

<sup>70</sup> *Single Transferable Vote*, *supra* note 68.

<sup>71</sup> Richie and Spencer, *supra* note 40, at 982, 985 (listing countries and municipalities that use choice voting and noting, "[C]hoice voting has repeatedly been used effectively by voters with a range of educational backgrounds."); Carstarphen, *supra* note 53, at 426-27 (describing introduction of choice voting in Northern Ireland, where only 1.5% of votes cast in the first election were invalid, and concluding "The success of the STV voting system in Northern Ireland indicates that voters do not need to understand all of the complexities of the counting process. Voters can participate successfully simply by ranking the candidates according to their preferences.").

<sup>72</sup> *See Single Transferable Vote*, *supra* note 68.

<sup>73</sup> *See Choice Voting*, *supra* note 69 (concluding that strategic voting in choice voting "is much more difficult to exploit than in plurality or block voting."). This is not to say that choice voting eliminates strategic behavior altogether. *See Single Transferable Vote*, *supra* note 68 (stating that "no preference voting system satisfies all the criteria in Arrow's impossibility theorem").

<sup>74</sup> *See Engstrom*, *supra* note 54, at 783 ("The vote transfer feature of STV allows a group of voters who support a set of candidates to differ internally over the preferability of specific candidates, without negating the group's opportunity to elect a candidate within that set.").

<sup>75</sup> *See* Richie and Spencer, *supra* note 40, at 981-82 ("Choice voting . . . is the most reliable of these three methods for accurately representing voters and upholding the principle of one person, one vote. Choice voting permits candidates or parties who receive less than majority support to receive some degree of representation."); *Modified At-Large Voting Systems*, *supra* note 55 ("[P]reference voting is nearly guaranteed to provide fair results."). Choice voting is the election reform group FAIRVOTE's

Given that this is a thought experiment, it is worth pausing to consider what would happen if we abolished districts and replaced them with modified at-large elections using choice voting instead. We have a pretty good idea as to how it would affect the representation of racial minorities. Indeed, the success of choice voting in providing representation for racial and other minorities has been the primary reason localities here in the United States have stopped using it.<sup>76</sup> Of course, such representation would not rely on racially segregated districts, as is now the case. But that means it would give voice to racial minorities outside those districts, where currently there is none, and that the focus would be on minority viewpoints, rather than venues—both of which I see as a good thing.

We have some idea how choice voting would affect political parties too. Choice voting maximizes voters' ability to elect the candidate of their choice, and thus cuts deeply into the power of parties. No primaries and no safe seats means no party control of elections. Indeed, choice voting needs no political parties at all, although it can accommodate party slates and other forms of party participation.<sup>77</sup> That said, not all parties would lose under choice voting. Parties that presented a reasonable second or third choice candidate to voters may well find entrance into the electoral market easier<sup>78</sup>—which is all the more reason both Democrats and Republicans would hate it.<sup>79</sup>

But choice voting would be good for politics in a number of ways. Candidates could win elections by being voters' second or third choice picks as well as their first, which would incentivize moderate positions with bipartisan appeal and coalition-building at most every turn.<sup>80</sup> Minority candidates viewed as extreme would find it difficult to attract second and third-preference votes, forcing them to moderate their views or roll the

choice. See *Choice Voting*, FAIR VOTE, <http://www.fairvote.org/reforms/fair-voting-proportional-representation/choice-voting/>

(last visited Feb. 15, 2014).

<sup>76</sup> See Engstrom, *supra* note 54, at 795-97 (discussing Cincinnati's 1957 decision to repeal choice voting after two African-Americans were elected to city council); *Fair Voting in the United States*, FAIR VOTE, <http://www.fairvote.org/reforms/fair-voting-proportional-representation/fair-voting-in-the-united-states/> (last visited Feb. 15, 2014) (describing New York City's decision to repeal choice voting during the Cold War after a member of the communist party was elected to city council in 1941).

<sup>77</sup> See *Single Transferable Vote*, *supra* note 68.

<sup>78</sup> See Douglas Amy, *A Fair Voting System for the United States: Making the Case for Proportional Representation*, FAIR VOTE (1993), <http://archive.fairvote.org/reports/1993/amy.html>

<sup>79</sup> See Arrington and Ingalls, *supra* note 58, at 711 ("Since it might pose a genuine threat to the duopoly of the Democrats and Republicans, we would expect it to be vigorously opposed by unanimous votes in legislative assemblies across the US.")

<sup>80</sup> See *Choice Voting*, FAIR VOTE, *supra* note 75.

dice that they have the numbers to earn a seat on their own.<sup>81</sup> And the results of choice voting, which approximate the distribution of the vote, mean that our representative democracy would be more, well, representative.

We would likely see campaigning change too. In the absence of safe seats, candidates could not be complacent and would need to reach a broad audience. That would likely increase the cost of political campaigns, although maybe not given that candidates would need a threshold number of votes, rather than a majority, to win, and would likely pool resources by running with others on a party slate. Regardless, it would likely change the nature of campaigning itself, as candidates looking to pick up other candidates' votes would find negative campaigning less efficacious.<sup>82</sup>

Choice voting would also encourage higher voter turnout. Indeed, elections that use choice voting routinely see voter turnouts of over 80%—a far cry from the 35-40% range we see year after year in congressional elections.<sup>83</sup> In part, more voters vote under choice voting because they have more choices to consider, and thus a better chance of finding a candidate they actually like. And in part, more voters vote because they know their vote actually matters.

In the United States, the challenge is not only voter turnout, but voter ignorance as well,<sup>84</sup> and how that would play out under choice voting is a hard question. There's a good chance that apathetic voters would just vote their party's slate—and if that happened, a state that ran 65% Republican and 35% Democrat would yield election results approximating those percentages.<sup>85</sup> That, along with the moderating effect of transferrable voting, strikes me as a vast improvement to the patently anti-democratic election results we have now. That said, one could imagine that over time, American voters would not just vote their party's slate. The availability of choices may well pique their interest in learning about those choices as well.<sup>86</sup>

<sup>81</sup> See *Single Transferable Vote (STV)*, ELECTORAL REFORM SOC'Y, <http://www.electoral-reform.org.uk/?PageID=483> (last visited Feb. 14, 2014).

<sup>82</sup> See *id.*

<sup>83</sup> See Amy, *supra* note 78. For national voter turnout rates in congressional and presidential elections, see *National Voter Turnout in Federal Elections: 1960 - 2012*, INFOPLEASE, <http://www.infoplease.com/ipa/A0781453.html> (last visited Feb. 15, 2014).

<sup>84</sup> See Corinna Barrett Lain, *Upside Down Judicial Review*, 101 GEO. L. J. 113, 154 (2012) (discussing voter ignorance and apathy).

<sup>85</sup> See Richie and Spencer, *supra* note 40, at 984, 995.

<sup>86</sup> American voters are “rationally ignorant”—that is, they typically do not invest in information about candidates because they conclude that it would cost them more in time, energy, etc. than their vote is worth. See Lain, *supra* note 84, at 154. If voters knew their vote mattered, that would change the calculation (although how much it would change is hard to say).

Finally, there are legitimate questions about the impact choice voting would have on the representation itself. Here lies the biggest challenge for choice voting, if only because our reigning assumption is that representation ought to be geographically defined. But why is that necessarily so? Senators represent statewide populations and we don't think they are ineffectual for that reason (other reasons, maybe, but not that one). And under the winner-take-all, single-member district approach we have now, minority party voters have a representative for their district, but that representative does not represent their views. Scholarship in this area has long recognized that representation is more about communities of interest than neighborhoods, and that it is increasingly the case that spatial proximity is a weak proxy for similar interests, concerns, and views.<sup>87</sup> That said, there is nothing about choice voting that prevents voters who care about geography from using that as a criterion in their voting preferences—just as there is nothing that prevents candidates from running campaigns that cater to particular urban, rural, or other geographically-defined communities' views.<sup>88</sup>

Maybe that's not the problem. My colleague Hank Chambers has argued that geographically-defined districts are important because they allow for a "real or perceived relationship between a representative and her constituency to flourish," which in turn "facilitates the ability of the representative to represent her constituency and allows the constituency to hold the representative accountable for her actions."<sup>89</sup> He's got a point. In a modified at-large system, voters don't have one representative who is theirs and theirs alone, and representatives don't know who exactly voted them into office. But in my mind, there's no flourishing relationship between representatives and their constituencies now; as I've already discussed, the relationship that matters in single-member districts is with the ideological activists who form the party base. Moreover, I'm not sure whether modified at-large systems render the relationship between representatives and the general public less accountable and responsive, or more. Advocates of choice voting say the latter is true—that voters have a greater connection to those they think they helped vote into office, and that choice allows them to develop relationships naturally with those who tend to most closely approximate their views.<sup>90</sup>

<sup>87</sup> See Arrington and Ingalls, *supra* note 58, at 707.

<sup>88</sup> See Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30 ST. LOUIS U. PUB. L. REV. 97, 114 (2010).

<sup>89</sup> Henry L. Chambers, Jr., *Enclave Districting*, 8 WM. & MARY BILL RTS. J. 135, 178, 182 (1999). I highly recommend this piece as an innovative attempt to have both communities of interest *and* geographical ties.

<sup>90</sup> See *Single Transferable Vote (STV)*, *supra* note 81.

I suppose the real answer is that we just don't know. But the problem with the single-member district system we have now is that we *do* know. We know which candidate will win because the districts are rigged beforehand. We know which parties control which districts. We know the current system pushes candidates to the political extremes. And we know that the results of our elections are patently undemocratic.

We ought to abolish districts. We really should. The hard part is figuring out how something like that might possibly happen.

### III. HOW IT MIGHT HAPPEN

Let's be real. Congress is not going to abolish districts. I can't imagine that state legislatures are much interested in the enterprise either. It's a safe bet that our political parties will not support the idea. And the Supreme Court? Forget about it. The Justices cannot even figure out whether the most tortured examples of gerrymandering are justiciable.<sup>91</sup>

Abolishing districts is a fight that election reform groups like FairVote (which has done incredible work in this area) are going to have to take to The People Themselves.<sup>92</sup> And what if they did? It's not inconceivable that an election reform referendum would make a state's ballot. Some already have.<sup>93</sup> Tired of waiting for courts to police the political process and knowing full well that the political process is not going to police itself, good government groups have increasingly turned directly to the people to circumvent entrenched self-interest in passing democratic reforms. And they could do so with choice voting initiatives too.

<sup>91</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 267 (2004).

<sup>92</sup> See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

<sup>93</sup> See, e.g., Proposition 11: Redistricting State of California (Nov. 26, 2008), <http://www.smartvoter.org/2008/11/04/ca/state/prop/11/> (providing results of referendum removing authority to redistrict California from elected officials to citizen's panel); Eric Russell, *Mainers Vote to Continue Election Day Registration*, BANGOR DAILY NEWS (Nov. 8, 2011, 9:46 PM), <http://bangordailynews.com/2011/11/08/politics/early-results-indicate-election-day-voter-registration-restored/> (reporting results of referendum vote in Maine to "overturn a recently passed law that would have ended a 38-year old practice of allowing voters to register on Election Day"); Jim Siegel, *GOP, Democrats Close to Election-Law Deal*, COLUMBUS DISPATCH (Apr. 26, 2012, 6:09 AM), <http://www.dispatch.com/content/stories/local/2012/04/26/gop-democrats-are-close-to-election-law-deal.html> (discussing Ohio referendum to repeal "a GOP-crafted election-law overhaul" and fight over whether GOP could repeal legislation); See Josh Israel, *Arizona Citizens Force Referendum on GOP Voter Suppression Bill, Halting the Bill For Now*, THINK PROGRESS (Oct. 30, 2013, 11:05 AM), <http://thinkprogress.org/justice/2013/10/30/2859201/arizona-voting-suppression-referendum/> (discussing referendum challenging bill passed by "Arizona's GOP-controlled legislature...designed to make it harder for citizens to vote and for candidates to get on the ballot.").



Except they can't. The problem is not the United States Constitution (thankfully). Article 1, Section 2 provides that representatives for the House "shall be apportioned among the several States which may be included within this Union, according to their respective Numbers," but does not require single-member districts.

The problem is federal law. Since 1967, federal legislation has required that states establish "a number of districts equal to the number of Representatives to which such State is so entitled, and . . . no district to elect more than one Representative."<sup>94</sup> Federal law requires single-member, winner-take-all districts.

As previously noted, federal legislation requiring the use of single-member districts arose in part as a response to attempts by Southern states to deprive racial minorities the power of their vote.<sup>95</sup> The timing was no fortuity. Southern states in the 1960s were seeing many of the devices traditionally used to disenfranchise African Americans—poll taxes, literacy tests, and the like—either declared unconstitutional by the Supreme Court or made illegal by the Voting Rights Act of 1965 (VRA).<sup>96</sup> In the wake of these actions, Southern states turned to at-large voting instead, and Congress responded by taking that move off the table.

So there it stands. Federal law prevents states from even considering choice voting (or other modified at-large voting systems) as a solution to the problems that single-member districts have wrought; states couldn't enact such reforms even if they wanted to. Apparently, Congress considered changing this rule 15 years ago with the proposed States' Choice of Voting Systems Act, but it died in committee.<sup>97</sup> Let's be real. Congress is not going to abolish districts.

But I don't think it has to because in my mind, the prohibition is unconstitutional, and even a wary Supreme Court has good reason to agree. As both the VRA and the Supreme Court have made clear, there is no right to proportional representation.<sup>98</sup> There is no right by statute and there is no right under the Constitution. But that's an entirely different proposition

<sup>94</sup> U.S. CONST. art. 1, § 2.

<sup>95</sup> See *supra* text accompanying note 50.

<sup>96</sup> See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (invalidating the poll tax); Voting Rights Act of 1965, 42 U.S.C. § 1973.

<sup>97</sup> See *The States' Choice of Voting Systems Act (HR 1173)*, FAIRVOTE, <http://archive.fairvote.org/library/statutes/scvsa99/index.html> (discussing bill and providing links to discussion, testimony, and text); HR 1173, Library of Congress, 106<sup>th</sup> Congress (1999-2000), <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:h.r.01173> (providing bill summary and status).

<sup>98</sup> See 42 U.S.C. § 1973 (" . . . nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. ").

from what federal law currently provides—that states *cannot* adopt voting systems that yield approximately proportional results, even if they want to.

As a point of clarification, none of the modified at-large systems I have discussed—not choice voting, not limited voting, not cumulative voting—guarantee proportional representation. Choice voting comes closest to yielding those results, but votes are for candidates, not parties or populations, and the results depend on how people vote. No one is guaranteed anything, except the power of his or her vote. What choice voting does is yield results that most accurately reflect voters' preferences. How can it possibly be constitutional for Congress to take that option off the states' table?

I could drag out the same arguments others have used in a feeble attempt to constitutionally regulate gerrymandering. “The right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise,” wrote the Supreme Court in *Reynolds v. Sims*.<sup>99</sup> Um, yeah. And anyone who didn’t believe that in 1964 should need no convincing now. The “one person, one vote” principle may not prohibit uberpartisan gerrymandering, but neither does it allow Congress to prohibit systems that best effectuate its mandate.

One can get to the same place based on Section 2 of the VRA, which prohibits “any electoral system that results in discrimination, irrespective of intent.”<sup>100</sup> In fact, Justice Thomas is already there (and has been for twenty years), noting that there is no reason that “a geographically dispersed minority cannot challenge districting itself as a dilutive electoral practice.”<sup>101</sup> While I happen to agree with Justice Thomas on this one—majority-minority districts do nothing to protect minorities outside those districts, and the nature of single-member districts systematically denies voice to minority voters of all varieties—one need not to go that far. The VRA (and Equal Protection Clause, Due Process Clause, First Amendment, and every other constitutional provision being thrown at the gerrymandering problem) may not require a particular solution, but neither do they allow Congress to take viable solutions off the table. And that’s exactly

<sup>99</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); see also *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution’s plain objective of making equal representation for equal numbers of people the fundamental goal of the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.).

<sup>100</sup> 42 U.S.C. § 1973.

<sup>101</sup> *Holder v. Hall*, 512 U.S. 784, 911 (1994) (Thomas, J., concurring).

what the federal mandate of single-member, winner-take-all districts does.

The key to my claim is what I'm *not* asking the Supreme Court to do, and that's why I think even a Court disinclined to enter political thickets would be willing to tip-toe around the edge of this one. Invalidating the federal mandate of single-member districts does nothing more than remove the barrier that keeps states from considering innovative solutions on their own. It does not require the Court to regulate redistricting plans. It does not require the Court to adopt judicially manageable standards. It does not require the Court to take a position on any electoral system at all. That said, Justice Thomas is surely right in noting that "there is no principle inherent in our constitutional system, or even in the history of the Nation's electoral practice, that makes single-member districts the 'proper' mechanism for electing representatives to governmental bodies."<sup>102</sup> As previously noted, multi-member districts were common until the 1840s,<sup>103</sup> which should give even originalists pause in thinking about Congress's power to prohibit states from considering multi-district electoral reform options.

In the end, I'm back to where I started. We should abolish districts. And the first step in that process is invalidating the federal statute that prohibits states from doing so, which should not be a hard call even for our current Supreme Court. The rest is up to us.

<sup>102</sup> *Holder*, 512 U.S. at 898 (Thomas, J., concurring).

<sup>103</sup> See *supra* text accompanying note 43; see also *Holder*, 512 U.S. at 897-98 (Thomas, J., concurring) ("[F]rom the earliest days of the Republic, multimember districts were a common feature of our political systems.").

### ABOLISH DISTRICTS - APPENDIX

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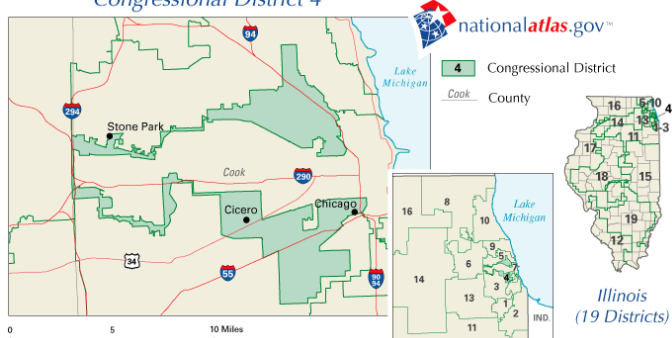
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Congressional District 4



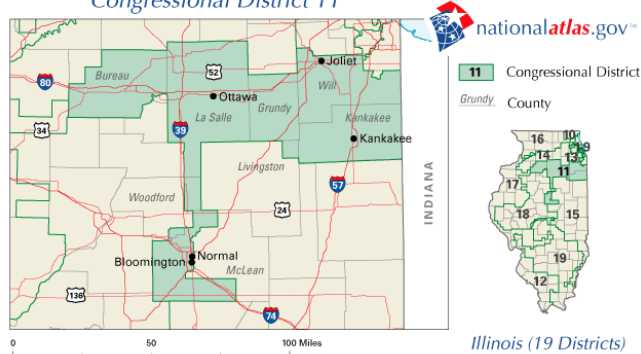
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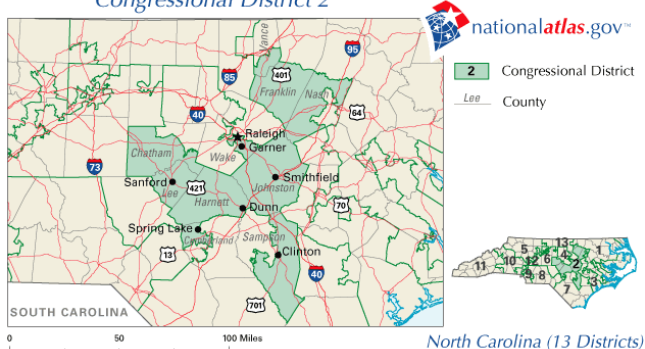
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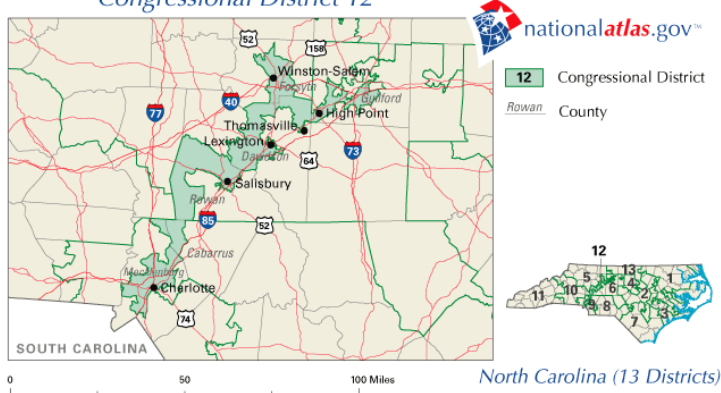
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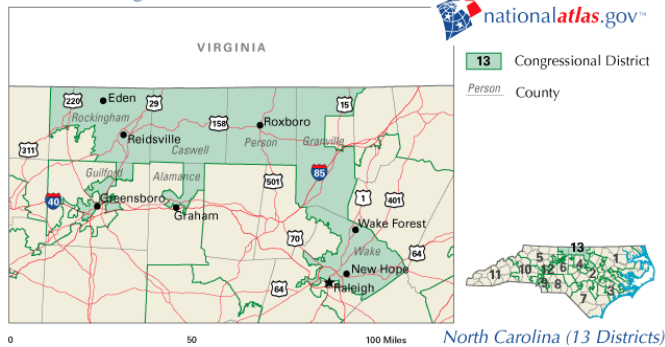
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Congressional District 12



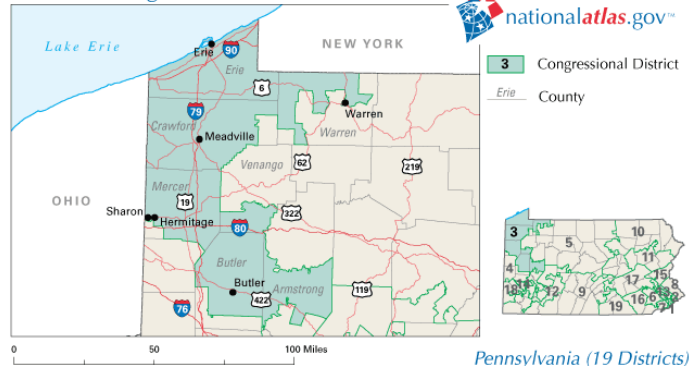
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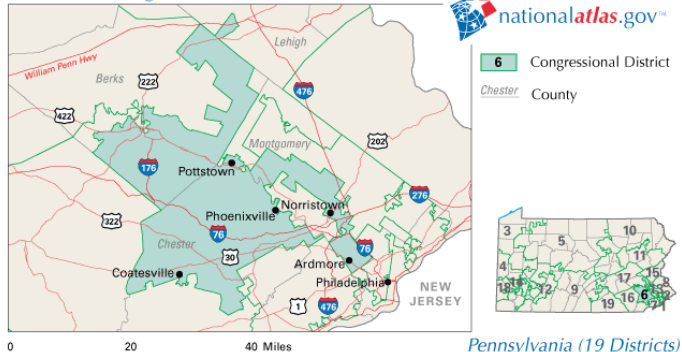
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### Congressional District 3



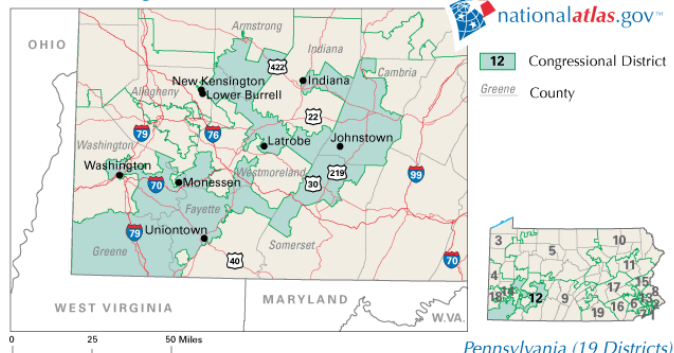
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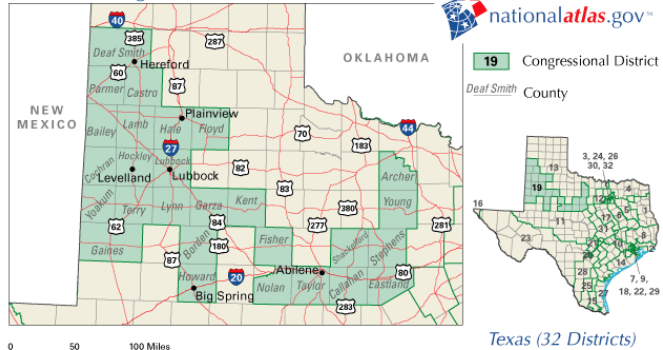
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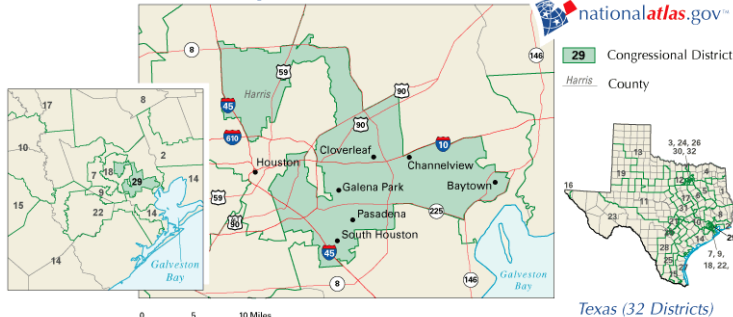
Pennsylvania's 12th Congressional District

### Congressional District 19



Texas' 19th Congressional District

### Congressional District 29



Texas' 29th Congressional District