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## CONSTITUTIONAL REFORMS TO ENHANCE DEMOCRATIC PARTICIPATION AND DELIBERATION: NOT ALL CLEARLY TRIGGER THE ARTICLE V AMENDMENT PROCESS

CAROL NACKENOFF\*

Scholars who point to ways in which the United States Constitution changes over time through processes of informal amendment, in which the Supreme Court is but one player, cannot seriously mean to suggest that all constitutional problems can be solved informally. Their understanding of legitimate transformation is, to be sure, more complex and interesting than that of the strict Article V proponents. For conservatives such as Justice Scalia and Robert Bork, there is “the whole antievolutionary purpose of a constitution,” i.e., the Constitution is not a more democratic one than the Framers chose to give us.<sup>1</sup> By this line of argument, if we want to make the Constitution more democratic, we should amend it using Article V provisions,<sup>2</sup> and not try to achieve through judicial activism what cannot be won through the political process. Most contemporary legal scholars acknowledge and can live with the fact that there are many ways in which constitutional arrangements change or are constructed over time by interaction between branches and political actors.<sup>3</sup> Sometimes problems, silences, and indeterminacies in the Constitution are resolved in this way, as those actors beyond the confines of the Supreme Court participate in working out general directions and reworking the meaning of

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1. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 44 (1997). See generally ROBERT BORK, *THE TEMPTING OF AMERICA* (1990).

2. U.S. CONST. art. V.

3. See KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* 1 (1999) (stating that beyond traditional and interpretive instruments, meaning in the Constitution “must be construed from the political melding of the document with external interests and principles”). Whittington would, however, restrict the role of the Court to interpretation and not construction. *Id.* at 209–10. Other scholars are far more comfortable with including the Court in this process of construction. See generally *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* (Ronald Kahn & Ken I. Kersch eds., 2006) (containing a series of essays that address the roles played by courts, other institutions, and activists in constitutional development).

the text.<sup>4</sup> The Court performs as one institutional actor in this process.

John Hart Ely won legions of devotees by arguing that the Constitution gave the Court power to intervene, in the name of enhancing democracy, when the political process deliberately and systematically excluded discrete and insular minorities, rendered their voice ineffective, and made it impossible for them to resolve their grievances there.<sup>5</sup> Constitutional authorization for such intervention came from what Ely saw as the overarching constitutional commitment to the democratic process.<sup>6</sup> Even if Ely is correct that the Constitution makes this textual commitment to democracy, not all constitutional problems are this tractable. Some democracy-denying aspects of the Constitution don't have a fix in the judicial branch or through other processes of construction: there are simply roadblocks.<sup>7</sup>

In *Our Undemocratic Constitution*, Sanford Levinson challenged Americans to propose a constitutional convention to make America more democratic by fixing some of these roadblocks.<sup>8</sup> This Essay will join the call, focusing on a few specific problems and considering why they should be remedied. Notwithstanding this Essay's discussion of the advantages of changing current arrangements, this author is less optimistic than Levinson that a constitutional convention, if called, would alter the Constitution in ways that would be personally appealing. There will always remain those invested in current arrangements who will not want change. Additionally, political scientists recognize that fear of discrete or tangible loss helps mobilize constituencies far more effectively than hope of a less tangible gain,<sup>9</sup> and that people

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4. Carol Nackenoff, *Constitutionalizing Terms of Inclusion: Friends of the Indian and Citizenship for Native Americans, 1880s–1930s*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT*, *supra* note 33, at 399–403.

5. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 135–36 (1980) (arguing that judicial review is properly exercised to protect the rights of minorities against failures of the political process).

6. *Id.* at 5–7.

7. As Sanford Levinson and Robert Dahl point out, the fact that small and large states have equal representation in the U.S. Senate is one such intractable problem. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 49–62 (2006); ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 17–18, 144–45 (2002).

8. LEVINSON, *supra* note 7, at 173–75.

9. See R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL'Y 371, 373–74, 394–95 (1987) (arguing that policy makers have a strong blame-avoidance incentive because voters are more sensitive to “what has been done *to* them than to what has been done *for* them”).

more easily organize around discrete interests than generalized ones.<sup>10</sup>

It is conceivable that such a convention would propose to make abortion or gay marriage unconstitutional (though the former would likely fail ratification), or prevent the federal government from passing along unfunded mandates to the states, or eliminate a pre-Rehnquist Court understanding of the “wall” of separation between church and state so that prayer can once again find its way into public schools and religion regain its “rightful” place in American life, or require that any regulation that negatively impacts the value of private property constitute a “taking” mandating compensation, or dramatically curtail the power of the Court or curb its jurisdiction over particular types of cases, or require that the federal government balance the budget each year (many state constitutions have such requirements, and these take great creativity to circumvent). Given the interests that have worked hard to mobilize at the local, state, and national level over the past quarter century,<sup>11</sup> conservatives and libertarians surely have plenty of ideas to try out. Democrats may have won an important victory in the midterm election of 2006, but they should not mistake this for the kind of infrastructure more conservative elements have put in place around the country.<sup>12</sup> What might result from a constitutional convention could be frightening for liberals.

Nevertheless, let me step up to the plate as a political scientist to propose a few constitutional reforms that I think would greatly enhance the quality of democratic deliberation and political participation in America. Surprisingly, perhaps, a couple of these would not

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10. See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 2 (1965) (arguing that, in most cases, rational self-interested individuals will not act in large groups to achieve broad social goods, even to achieve commonly beneficial goals); JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* 20–22 (1973) (applying the collective action problem to political organizing).

11. These include Christian conservatives who have become a key force in state Republican parties, sagebrush rebellion activists, and property rights advocates. *E.g.*, CLYDE WILCOX & CARIN LARSON, *ONWARD CHRISTIAN SOLDIERS?* (3d ed. 2006) (detailing the evolution of the Christian Right in America); R. MCGREGGOR CAWLEY, *FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND ENVIRONMENTAL POLITICS* (1993) (discussing the confrontational response of conservatives to federal land management decisions); RICHARD EPSTEIN, *TAKINGS* (1985) (addressing private property and the power of eminent domain).

12. See MATTHEW MOEN, *THE TRANSFORMATION OF THE CHRISTIAN RIGHT* (1992) (chronicling the evolution of the Christian Right); Duane M. Oldfield, *The Christian Right in the Presidential Nominating Process*, in *IN PURSUIT OF THE WHITE HOUSE* 254, 255 (William G. Mayer ed., 1996) (exploring the significant role and influence of the Christian Right); Mark J. Rozell & Clyde Wilcox, *Second Coming: The Strategies of the New Christian Right*, 111 *POL. SCI. Q.* 271, 279–87 (1996) (examining how the Christian Right became formidable political activists). *See also supra* note 11 and accompanying text.

seem to require constitutional amendments. Current arrangements, however, are so integrated in the fabric and tradition of our political system (like political parties) that any change might warrant using the amendment process.

Both Sanford Levinson and Robert Dahl have written so effectively in recent years about the overrepresentation of small states in the Senate<sup>13</sup> that I will not belabor this reform. This Essay will instead concentrate on the following reforms:

- Mandating that Court decisions require two-thirds of the voting members in the majority;
- Eliminating the Electoral College;
- Guaranteeing that individual citizens have a federal constitutional right to vote for President and for members of the House and Senate, and eliminating felony disenfranchisement;
- Changing the method by which redistricting occurs following the decennial census (and reversing the Court's decision in *Department of Commerce v. U.S. House of Representatives*;<sup>14</sup> and
- Instituting proportional representation and preferential voting.

#### PROPOSAL #1: SUPREME COURT SUPERMAJORITY VOTING

The number of justices serving on the Supreme Court is not fixed by the Constitution. The Judiciary Act of 1789 stipulated that “the supreme court of the United States shall consist of a chief justice and five associate justices . . . , any four of whom shall be a quorum . . . .”<sup>15</sup> Not until after the Civil War was there something approaching a consensus that the number of justices would be nine.<sup>16</sup> The six-member Court created by the first Congress had an interesting property: a simple majority and a two-thirds majority required the same number of votes—four.<sup>17</sup> If we extend the term “Framers” to the first Congresses that engaged in what Ted Lowi terms “constitutive policy”—or establishment of the government and its organizational practices<sup>18</sup>—then one must ask, what did Congress intend by the six-member Court? That any judicial decisions considered by the Court be made by a sim-

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13. See *supra* note 7 and accompanying text.

14. 525 U.S. 326 (1999).

15. Judiciary Act of 1789 § 1, 1 Stat. 73, 73 (1789).

16. The Judiciary Act of 1869 fixed the number of Supreme Court justices at nine. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 477, 478 (Kermit L. Hall ed., 1992).

17. Judiciary Act of 1789 § 1.

18. Theodore J. Lowi, *Four Systems of Policy, Politics, and Choice*, 32 PUBLIC ADMIN. REV. 298–310 (1972); see also Benjamin Ginsberg & Elizabeth Sanders, *Theodore J. Lowi and Juridical Democracy*, 23 POL. SCI. & POLS. 563, 564 (1990).

ple majority or a supermajority? I believe that the simple majority vote is in no way sacrosanct, and can be replaced by a supermajority voting requirement.

Congress has entertained multiple proposals for supermajority voting on the Court. Between 1918 and 1937, twenty-three bills proposing some sort of supermajority were introduced in the House or Senate.<sup>19</sup> Most of these proposals came from progressives infuriated by the Court's pattern of striking down social and economic legislation during this period.<sup>20</sup> While many were regular bills, some addressed the perceived problem by proposing constitutional amendments.<sup>21</sup>

Several scholars have recently argued for a supermajority rule as well. Evan H. Caminker, a professor at the University of Michigan School of Law, suggests that a supermajority requirement would move the Court closer to a "beyond a reasonable doubt" standard for judicial review, as opposed to a "preponderance of evidence" standard.<sup>22</sup> Jed Shugerman, an assistant professor at Harvard Law School, proposes that the Court can reclaim its historical commitment to deference and clarity either by adopting the two-thirds majority requirement internally or through Congressional legislation.<sup>23</sup> Max Boot, Senior Fellow for National Security Studies at the Council on Foreign Relations, asserts that a supermajority requirement also limits the problem of "federal courts unfairly striking down state laws" by removing the power of a Justice's swing vote to decide the fate of controversial legal issues.<sup>24</sup>

Those proposing either a bill or a constitutional amendment to reform Supreme Court voting could choose to confine supermajority voting to decisions involving constitutional interpretation, federal statutes, and decisions of federal circuit courts, or could decide to extend

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19. See Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons From the Past*, 78 IND. L.J. 73, 117–22 (2003) (providing an appendix that cites over sixty unique statutory and constitutional proposals from a wide variety of elected officials that would require the Supreme Court to make decisions via a supermajority).

20. Senator Borah, for instance, proposed in 1923 that the votes of seven of nine justices of the Court should be required to invalidate acts of Congress. LEROY ASHBY, *THE SPEARLESS LEADER: SENATOR BORAH AND THE PROGRESSIVE MOVEMENT IN THE 1920s*, at 32 (1972). See also WILLIAM G. ROSS, *A MUTED FURY* (1994), for a discussion on the hostility of populists, progressives, and labor unions toward the Court.

21. See *supra* note 19 and accompanying text.

22. See Caminker, *supra* note 19, at 98–101.

23. Jed Handelsman Shugerman, *A Six Three Rule: Revising Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 894 (2002).

24. MAX BOOT, *OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH* 207 (1998).

the rule across the board. The supermajority requirement could even be restricted to Supreme Court decisions invalidating laws and actions of the other federal branches. It would be worth considering what systematic patterns and effects, if any, there might be in Court responses to decisions by state high courts or federal circuit courts if there were a supermajority voting requirement. Any skew in outcomes that depended on the appointment process to the federal bench would surely vary over time.<sup>25</sup>

If we leave aside our knowledge and investment in particular precedents and decisions that currently hang by the most slender of threads, consider the consequences of the radical proposal to change to a supermajority. There are quite a few potential advantages. For Mark Tushnet and others who entertain the possibility of taking the Constitution away from the Court,<sup>26</sup> this reform would reduce the number of cases that a closely divided Court could produce. When the Court writes a large number of 5-4 opinions, other branches of government, states and state officials, and the attentive public are more likely to see the Court as political and the outcomes as arbitrary, thus undermining the prestige and authority of the Court.<sup>27</sup> Under a supermajority rule, the Court would simply not be able to issue opinions if they could not marshal the votes. Moreover, if we believe the Court is inclined to judicialize some matters better left to political branches, supermajority voting would reduce some of this activism.<sup>28</sup>

Would we want to require that a supermajority sign on to the majority opinion, not just concur in the judgment? This would displease Cass Sunstein, who wants to give members room to concur on results but differ on principles and reasons.<sup>29</sup> The one advantage of this even more radical idea is that fragmented decisions are not very helpful to legislators and policy makers, or to lower courts. However, (a) it is highly useful to democratic deliberation to hear how different

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25. As of September 2007, Republicans outnumber Democrats on the federal circuit courts (ninety-six to sixty-six), and of the Republicans, seventy-three were appointed by either former President Ronald Reagan or President George W. Bush. Federal Judicial Center, <http://www.fjc.gov> (follow "Federal judicial history" hyperlink; then follow "Judges of the United States Courts" hyperlink; then follow "The Federal Judges Biographical Database" hyperlink) (last visited Nov. 19, 2007). The Federal Judicial Center website provides a search mechanism that categorizes judges by political affiliation and by the president who nominated them.

26. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

27. Shugerman, *supra* note 23, at 896-97 (arguing that a two-thirds vote requirement for the Court would increase its legitimacy).

28. *See supra* note 23 and accompanying text.

29. CASS R. SUNSTEIN, *ONE CASE AT A TIME* 13-14 (1999).

justices reason about the meaning of the Constitution,<sup>30</sup> and (b) differently reasoned concurrences and dissents may help generate “nodes of conflict” for those outside the Court who are also engaged in generating constitutional meaning.<sup>31</sup> Therefore, I would *not* sign on to this additional requirement.

A supermajority rule could affect the Court in a variety of ways. It is conceivable that a simple version of the supermajority rule could lead to greater pressure for members of the Court to *sign on* or to compromise. Or, if the supermajority rule kept the Court from deciding certain highly controversial issues, perhaps this would be acceptable. It is even thinkable that a Court producing fewer closely divided opinions and a more stable body of precedent would be a less attractive target for activists of all stripes. We might still find many decisions wrong-headed, but we would likely have a Court not perceived as sufficiently politicized to merit much public opposition.

Of course, under a supermajority scheme, individual presidents would have less capacity to change the direction of the Court, and the Court would be less responsive to shifts in majority preference in the short run. Because the average length of tenure of justices on the Court has been rising,<sup>32</sup> it may be sensible to couple this proposal with the Carrington-Cramton proposal for limiting the Supreme Court service of federal judges appointed for life.<sup>33</sup>

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30. Mark Tushnet, Cass Sunstein, and others would like to see greater deliberation about constitutional meaning in legislatures. See *supra* notes 3, 23, 24 and accompanying text.

31. JULIE NOVKOV, *CONSTITUTING WORKERS, PROTECTING WOMEN* 16 (2001). According to Novkov, nodes of conflict are “moments in the development of doctrine during which the various groups of actors who have access to the legal community struggle among themselves and with each other to establish their interpretations of a particular legal concept as the dominant interpretation.” *Id.*

32. See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court*, 29 HARV. J.L. & PUB. POL’Y 769, 775 (2006) (noting that the average tenure for justices rose from 14.9 years during 1789–1970 to 26.1 years between 1970 and 2005). For Robert Dahl, turnover of justices is an important factor keeping the Court from becoming countermajoritarian. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284–85 (1957). The rate of turnover, however, has declined quite a bit since the time Dahl wrote, attenuating the link between the appointment process and responsiveness to majority will.

33. Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, in *REFORMING THE COURT* 467, 467–71 (Roger C. Cramton & Paul D. Carrington eds., 2006). The consideration about responsiveness of the Court via the appointment process bears on this proposal, which was endorsed by (among many others) Bruce A. Ackerman, Jack M. Balkin, Sanford Levinson, Lawrence H. Tribe, and Mark V. Tushnet. See Roger C. Cramton & Paul D. Carrington, *The Supreme Court Renewal Act* (July 5, 2005), available at <http://paulcarrington.com/Supreme%20Court%20Renewal%20Act.htm> (listing scholars who endorse the Act “in principle”). This reform proposal could be considered alongside the supermajority voting proposal.

## PROPOSAL #2: KILL THE ELECTORAL COLLEGE

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College.<sup>34</sup>

Levinson has already made clear the Byzantine nature of our system for electing presidents.<sup>35</sup> The Court in *Bush v. Gore* seems to have determined that it was just too messy and problematic to leave the 2000 election to the House of Representatives, even though the Framers expected many presidents to be selected by the House under the system ultimately adopted in Philadelphia.<sup>36</sup> Here is certainly an arena in which the Constitution has been informally amended. As *Bush v. Gore* makes clear, citizens have no constitutional right to vote for *electors* for President of the United States unless their home state legislature chooses to allow them to do so.<sup>37</sup> South Carolina became the last state to allow for direct popular election of electors, a change made nearly a century and half ago.<sup>38</sup> During the nineteenth century, the move to allocate electors on a unitary basis statewide also gained momentum—again, not constitutionally mandated.<sup>39</sup> However, not all states continued under the winner-take-all rule. Maine and Nebraska allow electoral votes to be split at the congressional district level.<sup>40</sup> California also recently considered splitting its electoral votes,<sup>41</sup> as did Colorado.<sup>42</sup> In 2007, Maryland became the first state to

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34. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (citing U.S. CONST. art. II, § 1).

35. LEVINSON, *supra* note 7, at 81–2.

36. See John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 810–11 (1961), reprinted in PRINCIPLES AND PRACTICE OF AMERICAN POLITICS 47, 63 (Samuel Kernell & Steven S. Smith eds., 2d ed. 2004) (noting that the Founding Fathers assumed that the House of Representatives would choose many presidents because the electors would fail to produce majorities after the Washington Presidency). Based on this historical information, one might ask: was *Bush v. Gore* yet another instance of the Court privileging the power of the Executive over that of Congress?

37. *Bush*, 531 U.S. at 104.

38. Robert G. Dixon, Jr., *Electoral College Procedure*, 3 W. POL. Q. 214, 215 (1950).

39. By 1832, almost all states allocated their electors on a winner-take-all basis. See DAHL, *supra* note 7, at 82; Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 946 (1996).

40. GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA 10, 152–53 (2004).

41. See George Will, *California Governor's Veto Was Good for the Nation*, CHI. SUN-TIMES, Oct. 12, 2006, at 35 (arguing that the vetoed bill that would have changed the California electoral college system to proportional voting was unconstitutional).

42. Colorado voters rejected the proposal in 2004. Kirk Johnson, *Electoral Vote Redistribution Is Defeated*, N.Y. TIMES, Nov. 3, 2004, at P9.

sign an interstate compact that would obligate each state that signed to cast all its electoral votes for the presidential candidate winning the national popular vote.<sup>43</sup> Consolidating electoral votes arguably gives the state more clout; dividing them makes it somewhat less likely that the electoral vote will diverge as much from the popular vote as it currently can and does. Tinkering with but retaining the Electoral College would be a possibility. However, we should eliminate it completely, and doing so has the potential to increase interest and turnout among voters.

The office of President of the United States has become far more powerful at the outset of the twenty-first century than it was at the time of the Founding.<sup>44</sup> Someone this important and powerful who claims to speak for and represent *all the people* should be elected by the people. If electors simply cast their votes mechanically according to the popular vote of the state, they serve no positive purpose—it is simply a ritual. There are, of course, occasional faithless electors, and there is no popular recourse for this problem. More serious issues arise because (a) small states have a disproportionate share of votes in the Electoral College, and (b) in close elections, the state's entire slate of electoral votes will generally be thrown to the presidential candidate who gets a bare plurality of the popular vote.<sup>45</sup> We need to amend the Constitution to fix these problems.

This reform enhances democracy in more than one way. Yes, it allows the people's voice better to prevail, favoring popular majorities over states and allowing more votes to count. However, it does more. Political scientists know that citizens are more likely to take an interest in elections and vote when there is an active campaign going on where they live.<sup>46</sup> Many states and congressional districts are currently ignored by candidates, because they are sure to win or lose that state.<sup>47</sup> Swing, or battleground states, in which any candidate could

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43. H.B. 148, 2007 Leg., 423rd Sess. (Md. 2007). The bill's changes do not take effect until the signing states amount to 270 electoral votes. See also Editorial, *Maryland Takes the Lead*, N.Y. TIMES, Apr. 14, 2007, at A14.

44. There are curbs on the power claimed by the Bush Administration that we may want to address separately, but I will not address them here. The recent work of Kim Lane Scheppele and collaboration by Sanford Levinson and Jack Balkin very effectively address some of the post-9/11 themes. See generally Jack Balkin & Sanford Levinson, *The Process of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006); Kim Lane Scheppele, Comment, *Small Emergencies*, 40 GA. L. REV. 835 (2006).

45. See EDWARDS, *supra* note 40, at 39; THOMAS E. PATTERSON, *THE VANISHING VOTER* 139–41 (2002).

46. See PATTERSON, *supra* note 45, at 142–44.

47. *Id.* at 141–42; DAHL, *supra* note 7, at 83.

win, get a tremendous number of candidate visits, along with visits by other national politicians and celebrity friends lobbying on behalf of candidates.<sup>48</sup> As such, a very select few states get an enormous infusion of money, media buys, and candidates—causing the residents of these states to be more politically involved in presidential elections.<sup>49</sup>

The timing of primaries privileges some voters even more in electoral politics. While residents of tiny New Hampshire, with four electoral votes, have trouble counting the number of primary candidates who visit their towns or living rooms, residents of some states have rarely if ever been engaged in campaigns or courted.<sup>50</sup> In those areas where candidates are invisible, where no campaign advertisements run, and where the election is remote, participation and electoral turnout are both lower.<sup>51</sup> When the potential electorate is mobilized, their interest in issues and in politics is higher.<sup>52</sup> The Electoral College system demobilizes many potential voters because of the strategic behavior of candidates.

One objection to the elimination of the Electoral College is that in a strict popular vote system, candidates would concentrate on large metropolitan areas, and that rural America would be neglected.<sup>53</sup> With the current strength of organized Christian conservatives, and the fact that most of the attention given to urban voters is by Democrats,<sup>54</sup> I doubt ex-urban and rural American voters would be neglected anytime soon. The current under-representation of urban

48. See LEVINSON, *supra* note 7, at 87–89; PATTERSON, *supra* note 4545, at 142–44.

49. See LEVINSON, *supra* note 7, at 88; see also *supra* notes 46–48 and accompanying text.

50. See EDWARDS, *supra* note 40, at 103–14 (2004) (discussing how candidates' visits and advertising focus primarily on battleground states); *supra* notes 44–48 and accompanying text.

51. See David Hill & Seth C. McKee, *The Electoral College, Mobilization, and Turnout in the 2000 Presidential Election*, 33 AM. POLS. RES. 700, 713–18 (2005) (finding a correlation between presidential candidate engagement and voter turnout); see also FAIRVOTE, *THE SHRINKING BATTLEGROUND: THE 2008 PRESIDENTIAL ELECTIONS AND BEYOND* 17 (2005), [http://fairvote.org/media/perp/Shrinking\\_Battleground\\_Final.pdf](http://fairvote.org/media/perp/Shrinking_Battleground_Final.pdf) (urging a popular election for the presidency because of the shrinking importance of many states in the electoral process).

52. STEVEN J. ROSENSTONE & JOHN MARK HANSEN, *MOBILIZATION, PARTICIPATION AND DEMOCRACY IN AMERICA* (2002). Rosenstone and Hansen have richly demonstrated that citizens participate in electoral activities when mobilized. But often a deliberate decision is made to not mobilize various groups of citizens. *Id.*

53. See Paul A. Rahe, *Moderating the Political Impulse*, in *SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE* 55, 68–69 (Gary L. Gregg II ed., 2001) (arguing that candidates for president would ignore less populous states under a direct vote system).

54. See Bruce E. Cain et al., *From Equality to Fairness: The Path of Political Reform Since Baker v. Carr*, in *PARTY LINES* 6, 22–23, 26 (Thomas E. Mann & Bruce E. Cain eds., 2005) (discussing how majority-minority districts are created through gerrymandering because African Americans tend to align with Democrats).

racial and ethnic groups in the census enumeration, and their consequent under-representation in the apportionment of representatives, builds in further disincentives to neglect ex-urban voters. As Jack Rakove argues, “[t]he logic of the current system encourages candidates to focus on those issues and approaches that seem most likely to sway undecided voters or mobilize loyalist turnout in the contested jurisdictions.”<sup>55</sup> Contemporary parties are unlikely to seek to mobilize those who do not participate since these nonparticipants introduce a great deal of uncertainty into election outcomes.<sup>56</sup> If the Electoral College vanishes, a vote would be a vote wherever it were cast throughout the country. Instead of the current system where candidates, parties, and political action committees use negative advertising to try to demobilize those relatively inattentive voters who might be persuaded to stay home on election day and not vote for their opponent,<sup>57</sup> and devise strategies to put together winning coalitions of states,<sup>58</sup> we might see an attempt to actually turn out voters so long as the parties are sufficiently competitive on the national level.

A historical argument for the popular vote is that the Framers were not conscientiously attempting to create a presidential selection method that provided additional protections for federalism.<sup>59</sup> The system for electing presidents was one of the last matters settled in Philadelphia in the summer of 1787, having been referred to a Committee of Eleven at the end of August.<sup>60</sup> There were many considerations involved, including fatigue, when the final plan was reported on September 6.<sup>61</sup> The discussion on the presidential selection process generally concerned how to select an executive not beholden to any

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55. Jack N. Rakove, *Presidential Selection: Electoral Fallacies*, 119 POL. SCI. Q. 21, 36 (2004).

56. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* 13–14 (1988). Piven and Cloward argue that historic efforts by reformers in the Progressive Era to demobilize African American and immigrant working-class voters in the late-nineteenth and early-twentieth centuries shaped the character of nonvoting. *Id.* at 78–84. See also *infra* notes 76–80 and accompanying text for a discussion of felony disenfranchisement.

57. PATTERSON, *supra* note 45, at 50–52.

58. *Id.* at 141–42.

59. Most of the discussion among the delegates in the final days of the Philadelphia Convention gravitated toward selection of electors by the national legislature, with some sympathy for selection of the president by popular vote. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 493–94, 500 (Max Farrand ed., rev. vol. 1937) (1911) [hereinafter THE RECORDS].

60. *Id.* at 473. The committee was elected on August 31 to deal with sections of the Constitution postponed or not acted upon. *Id.* Mr. Brearley from the Committee of Eleven reported out the Clause on Electors on September 4 and discussion continued over the next several days. *Id.* at 496–98.

61. See EDWARDS, *supra* note 40, at 88–89.

specific states or any particular constituency, which body would best know the character of the candidates, how to create an executive dependent only on the people, and how to avoid cabal and intrigue.<sup>62</sup> The finalized system of electors seemed to be a compromise settled on with little discussion; much more discussion was devoted to the branch of the national legislature that would decide the election in case a majority candidate did not emerge.<sup>63</sup>

Opponents of the plebiscitary presidency also bemoan the loss of something important to constitutional design. It has been argued that “[i]f the states are removed from the presidential election system, these unique and celebrated features of political locale will lose much of their significance. . . . [because] [w]ith a national plebiscite, the media mavens will not have to leave their offices in New York, Washington, or Los Angeles to run a presidential campaign.”<sup>64</sup> However, having worked with the *Records of the Federal Convention of 1787* for some years, I am convinced that the creation of an Electoral College was nowhere near as clearly considered as were many other provisions of the Constitution. It resulted in part from fears that the populace could not be trusted to make good decisions and would not know candidates outside their own states or regions.<sup>65</sup> As John Roche argues, the Framers were pragmatists and the Electoral College “was merely a jerry-rigged improvisation which has subsequently been endowed with a high theoretical content. . . . The future was left to cope with the problem of what to do with this Rube Goldberg mecha-

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62. See THE RECORDS, *supra* note 59, at 499–502.

63. See *supra* notes 59–62 and accompanying text. As George Edwards argues, “[m]ost of the motivations behind the creation of the Electoral College are simply irrelevant today and can be easily dismissed.” EDWARDS, *supra* note 40, at 89. See also NEAL R. PEIRCE, THE PEOPLE’S PRESIDENT 296–97 (1968), for a classic work calling for direct election of the president to resolve problems with the Electoral College system.

64. Michael M. Uhlmann, *Creating Constitutional Majorities: The Electoral College after 2000*, in SECURING DEMOCRACY, *supra* note 52, at 103, 106–07. A generation ago, Alexander Bickel cautioned against a strict majoritarian premise and argued that the Electoral College serves to make sure the president represents a diverse constituency. ALEXANDER M. BICKEL, REFORM AND CONTINUITY 13–15 (1971). Bickel felt that the “one-man, one-vote” vision of the Court professed in reapportionment decisions should not prevail for presidential elections. *Id.* at 14–15; see also JUDITH BEST, THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT 146–48 (1975) (contending that the Electoral College system actually strengthens the influence of urban issues and some minority groups such as Jews, African Americans, and Catholics).

65. See THE FEDERALIST NO. 68 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (praising the presidential selection process because the election is ultimately decided by thoughtful and deliberate electors and not the people). Hamilton’s views that the people would not have adequate knowledge of the potential candidates for president was also reflected by some delegates as evidenced in THE RECORDS, *supra* note 59, at 499–500, 512, 514, including Delegates Mason, Sherman and Gerry.

nism.”<sup>66</sup> I believe that we have coped with this unnecessarily complex and problematic system long enough, and should move to direct voting.

PROPOSAL #3: CREATE AN INDIVIDUAL FEDERAL CONSTITUTIONAL RIGHT TO VOTE FOR PRESIDENT (AND SUPERVISE THE FEDERAL ELECTION PROCESS)

It is essential that individual citizens have a federally recognized right to vote for President of the United States, not just for members of the Senate and House. If such a right were recognized, the federal government could assume greater responsibility for rules under which votes in federal elections are counted and recounted; in making sure there are numerous, well-advertised polling places; and that voting equipment used in federal elections is adequately available and reliable. The federal government could eliminate injustices of previous elections by holding accountable any state actors who suggest that people with outstanding parking tickets might be arrested if they show up at the polls, or state party activists who call black voters and tell them, incorrectly and deliberately, that their polling place has been moved.<sup>67</sup> It would give the beleaguered and whittled-away Voting Rights Act some new purchase.

While under Article I, Congress retains power to make or alter the “Times, Places, and Manner of holding Elections for Senators and Representatives” that are prescribed in each State,<sup>68</sup> Congress has been unwilling to make federal election processes and provisions uniform. This is despite adequate constitutional authority to do so “except as to the Places of chusing Senators.”<sup>69</sup> Congress’s power to pre-empt the states arguably extends to presidential elections, which take place when all Representatives and at least some Senators are up for election.<sup>70</sup>

We should move to take time, place, and manner power from the states and place this among the powers of Congress in order to make sure that the federal constitutional right to vote is equal, fair, and uni-

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66. Roche, *supra* note 36, at 811.

67. Allegations of the former illegal acts came from voters in South Carolina in 2004, and the latter from voters in New York and many other states in 2006. National Campaign for Fair Elections, Deceptive Practices and Voter Intimidation (2006), <http://www.nationalcampaignforfairelections.org/page/-/Deceptive%20Practices%20Network%20Issue%20Paper.pdf>.

68. U.S. CONST. art. I, § 4.

69. *Id.*

70. If doubt remains about the ability of Congress to pre-empt the states, an amendment to eliminate the Electoral College would be helpful.

form. If we are going to do this via constitutional amendment, Congress should be directed in clear language to exercise such power. We will then want federal rules governing voter registration that make voting easier, not harder. We could make election days for federal officials national holidays or experiment with a multi-day election to enhance participation. We can assure that federal ballot access for minor parties is not encumbered by creating rules governing nominating petitions. As well, we could revisit the Court's determination in *Timmons v. Twin Cities Area New Party* that Minnesota's ban on fusion candidacies does not violate a party's or a candidate's constitutional rights to free association under the First or Fourteenth Amendments.<sup>71</sup>

This reform would also cut the legs from under the Anti-Federalist argument advanced in *U.S. Term Limits v. Thornton* and assure that the federal government has the capacity to determine the qualifications for an individual's election to Congress.<sup>72</sup> If others believe that proposals to institutionalize term limits should come before a constitutional convention as a means to enhance democracy, it is certainly appropriate to have such a discussion. I remain unconvinced. Other reforms might better curb the influence of lobbyists and campaign contributions on legislation.<sup>73</sup> Term limits just make more legislators novices; they do not cause Congress as an institution to improve.<sup>74</sup> A constitutionally derived term limits amendment would, at least, put citizens on a level playing field, which would not be the case if individual states were able to limit terms of federal officials.<sup>75</sup>

If there were a constitutionally recognized individual right to vote for president, and if the right to vote for other federal officials was guaranteed by robust federal protection in the ways I have suggested, we could also stipulate an end to state practices of long-term felony disenfranchisement. It is not merely the case that convicted felons are

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71. 520 U.S. 351, 369–70 (1997).

72. 514 U.S. 779, 787–98 (1995).

73. For an excellent examination of corporate influence issues, see R. Kenneth Godwin & Barry J. Seldon, *What Corporations Really Want from Government: The Public Provision of Private Goods*, in *INTEREST GROUP POLITICS* (Allan J. Cigler & Burdett A. Loomis eds., 6th ed. 2002).

74. See Thomas E. Mann, *Congressional Term Limits: A Bad Idea Whose Time Should Never Come*, in *THE POLITICS AND LAW OF TERM LIMITS* 83, 84–88 (Edward H. Crane & Roger Pilon eds., 1994); Nelson W. Polsby, *Constitutional Mischief: What's Wrong with Term Limitations*, *AMERICAN PROSPECT*, Nov. 30, 2002.

75. For a discussion of this representational dimension of *U.S. Term Limits v. Thornton*, see Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 *HARV. L. REV.* 78 (1995); Neil M. Richards, Note, *U.S. Term Limits v. Thornton and Competing Notions of Federalism*, 12 *J. L. & POL.* 521 (1996).

barred from voting in most states; in many of these states, those paroled or on probation are still denied the right to vote, and in a significant number of states, ex-offenders are barred from voting for life.<sup>76</sup> These measures disproportionately affect African-American males and proliferated as ballot-restricting measures following the Civil War.<sup>77</sup> This kind of civil death has additional demobilizing, depoliticizing consequences for inner-city residents.<sup>78</sup> Due to these adverse effects, even if we cannot affect felon voting restrictions in state elections, we can at least address voting in federal elections. I believe that we can overturn the Court's *Richardson v. Ramirez* determination that lifetime disenfranchisement of ex-felons poses no Fourteenth Amendment Equal Protection difficulty,<sup>79</sup> but this will probably require rewording of Section 2 of the Fourteenth Amendment to deal with its specific mention of "crime" as a reason for disenfranchisement.<sup>80</sup>

PROPOSAL #4: CHANGE REDISTRICTING METHODS AFTER THE DECENNIAL CENSUS AND AMEND CENSUS PROCEDURES TO ALLOW STATISTICAL SAMPLING

As currently practiced, partisan redistricting has a variety of harmful consequences for democratic politics and processes.<sup>81</sup> If we retain present districting statutes (see Proposal #5 below), we need to devise a different method for drawing district boundaries following

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76. See THE SENTENCING PROJECT & HUMAN RIGHTS WATCH, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* (1998), available at <http://hrw.org/reports98/vote> (noting that, as of 1998, fourteen states barred ex-offender voting for life in many or all circumstances). Maryland previously disenfranchised ex-felons for life after two felony convictions, but changed the law in 2007 and restored voting rights to ex-felons who have completed their sentences, including time on parole or probation. See S.B. 488, 2007 Leg., 423rd Sess. (Md. 2007).

77. JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT* 41–45, 55–58 (2006). See also ALEXANDER KEYSAR, *THE RIGHT TO VOTE* 54–60 (2000), for a look at the growth of racial exclusion from the ballot prior to the Civil War, and ELIZABETH A. HULL, *THE DISENFRANCHISEMENT OF EX-FELONS* 16–17 (2006) for a review of the history of pre-Civil War disenfranchisement measures affecting criminals.

78. See Todd R. Clear, *The Problem with "Addition by Subtraction": The Prison-Crime Relationship in Low-Income Communities*, in *INVISIBLE PUNISHMENT* 181, 181–82 (Marc Mauer & Meda Chesney-Lind eds., 2002) (arguing that high incarceration rates in impoverished areas destabilize community life and collective efficacy).

79. *Richardson v. Ramirez*, 418 U.S. 24, 54–56 (1974).

80. See U.S. CONST. amend. XIV, § 2.

81. Some of these harms are congressional polarization and the creation of "safe seats" wherein one party is virtually guaranteed that their candidate will win. See NOLAN McCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 59–66 (2006) (noting that incumbents were all but invincible in the 2002 election); Norman Ornstein & Barry McMillion, *One Nation, Divisible*, N.Y. TIMES, June 23, 2005, at A23 (commenting on the substantial decline in centrist politicians from 1955 to 2004).

the decennial census—one that removes the process from state legislative majorities or that eliminates many of the prerogatives they currently enjoy.

The Court considers that, in addition to factors such as compactness and contiguity, partisan gerrymandering is a time-honored and generally constitutional reason for drawing district lines for congressional seats.<sup>82</sup> There may be limits—non-retrogression, vote dilution—when the gerrymandering impacts minority voters,<sup>83</sup> but these impose rather modest constraints on legislatures.<sup>84</sup> It is unlikely that the Court will hold otherwise in the near future. Four members of the current Court appear to consider partisan gerrymandering a nonjusticiable political question;<sup>85</sup> Justice Kennedy, citing absence of rules and precise rationale for correcting an established violation of the Constitution in some redistricting cases, concurred in the judgment in *Vieth v. Jubelirer*.<sup>86</sup>

Partisan gerrymandering generates safe legislative seats. It also imposes a great challenge on voters who want to evict incumbents or change policy direction by changing their representatives. Citizens are less likely to vote, and those who are dissatisfied with the status quo are more likely to feel alienated and disempowered if electoral outcomes are predictable and relatively safe for the majority party in state legislature. Term limits amendment proposals seek to impose

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82. See Nathaniel Persily, *Forty Years of Political Thicket: Judicial Review of the Redistricting Process Since Reynolds v. Sims*, in *PARTY LINES*, *supra* note 54, at 67, 89 (concluding that those proposing redistricting plans may legally base their decisions on partisanship); see also Michael C. Dorf, *The Supreme Court Gives Partisan Gerrymandering the Green Light—or at Least a Yellow Light* (May 12, 2004), <http://writ.news.findlaw.com/dorf/20040512.html> (analyzing the Court's rejection of a challenge to a politically gerrymandered district in *Vieth v. Jubelirer*, 541 U.S. 267 (2004)).

83. See *Davis v. Bandemer*, 478 U.S. 109, 143 (1986) (noting that political gerrymandering cases may be brought under the Equal Protection Clause if the charging party makes a threshold showing of discriminatory vote dilution).

84. See *League of United Latin American Citizens v. Perry*, No. 05-204, slip. op., 29–36 (U.S. 2006) (noting that incumbency protection can be a legitimate claim for congressional redistricting). Gary King believes that the Court may be increasingly receptive to a measure of partisan symmetry as a standard by which to gauge the constitutionality of partisan gerrymandering, since the *Vieth* majority held out some hope that partisan gerrymandering could be found unconstitutional under some circumstances if there were a manageable standard, and three members of the *LULAC v. Perry* Court exhibited interest in partisan symmetry. See Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v. Perry*, 6 *ELECTION L.J.* 2, 4 (2007).

85. See *Vieth v. Jubelirer*, 541 U.S. 267, 305–06 (2004) (Scalia, J., joined by Rehnquist, C.J., and O'Connor & Thomas, JJ.) (concluding that political gerrymandering claims under Article I and the Equal Protection Clause are nonjusticiable).

86. *Id.* at 306–07 (Kennedy, J., concurring). Justice Kennedy cited a “lack of comprehensive and neutral principles for drawing electoral boundaries. . . . [and] the absence of rules to limit and confine judicial intervention” in his opinion. *Id.*

constraints on representatives that voters themselves cannot effect at the ballot box, although partisan gerrymandering can still make it extremely difficult to change parties. Parties protect their own power at the expense of the electorate.<sup>87</sup>

Partisan gerrymandering has an insidious effect on Congress, and on the policy-making process. Keith T. Poole and Howard Rosenthal have documented how much more polarized congressional voting is now than at any time in the past century; when Congress was last this polarized, American politics was at its most violent and unstable.<sup>88</sup> Research suggests that a polarized Congress pays less attention to policies that might narrow income disparities and less attention to social welfare policy for all but the elderly.<sup>89</sup> In fact, increases in polarization in different periods of American history correlate with increases in economic inequality.<sup>90</sup> Because other evidence suggests that when Americans benefit from governmental social provision policies, they are more likely to be invested in and participate in political and civic life, the policy disinvestments we have seen since 1980 affecting all but the elderly may be linked to a decline in civic engagement.<sup>91</sup>

According to students of congressional roll-call voting, party polarization in Congress appears to increase Congress's propensity for legislative gridlock and reduces its output of significant (as opposed to trivial and narrow) legislation. "Perhaps one of the most important long-term consequences of the decline in legislative capacity caused by polarization is that Congress's power will decline relative to the other branches of government."<sup>92</sup> It even seems plausible that perceptions of Supreme Court activism may be rising because Congress is doing less and even delegating enforcement power to courts, and that such perceptions may therefore be integrally linked to what is going on elsewhere in the federal government. This is a question that students of courts might well consider.

It will take some work to devise a good plan for how and by whom district lines are to be drawn. There are proposals for independent or

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87. See PARTY LINES, *supra* note 54. But see Andrew Gelman & Gary King, *Enhancing Democracy through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 541-59 (1994) (arguing that legislative redistricting benefits American democracy because it increases responsiveness and reduces partisan bias).

88. KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING 229-32 (1997); Ornstein & McMillion, *supra* note 81.

89. See McCARTY ET AL., *supra* note 81, at 184-86.

90. *Id.* at 6-10.

91. See SUZANNE METTLER, SOLDIERS TO CITIZENS (2005) (discussing the high level of civic involvement of veterans who benefited from the G.I. Bill).

92. McCARTY ET AL., *supra* note 81, at 186.

bipartisan state commissions to draw districts because they would ostensibly be less invested in protecting the seats of incumbents.<sup>93</sup> Such commissions would not be above politics, could be beholden to the legislature, and would surely leave out the interests of third parties. One proposal calls for a bipartisan commission to reject obviously unfair plans, fairness being defined by equal and neutral treatment of all parties.<sup>94</sup> One could end up with redistricting proposals reifying the existing strength of the two major parties—better than what happens now, but would this be the optimal system to choose? If we retain traditional single-member districts, we need to consider what constitutes an appropriate congressional district: should it be heterogeneous or politically, economically, racially or ethnically more homogeneous? We may need another amendment to undo the Court's color-blindness jurisprudence going back to *Richmond v. Crosson*.<sup>95</sup>

While on the subject of reapportionment, we should make sure our reformed Constitution makes clear that an “actual [e]numeration” of the population in the decennial census stipulated in Article I, Section 2 does not preclude the use of statistical sampling.<sup>96</sup> The Census Act was amended by Congress in 1976 directing that the Secretary of Commerce “in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the ‘decennial census date,’ in such form and content as he may determine, including the use of sampling procedures and special surveys.”<sup>97</sup> In 1999, the Supreme Court in *Department of Commerce v. U.S. House of Representatives* held that this Section was still limited by Title 13, Section 195 of the United States Code, which states that “[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as ‘sampling’ in carrying out the provisions of this title.”<sup>98</sup> Thus, O'Connor,

93. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 646–47 (2002); Ryan P. Bates, Note, *Congressional Authority to Require State Adoption of Independent Redistricting Commissions*, 55 DUKE L.J. 333, 338 (2002).

94. Robert G. Dixon, Jr., *Fair Criteria and Procedures for Establishing Legislative Districts*, in REPRESENTATION AND REDISTRICTING ISSUES 7, 10–11 (Bernard Grofman et al. eds., 1982).

95. *Richmond v. J.A. Crosson*, 488 U.S. 469, 509–11 (1989) (curtailing the power of states to address a legacy of discrimination under a reading of the Fourteenth Amendment).

96. U.S. CONST. art. I, § 2, cl. 3.

97. 13 U.S.C. § 141(a) (2000).

98. *See Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 339, 343 (1999) (quoting the amended language of 13 U.S.C. § 195 (1994)). Justice Ste-

writing for the Court, decided that the Secretary of Commerce was prohibited from using statistical sampling methods to determine population for the purpose of apportioning House districts.<sup>99</sup> Obviously, deference to administrative determination of procedures was not the governing principle in this case.

Because members of the House of Representatives themselves benefit from existing rules, they are unlikely to amend Section 195 of the Census Act to eliminate what the Court sees as conflicting language. Even if Congress did act, the Supreme Court might then turn to the Constitution itself and aver that the “actual [e]numeration” language precludes statistical sampling.<sup>100</sup> According to Justice Scalia, it is “unquestionably doubtful whether the constitutional requirement of an ‘actual Enumeration,’ Art. I, § 2, cl. 3, is satisfied by statistical sampling.”<sup>101</sup> Justice Scalia’s concurring opinion in *Department of Commerce* was joined by Chief Justice Rehnquist and by Justices Thomas and Kennedy. If a future Court majority agreed with Justice Scalia’s position, statistical sampling could only occur with a constitutional amendment.

If some members of the Court are under the impression that a headcount will be more reliable than sampling, they fail to understand that a statistical sample controls for biases in a way that a headcount does not.<sup>102</sup> Moreover, the Court has permitted the Census Bureau to use “hot-deck imputation” to fill in non-responses,<sup>103</sup> which means that an assumption is made that a missing household is identical to its closest neighbor. Evidence does not indicate that hot-deck imputation is any more reliable than sampling methods. It is more likely that the current majority simply thinks there are no constitutional issues involved in undercounting and underrepresenting minority or urban residents for purposes of congressional redistricting

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vens, joined by Justices Souter and Ginsburg, dissented and argued that the Census Act required the Secretary of Commerce to use sampling in every situation, subject only to two limitations: that the Secretary, in his discretion, may choose not to use sampling for apportionment purposes and if he considers it unfeasible. *Id.* at 357–59 (Stevens, J., dissenting).

99. *Id.* at 343 (majority opinion).

100. U.S. CONST. art. I, § 2, cl. 3.

101. *Dep’t of Commerce*, 525 U.S. at 346 (Scalia, J., concurring in part).

102. Justice Breyer seems to understand this. In his opinion in *Department of Commerce*, he pointed out that “unadjusted headcounts are also subject to error or bias—the very fact that creates the need for a statistical supplement.” *Id.* at 316, 354 (Breyer, J., concurring in part and dissenting in part).

103. *Utah v. Sec’y of Commerce*, 536 U.S. 452, 457, 479 (2002). The Court permitted the technique because it found that imputation differs from sampling.

following an “actual [e]numeration.”<sup>104</sup> After all, as Justice Frankfurter famously remarked, “there is not under our Constitution a judicial remedy for every political mischief . . . .”<sup>105</sup>

However, census enumerations are high-stakes games, relevant not only for legislative apportionment but for determining access to federal revenues.<sup>106</sup> A statistical sampling method can get the head count done more accurately,<sup>107</sup> and it is also potentially less costly.<sup>108</sup> A reform is probably best accomplished here via constitutional amendment.

#### PROPOSAL #5: MOVE TO PROPORTIONAL REPRESENTATION AND PREFERENTIAL VOTING

While I am only able to touch superficially upon this final proposal, I am quite certain that we would encourage political participation in America by designing a better system of representation. It makes no sense that, with single-member districts, the Blue Party could receive 49% of the vote in every district, the Red Party receive 47% of the vote in every district, and the Green Party receive 4% of the vote in every district, and Congress would be 100% Blue Party.<sup>109</sup> Our current system does not adequately give voice to the distribution of preferences in the nation.<sup>110</sup> Minor parties have no chance of electoral

104. See Robert R. McCoy, Note, *A Battle on Two Fronts: A Critique of Recent Supreme Court Jurisprudence Establishing the Intent and Meaning of the Constitution's Actual Enumeration Clause*, 13 CORNELL J. LAW & PUB. POL'Y 637, 654–59 (2004) (discussing the Framers' likely understanding of the phrase “actual enumeration”).

105. *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

106. MARGO J. ANDERSON & STEPHEN E. FIENBERG, WHO COUNTS?: THE POLITICS OF CENSUS-TAKING IN CONTEMPORARY AMERICA 1 (1999); see also Tom G. Palmer, *Census 2000: You May Already Be a Winner!*, SLATE, Apr. 5, 2000, <http://slate.com/default.aspx?id=78474> (explaining that the U.S. Census Bureau now tries to incentivize participation by explicitly stating that access to government goods and services is determined by the forms); United States Census 2000, Flyer, Five BIG Reasons Why You Should Fill Out Your Census Form, <http://www.census.gov/dmd/www/pdf/d3236c.pdf>.

107. Reply Brief for the Appellants at \*1, *United States Dept. of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999) (No. 98-404), available at 1998 WL 801090. (“Based on abundant scientific evidence and the opinions of numerous experts and panels, the Census Bureau has determined that the use of statistical sampling mechanisms in the 2000 census will improve the accuracy of the state-level population counts that will be used in apportioning Representatives among the States.”).

108. William M. Hunt, Dir. Fed. Mgmt Issues, Gen. Gov't Div., Gov't Accounting Office, Testimony before the House Subcommittee on Census, Statistics, and Postal Personnel, *Decennial Census: Promising Proposals, Some Progress, but Challenges Remain* (Jan. 26, 1994), <http://archive.gao.gov/t2pbat4/150852.pdf>.

109. For a useful discussion of various voting methods and outcomes, see JACK H. NAGEL, PARTICIPATION 100–08 (1987).

110. See LANI GUINIER, THE TYRANNY OF THE MAJORITY (1994) (discussing the problems of our majority-rule system).

success. Lani Guinier makes the very appropriate point that if some identifiable and intensely felt interests are unable to ever contemplate winning a majority, they will feel disenfranchised because their voices are absent in policy-making circles.<sup>111</sup> She is, of course, talking about race, but her argument could pertain to feminists, environmentalists, or others.<sup>112</sup> The issue is a sense of legitimacy and belief that one's voice matters in government. There is also a good chance that if more diverse values and voices are heard there will be new ideas infused into politics.

When the Framers considered the importance of representing place, they were fighting against taxation without representation, arguing that the colonies could not be represented without a presence in Parliament.<sup>113</sup> They also thought in terms of interests divided by state and region. The customs and values in their own states might not be compatible with those in others, and potential new western states might bring yet other interests to bear, upsetting a delicate balance between coastal states and their already diverse interests, including their interest in the use of slave labor.<sup>114</sup> Geography is not the unifying interest it once was.

Furthermore, there is no constitutional requirement for single-member districts. Many states used multi-member districts to elect the first Congress. Congress created the requirement for single-member districts in the Apportionment Act of 1842, although a few states continued to elect representatives at-large following the legislation.<sup>115</sup> Subsequent apportionment bills dropped, then re-added the single-member district provisions.<sup>116</sup> Not until 1967 did Congress prohibit

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111. *Id.* at 9–10.

112. *See id.* at 19–20.

113. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 173–81 (1998); *see also Introduction to PAMPHLETS OF THE AMERICAN REVOLUTION 1750–1776*, at 93–96 (Bernard Bailyn ed., 1965).

114. *See THE RECORDS*, *supra* note 59, at 447–56 (debating the admission of new states to the union); MARK A. GRABER, *Dred Scott and the Problem of Constitutional Evil* 91–96 (2006) (discussing the continual balancing of the interest of slave states and non-slave states as the nation grew).

115. *See* Thomas E. Mann, *Redistricting Reform: What is Desirable? Possible?*, in *PARTY LINES*, *supra* note 54, at 92, 95–96 (explaining that Congress first mandated single-member districts in 1842, then effectively repealed the law in 1929, then enacted the current law requiring single-member districts in 1967); ANDREW HACKER, *CONGRESSIONAL DISTRICTING* 48–49 (1964) (noting that in the 88th Congress, 17 of 435 Representatives were elected on a statewide basis).

116. *Voting Rights: Hearings before the H. Subcomm. on Civil and Constitutional Rights*, 103d Cong. 2 (1994) (drawing of Thomas M. Durbin), *reprinted in* MARK MONMONIER, *BUSHMANDERS & BULLWINKLES* 15 (2001) (illustrating the evolution of federal redistricting standards); Mann, *supra* note 115; HACKER, *supra* note 115. *But see* Stephen

at-large and multi-member elections for states with more than one House seat, but by this point, only Hawaii and New Mexico were affected.<sup>117</sup> This legislation reflected concern, in the aftermath of passage of the 1965 Voting Rights Act, that at-large elections might dilute black voting strength in southern states.<sup>118</sup> There was an additional concern, triggered by Court opinions in *Baker v. Carr* and *Reynolds v. Sims*, that courts might compel states to hold at-large elections if they were having trouble redistricting.<sup>119</sup> While we must be mindful of vote dilution problems if we change the current system, it is important to emphasize that many aspects of the method of selection of Representatives are not based on constitutional language or inference, but rather on later statutory provisions.<sup>120</sup>

At a constitutional convention, we should discuss what kind of system would better serve us. Could we imagine municipal, regional, or statewide multi-member House districts with citizens having the same number of ballots as there are seats, and opportunities for bullet or cumulative voting? Such systems have been used at the state and municipal level.<sup>121</sup> What about preferential voting—a modified Hare system or a single transferable vote to minimize wasted votes? If voters had been able to rank preferences, many Nader voters might have indicated Gore as a second choice in 2000, for example. There would be less disincentive to vote for a third party if the strategic voter did not have to consider that her vote would likely lead to the election of her least preferred candidate.<sup>122</sup> Or, we could urge adoption of a party-list proportional electoral system, with vote totals determining

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Calabrese, *An Explanation of the Continuing Federal Government Mandate of Single-Member Congressional Districts*, 130 PUB. CHOICE 23, 37–38 (2006) (arguing that the 1842 Act remains in force today).

117. 2 U.S.C. § 2(c) (2000). Senator Bayh of Indiana proposed exempting Hawaii and New Mexico from the new legislation, but the version that passed, introduced by Senator Howard Baker of Tennessee, provided no exemption. See 113 CONG. REC. 31718–20 (1967) (Senate debate); 113 CONG. REC. 34032–39 (1967) (House debate).

118. See *supra* note 117 and accompanying text.

119. *Baker v. Carr*, 369 U.S. 186, 209–10 (1962) (holding that state voters' claims that redistricting violated their Equal Protection rights is justiciable); *Reynolds v. Sims*, 377 U.S. 533, 586–87 (1964) (upholding the Alabama district court's reapportionment of both houses of the Alabama legislature); see also *Branch v. Smith*, 538 U.S. 254, 290 n.5 (Stevens, J., concurring) (recounting the legislative history of 2 U.S.C. § 2a(c) (2000)).

120. See *supra* note 116 and accompanying text.

121. See GUINIER, *supra* note 110, at 14–16 (discussing examples where alternate systems such as cumulative voting have been used in American state and local politics); Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L. J. 144, 153–60 (1982) (arguing for a cumulative voting system).

122. A classic examination of strategic voting and the minimization of maximum regret calculation (minimax regret) is John A. Ferejohn & Morris P. Fiorina, *The Paradox of Not Voting: A Decision Theoretic Analysis*, 68 AM. POL. SCI. REV. 525 (1974).

how many of the party's candidates win. This would have the potential virtue of not further undermining the role of parties in elections.

Many of these options have something to recommend them in terms of enhancing the democratic process, improving representation, and making people feel they have more of a stake in electoral outcomes.

#### CONCLUSION

Many other proposals could be advanced. We should also think carefully about provisions that would preserve rights, liberties, workplace and environmental protections, and other values we have worked hard to come by in an era of emerging global governance. Despite our successes in the past 220 years, there are surely ways we could form a better plan of union for a twenty-first-century nation. I believe the proposals I offer would help reinvigorate democracy and enhance democratic processes, though my list is far from exclusive.