

**MAKING VOTES COUNT: JUDICIAL AND LEGISLATIVE REMEDIES FOR  
ENSURING PROPORTIONALITY IN CONGRESSIONAL AND STATE ELECTIONS**

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## Abstract

*The focus of this paper is identifying a partial remedy to exceptionally low rates of voter turnout in the U.S. The remedy requires rectifying a systematic problem at the heart of the U.S. Single Majoritarian District (SMD) system of elections: disproportionality between the share of votes of a particular party and the share seats that party has in government. This system is incompatible with the principal of voluntary proportionality, a principle which guarantees the equal power and effectiveness of all votes as outlined by the U.S. Constitution and Supreme Court. After outlining the place of voluntary proportionality in the history of U.S. voting rights, I will specifically examine what structural remedies are available for helping the U.S. electoral system realize this principle. These remedies will include systematic changes that local, state and federal legislatures can quickly and effectively implement. I will also review a proposed judicial remedy to the structural problems of the U.S. SMD system, as well as reasons for and against this solution. I will argue that – with historical evidence from U.S. cities and states – an electoral system that adheres to voluntary proportionality can enjoy benefits like increased voter turnout, greater satisfaction in government and more competitive elections and greater responsiveness of elected officials to the wishes of their voters. Finally, I will argue that while a system guided by the principle of voluntary proportionality may not be feasibly implemented on a national level anytime soon, a more realistic approach may involve smaller changes at the state or municipal level.*

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## INTRODUCTION: PARTICIPATION IN U.S. ELECTIONS

Every election cycle, millions of eligible voters across the United States avoid participating in local, state and federal elections. For last year's presidential election, nearly 100 million people, over 40 percent of the eligible population, didn't go to the polls or send in an early ballot.<sup>1</sup> For midterm elections the problem is worse: over 60 percent of the population doesn't participate.<sup>2</sup> Out of 35 member nations of the Organization for Economic Cooperation and Development (OECD), participation of eligible voters for the most recent national election U.S. falls to 28<sup>th</sup>.<sup>3</sup>

Despite the faltering levels of citizens who exercise it, the right to vote has a colorful history in U.S. constitutionalism. Since the birth of the nation, the right to vote has maintained a central, albeit contested position in its pantheon of fundamental constitutional freedoms, like rights to free speech, legal counsel and firearms. The struggle to make the right universal involved decades of civil disobedience, protests, marches and a war that tore the nation apart. Racial minorities, women, and young adults were chastised, beaten and bloodied for their attempts to expand voting rights to include their ranks. The right to vote has also made up a voluminous part of the Supreme Court's docket and a vast body of legal theory. For every ten years, in response to new demographic data from the U.S. Census Bureau, dozens of new lawsuits are filed to contest district maps out of a desire to maintain the integrity of one's right to vote.

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<sup>1</sup> McDonald, Michael P. "2016 November General Election Turnout Rates." United States Elections Project. Accessed March 14, 2018. <http://www.electproject.org/2016g>.

<sup>2</sup> "Participation in Elections for President and Representatives." United States Census Bureau. Accessed March 20, 2018. <https://www.census.gov/prod/3/98pubs/98statab/sasec8.pdf>

<sup>3</sup> DeSilver, Drew. "U.S. Trails Most Developed Countries in Voter Turnout." Pew Research Center. May 15, 2017. Accessed March 27, 2018. <http://www.pewresearch.org/fact-tank/2017/05/15/u-s-voter-turnout-trails-most-developed-countries/>.

A representative democracy is composed of lawmaker's whose power is contingent on the will of voters. The lawmaker is an agent of the citizenry, accountable to the citizen's right to vote as well as under pressure of their other rights to free speech, press and protest. Because of this, leading Western political philosophers have stressed the centrality of voting rights to the survival of representative democracy and human freedom. John Rawls refers to the right to vote as one of a few "constitutional essentials," alongside the right to hold property and freely practice religion, that any ordered society requires.<sup>4</sup> Ronald Dworkin believed that "the right to vote is surely at least as important a badge of equal citizenship as the right to speak."<sup>5</sup> According to Thomas Paine, "the right of voting for representatives is the primary right by which other rights are protected."<sup>6</sup> Why then, given the lengthy, bloody struggle surrounding such an important right, do millions of eligible citizens not take the time to exercise them in regularly scheduled elections?

Social science provides several compelling explanations for this: successful suppression efforts; a flood of dark money for campaigns that cause widespread feelings of disappointment in the governing system; citizens expressing protest; or crippling poverty that keeps many potential voters working low-wage jobs rather than waiting in line for the polls. But this paper will only focus on one explanation, which lies at the heart of the U.S. federal electoral system: the fact that the design of our electoral system does not guarantee a vote of equal effectiveness for all of its citizens.

The design of electoral laws for the U.S. House of Representatives is not commensurate with modern standards of equal representation. It also keeps elected

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<sup>4</sup> Rawls, John. *Political Liberalism*. New York, NY: Columbia University Press, 2005.

<sup>5</sup> Dworkin, Ronald. "The Decision That Threatens Democracy." *The New York Review of Books*. May 13, 2010. Accessed March 30, 2018. <http://www.nybooks.com/articles/2010/05/13/decision-threatens-democracy/>.

<sup>6</sup> Paine, Thomas. *Dissertation on First-principles of Government*. Paris, France: V. Griffiths, 1795.

officials from effectively representing millions of U.S. citizens, whose votes are either of varying effectiveness or not cast at all. The Supreme Court has even outlined a constitutional principle of a citizen's right to "an equally effective voice" through the vote over fifty years ago.<sup>7</sup> But the electoral system itself has not been modified to properly match this principle. In order to fully realize the promise that universal, constitutionally protected voting rights entail, substantial changes, whether through judicial rulings or legislative reform, must be made to the design of our electoral system.

### **ELECTIONS, EQUALITY, AND THE GOALS OF DEMOCRACY**

Voting rights serve two important functions in a representative democracy: (1) they allow citizens to participate as equals in a representative democracy by electing lawmakers, and (2) they ensure responsiveness of lawmakers to citizens' preferences. Both of these functions, *equality* and *responsiveness*, have their roots in fundamental principles of the U.S.'s constitutional republic, enshrined in our founding documents and further reinforced by Supreme Court jurisprudence. But they are also closely related to each other, in that realization of one enhances the fuller realization of the other. This section will first outline each function, then explain how this relationship is captured by the principle of voluntary proportionality.

#### *Responsiveness of elected officials to citizens*

First, a definition of what "responsiveness" means in the context of electoral representation. In the simplest terms, responsiveness is the change in the composition of

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<sup>7</sup> *Reynolds v. Sims*, 377 U.S. 533, (1964), 565-570.

elected lawmakers in response to different voting patterns of their constituents. G. Bingham Powell, from the University of Rochester, revealed through a study of 153 elections in 20 separate representative democracies that, in terms of this definition of responsiveness, “votes do make a difference.”<sup>8</sup> If citizens expressed their disapproval toward incumbents by voting against them, data indicated that incumbents lost their power at a much greater rate than those that received increased votes. American political scientist William H. Riker agrees that the ability to vote out representatives that have failed to act on the preferences of citizens has “the potential of preventing tyranny and rendering officials responsive.”<sup>9</sup>

But the vote – in combination with other citizen-based pressure mechanisms like letters, advertisements, marches, investigative reports, and public inquiries – ensures much more than just a binary, yes-or-no mandate for policymakers. It is a crucial tool in the citizens’ arsenal to shape public policy in accordance with their preferences. Extensive studies on the relationship between constituent preferences (expressed through votes, letters, public forums and other mechanisms) and the policy choices of representatives, dating back to the 1960s, show a strong causal link. Donald Stokes and Warren Miller revealed the “correlation of congressional roll call with constituency opinion” in a 1963 model on the issues of civil rights and the provision of social welfare.<sup>10</sup> Their finding of a “measurable degree of congruence” between opinions of district constituencies and the decisions of policymakers was replicated through several other studies over the last half-

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<sup>8</sup> Powell, G. Bingham. *Elections as Instruments of Democracy: Majoritarian and Proportional Visions*. (New Haven, CT: Yale University Press, 1988), 120.

<sup>9</sup> Riker, William. "Social Choice Theory and Constitutional Democracy." In *Philosophy and Democracy: An Anthology*. (Oxford: Oxford University Press, 2003), 243-51.

<sup>10</sup> Miller, Warren E., and Donald E. Stokes. "Constituency Influence in Congress." *American Political Science Review* 57, no. 01 (1963): 45-56.

century.<sup>1112</sup> While citizens don't have complete control through voting, it is still a crucial mechanism that citizens can employ to hold officials accountable to their policy preferences. This is why Powell refers to elections as "instruments of democracy," or vessels that enable citizens to shape the direction of public policy, all the way from the selection of candidates to the formation of policy packages to the passage of laws.<sup>13</sup> And while the responsiveness of elected officials tends to be driven by more elitist, organized, and affluent citizens on foreign policy, political scientists have determined that lawmakers are much more deferential to larger, economically diverse voting groups on domestic policies like health care, civil rights and tax policy.<sup>14</sup>

The presence of responsiveness is one of the greatest distinctions between a representative democracy and an authoritarian dictatorship. Being able to voice one's displeasure in the the direction of a government's agenda, and having that displeasure signaled through voting, is what makes the right to vote as crucial as the right to protest or speak. If citizens are kept from influencing election outcomes through voting, lawmakers have no incentive to respond to the their preferences in crafting a nation's policies. Citizens would have to outsource their role over the formation of public policy to a class of intellectuals, bureaucrats, or a single dictator. This will not only lead to policymaking that will more likely be out of sync with the wishes of citizens – it will also trample over any notion of political equality, elevating elected officials to a class of their own of artificial superiority. While lawmakers, according to Thomas Christiano of the University of Arizona,

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<sup>11</sup> Miller, 50.

<sup>12</sup> Gilens, M. "Inequality and Democratic Responsiveness." *Public Opinion Quarterly* 69, no. 5 (2005): 778-96.

<sup>13</sup> Powell, G. Bingham. *Elections as Instruments of Democracy: Majoritarian and Proportional Visions*. (New Haven, CT: Yale University Press, 1988), 120.

<sup>14</sup> Griffin, John D., and Brian Newman. "Are Voters Better Represented?" *The Journal of Politics* 67, no. 4 (2005): 1206-1227

need some deference from citizens in crafting complex policies that require expertise, lawmakers of a democratic republic must defer to citizens when determining the *aim* of these policies.<sup>15</sup> This setup aligns with Joseph Schumpeter's formulation that in a system of free and fair elections, politicians are the agent to the citizens' principal, not the other way around.<sup>16</sup> The right to vote is an indispensable ingredient in this agent-to-principal relationship.

The importance of the universal right to vote has been recognized by political scholars and philosophers for centuries. As John Stuart Mill warned, if the individuals of a nation are "without any potential voice in their own destiny," then their intellectual and moral capacities will become diminished to the point of barbarism.<sup>17</sup> Without the ability to control the agenda of their governing institutions through voting, citizens will have no motivation to exercise the moral and intellectual energy that comes with being a citizen in a liberal, pluralistic society. They will not be equipped to argue, deliberate, participate in or dictate the aims of public policy, making them passive subjects to the wishes of a detached class of bureaucrats.

Like other fundamental rights guaranteed by the U.S. constitution, the value of the right vote is closely couched in the equal ability of citizens to effectively exercise it. Recently, a great amount of literature has focused on the unequal responsiveness of politicians to the preferences and voting patterns of U.S. citizens. The data, according to Larry M. Bartels, reveals that elected officials "respond unequally to the views of rich,

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<sup>15</sup> Christiano, Thomas. *The Rule Of The Many: Fundamental Issues In Democratic Theory*. (Boulder: Taylor and Francis, 2018).

<sup>16</sup> Schumpeter, Joseph. *Capitalism, Socialism and Democracy*, New York: Harper and Row, 1956.

<sup>17</sup> Mill, John Stuart. *Considerations on Representative Government*. (Indianapolis: Bobbs-Merrill, 1958), 143.

middle-class and poor constituencies,” arguing that the preferences of more affluent voters are given more deference than those of poorer ones.<sup>18</sup> If this political inequality along the lines of economics is true, initiatives to elevate the standing of poorer citizens in the minds of lawmakers is crucial. But the focus of this paper will be on a deeper problem of voter inequality that is built into the structure of the U.S.’s *single majoritarian district* system (SMD), which is the design of the vast majority of U.S. state legislatures and the House of Representatives. For the next section, I will outline the importance of equality between all votes of U.S. citizens, both in terms of *power* and *effectiveness*, and the steps institutions like the U.S. Supreme Court and Congress have taken to address systematic inequality over the last half century.

### *Qualitative and quantitative equality*

Equality in the U.S. electoral system usually evokes the standard of “one person, one vote” outlined by the Supreme Court’s series of landmark voting rights decisions in the 1960s. In one of these decisions, *Reynolds v. Sims*, the court claimed that equality between voters is “a bedrock of our political system,” and that ensuring this equality required that votes in different state counties be given an equal amount of weight in electing representatives.<sup>19</sup> At the time in 1963, the focus of the case was Alabama Legislature, which was made up of rural and urban counties that each had substantial variation in their populations of eligible voters. According to a federal district court, “Population variance ratios of up to about 41-to-1 existed in the Senate, and up to about 16-to-1 in the House,”

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<sup>18</sup> Bartels, Larry M. *Unequal Democracy: The Political Economy of the New Gilded Age*. (New York: Russell Sage Foundation), 2016, 255.

<sup>19</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964), 563.

giving Alabama voters in sparsely populated counties more sway in selecting elected officials than those in densely populated ones.<sup>20</sup> These population differences were so egregious that the court deemed them a violation of the Equal Protection Clause of the 14<sup>th</sup> amendment. The *Reynolds* ruling required state legislatures to draw county lines that encompassed equal populations, with a few exceptions for some small, contiguous political groups. This ruling was part of a constitutional and nation-wide overhaul of county lines for state legislatures. Within a year, the court also ruled to enact a similar “reapportionment” requirement for how U.S. Congressional districts were drawn in *Wesberry v. Sanders*.<sup>21</sup> These cases helped enshrine new standards for population counting that are still practiced to this day by state legislatures and redistricting commissions.

This standard of “one person, one vote” from *Reynolds* is an important chapter in the history of equality in electoral participation. The notion that a U.S. citizen is entitled to a vote of equal mathematical weight, or equal political power, to every other citizen in the election of lawmakers is a crucial ingredient to the substance of votes in a U.S. democracy. If geographic, demographic or mathematical features dilute the strength of a vote without good reason, it is less a fundamental right than a gift whose value is contingent on arbitrary factors.

But the court’s *Reynolds* standard is only the start, not the end, of a conversation on the importance of effective voting rights. This is because it only realizes the idea of *quantitative equality* between individual votes, not *qualitative equality* among different voting groups. In other words, it simply requires that each vote for an elected representative be, in the words of Professor Charles Beitz of Princeton University, “equally

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<sup>20</sup> 377 U.S. 533. (1964), 562.

<sup>21</sup> *Wesberry v. Sanders*, 376 U.S. 1, 43 (1964).

weighted.”<sup>22</sup> *Quantitative* equality is met if each voter is able to overcome an equal amount of resistance in voting for a candidate. If each voter, regardless of their geography, the candidate they vote for, or what group they vote with, has the same *power* to exercise their right to vote, quantitative equality is met. Qualitative equality, on the other hand, is a much more difficult, complicated standard to meet, but no less important. Qualitative equality is met if every citizen’s vote, in addition to being equally weighted, also has equal *effectiveness* in electing a lawmaker.

To understand this concept, consider a fictional jurisdiction with three counties: County X, County Y and County Z. Each elects one representative to be part of the state legislature. If each have different populations, say County X has 1,000, County Y has 5,000 and County Z has 15,000, that means that the vote of a citizen in County X has greater weight than a citizen’s vote in County Y, and even greater than a citizen in County Z. As might seem clear, quantitative inequality is fairly easy to spot, and the remedy is (usually) easy to prescribe: if there are variations in population for a given number of counties, each vote will not be of equal weight, meaning that the lines must be redrawn (barring any obvious geographic obstacles). The variation of population between counties is a phenomenon that Larry Alexander calls “quantitative vote dilution,” and the solution to it is a relatively simple procedural fix: equalize the amount of votes in each county.<sup>23</sup>

But what if the voters of the above counties have different political views that fall into distinct political groups? What if 30 percent of the state’s voting population describe themselves as secular socialists, and the remaining 70 percent describe themselves as

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<sup>22</sup> Beitz, Charles R. *Political Equality: An Essay in Democratic Theory*. (Princeton: Princeton University Press, 1989), 141.

<sup>23</sup>Alexander, Larry. *Lost in the Political Thicket*, 563 Florida Law Review. No. 41, (1989). 567.

Christian conservatives? And what if the population of these voters is evenly distributed among all three of the counties (7,000 voters each), but the secular socialists are spread out in each district to the point where Christian conservatives, voting as a bloc for candidates of similar affiliation, earn more than a bare (50.1 percent) majority in each of the three counties? Technically, this (highly simplified) design achieves the standard of one person, one vote as outlined by the U.S. Supreme Court in *Reynolds*. Quantitative equality is satisfied. But a substantial part of the population has no representative. The vote of a secular socialist, while equally weighted to the vote of a Christian conservative, is ultimately wasted, since it plays no part in the successful election of a lawmaker to public office. It is not as equally effective as the vote of another citizen.

To better understand qualitative inequality in the context of the U.S., one powerful body of evidence is the history of racial gerrymandering. In the wake of several landmark supreme-court cases and civil rights legislation in the 1950s and 60s, southern states were forced to recognize the political equality of their black citizens. One form of resistance to these federal impositions was racial gerrymandering, a practice that diluted the power of black citizens to organize and vote for preferred candidates. While the black citizens formally had the right to exercise an equally weighted vote (if they could surmount the obstacles built by the white establishment to getting registered), their vote was still as good as wasted at the ballot box. This is because racial gerrymandering, or the practice of drawing individual districts in a way that divided blocs of black voters to the point where they would lose to white majorities, diluted the power of black votes. Qualitative equality, or the equality of prospects for successfully electing candidates that black voters preferred,

was nowhere close to being realized, and it was reflected through local and state governments dominated by whites.<sup>24</sup>

When the *Reynold's* court called for the need to maintain an “equally effective” vote, it left the issue primarily up to the legislative branch. In 1965, through the passage of the U.S. Voting Rights Act (VRA), Congress sought to prohibit a variety of methods employed mostly by southern states to restrict black citizens from effectively exercising their right to vote, including diluting voting blocs of blacks through strategically drawn districts. Section 5 of the act required certain states in the south with particularly egregious records of discrimination to “pre-clear” any changes they made to congressional districts or registration requirements.<sup>25</sup> Section 2, which is essentially a statutory version of the 15th Amendment of the U.S. Constitution, prohibits states or local subdivisions from passing laws that abridge the rights of U.S. citizens on the basis of race or color.<sup>26</sup> Subsequent amendments to this passage made it a potent tool for voting rights advocates who claim that election systems are designed in ways that dilute the votes of racial minorities. One common remedy these advocates sought was affirmative gerrymandering, or redrawing districts in majority white states and political subdivisions to help racial minorities elect candidates of their choice.

One example of minority voters’ political power being diluted by carefully drawn districts was in Frio County, Texas in the early 1970s. In this instance, Mexican-Americans were 75 percent of the population of Frio County, with Whites making up the remaining 25

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<sup>24</sup> Berman, Ari. *Give Us the Ballot: The Modern Struggle for Voting Rights in America*. (Farrar, Straus and Giroux, 2015).

<sup>25</sup> H.R. 89-110, 89th Cong., U.S. Commission on Civil Rights (1965) (enacted).  
[http://library.clerk.house.gov/reference-files/PPL\\_VotingRightsAct\\_1965.pdf](http://library.clerk.house.gov/reference-files/PPL_VotingRightsAct_1965.pdf), 3.

<sup>26</sup> *Ibid.*, 1.

percent. But the all-white county commissioner, which had complete control of drawing the lines for the county's four seats, "packed" 97 percent of the Mexican-American population into one of the county districts in a 1973 map.<sup>27</sup> As a result of this concentration of votes, the minority population could only elect a single representative of the same race, even though Mexican-Americans made up a substantial majority of Frio County. This misrepresentation was so lopsided that the state of Texas was included in a 1975 amendment to the 1965 Voting Rights Act, which required local county commissioners to seek approval from the federal government to any changes they made to district lines. As a result of this "preclearance" requirement, and several other federal and state initiatives that pushed for greater minority turnout, minorities not only voted more, but voted more effectively. Their votes, rather than being wasted in a massive majority for a single lawmaker, became more dispersed throughout Frio County. The positive outcomes of this fairer distribution of votes can be seen with just a glance of the elected positions for Frio County in 2018. Mexican-Americans hold the vast majority of elected positions, including County Judge, District Clerk, and County Treasurer.<sup>28</sup>

While the struggle of racial equality for voting rights is still ongoing, significant progress has been made since the days of Jim Crow. Increased rates of minority turnout, election of minority candidates at all levels of government, and a vast body of detailed legal protections all indicate historical steps designed to ensure voter equality, both quantitative and qualitative.<sup>29</sup> But there is another dimension of voting equality that, while arguably just as crucial as racial equality, neither the Supreme Court nor the U.S. Congress has devoted

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<sup>27</sup> Berman. *Give Us the Ballot: The Modern Struggle for Voting Rights in America*, 131.

<sup>28</sup> "Frio County, Texas." Elections Calendar. Accessed May 02, 2018.  
[http://www.co.frio.tx.us/default.aspx?Frio\\_County/Elections](http://www.co.frio.tx.us/default.aspx?Frio_County/Elections).

<sup>29</sup> Sutton, John. *Law/society: Origins, Interactions, and Change*. (Thousand Oaks: Pine Forge, 2003).

nearly the same amount of effort to addressing. This dimension involves inequality of voting effectiveness in relation to party affiliation.

Before I advance any further on how government institutions can take further steps to bolster qualitative equality for voters of different political parties, I will take the next section to outline the core principle of voluntary proportionality and this principle's place in U.S. constitutionalism. I will also point out that the standard of qualitative equality cannot be met without realizing this principle of voluntary proportionality.

### **ENSURING FAIRNESS: THE PRINCIPLE OF VOLUNTARY PROPORTIONALITY**

The principle of voluntary proportionality requires that the composition of lawmakers in government symmetrically reflect the expressed preferences of all citizens participating in a democratic political process. It is rooted in a concept of numerical *equality* for all participants of a democratic electoral system in the process of decision-making, as well as the principle of representatives *responding* to voters as agents of their collectively expressed preferences. For the purposes of this paper, an electoral system will be considered democratic if it involves: (1) the option of participation for all citizens of that society through voting for political officeholders; (2) periodic elections that hold political officeholders accountable to the preferences of citizens; (3) power (and responsibility) vested in the officeholders to implement these preferences. A democratic system should also embody the view of Nobel Prize-winning economist Sir Arthur Lewis, in that it must ensure that every citizen impacted by a government decision must “have the chance to participate in making that decision either directly or through chosen representatives.”<sup>30</sup>

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<sup>30</sup> Lewis, W. Arthur. *Politics in West Africa*. (Westport, CT: Greenwood Press, 1981), 64.

Because of conflicting interests between citizens on matters of policy, an electoral system must treat participants equally by endowing each voter with an equal share of political power. This egalitarian character encourages disagreements over policy to be resolved through orderly elections and thoughtful, respectful discussion, rather than arbitrarily enforced dictates based upon a particular group's interest.

The principle of voluntary proportionality is inextricably linked to a political system's democratic character. If we've already established evidence that indicates politicians respond to citizen's wishes as expressed by their voting patterns, and that there is no reason to treat the votes of citizens as anything other than equal, then we've already accepted the value of this principle. This aligns with Robert Dahl's claim that a "key characteristic of a democracy" is the lawmaker's responsiveness to "the preferences of its citizens, considered as political equals."<sup>31</sup> If citizens are to be considered equals, things like their geography, alignment with a majority or minority group, or position as a winner or a loser in an election shouldn't diminish the impact of their vote. Unfortunately, all of these factors play an outsize role in the current SMD system of representation in the U.S. As was outlined above, a geographically districted system of representation can be highly inimical to the political power of minorities through discriminatory gerrymandering.

But even if districts aren't drawn in a way to intentionally dilute the political power of racial minorities, huge amounts of votes, in the words of Nicholas Stephanopoulos and Eric McGhee from the University of Chicago, are "wasted" in majoritarian elections with a

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<sup>31</sup> Dahl, Robert Alan. *Polyarchy: Participation and Opposition*. (New Haven: Yale University Press, 1971), 5.

single winner.<sup>32</sup> Without any insidious intentions, SMD systems of representation can be inherently wasteful and result in “complete exclusion of the minority from all representation,” according to Paul Douglas from the University of Chicago.<sup>33</sup> He pointed out in the early 1900s that the actual compositions of legislatures throughout the U.S. were not reflective of the voting patterns of citizens, all because of the majoritarian bias built into the system. In North Carolina’s congressional elections, for instance, 307,000 citizens voted for ten Democratic candidates and 225,000 citizens voted for Republican ones.<sup>34</sup> But because of the geographic distribution of votes in each district, the Democrats ended up securing majorities (and wins) for all ten seats. From the perspective of voter equality, there is no justification for this severe imbalance between voter choices and the outcomes of elections. If changing the location of voters, rather than altering their preferences or choices through reasoned debate, can change the outcome of an election, then political equality becomes sublimated to geography.

But the current system doesn’t just fail at ensuring symmetry between citizens’ voting patterns and the composition of their representatives. It also has the tendency to create political cleavages in society that are dictated by geography or historical accident, not the choices of citizens. The *voluntary* aspect of voluntary proportionality means that citizens’ political preferences are the deciding factor in the creation of voting blocs or groups that determine which politicians get elected and whose preferences they respond to. For a large amount of elections in the U.S., unelected commissions appointed by

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<sup>32</sup> Stephanopoulos, Nicholas O., and Eric M. McGhee. "Partisan Gerrymandering and the Efficiency Gap." *The University of Chicago Law Review* 82, no. 2 (2015): 831-900.

<sup>33</sup> Douglas, Paul H. "The Necessity for Proportional Representation." *Ethics* 34, no. 1 (1923): 6-15.

<sup>34</sup> *Ibid.*, 4.

politicians draw the districts.<sup>35</sup> These commissions, rather than the citizens through their natural voting patterns, determine the salient features of the groups that elect politicians. One example is affirmative gerrymandering, which was required by the Voting Rights Act to boost the power of racial minorities in majority white districts. Commissioners, who determined that the salient feature of voting groups at that time was their race, carved out districts throughout the south with this priority in mind. But while this mechanism of affirmative gerrymandering was necessary and beneficial several decades ago, the Supreme Court recently ruled that this practice imposed unconstitutional burdens that were not “grounded in current conditions” of voter inequality.<sup>36</sup> Rather than having the heavy hand of a court or a board of commissioners determine what issues are salient to groups of voters, the principle of voluntary proportionality makes it clear that these should be determined by the normal movements and choices of voters themselves. As John Stuart Mill pointed out, the “feelings and interests which arrange mankind according to localities” should not be the “only ones thought worthy of being represented.”<sup>37</sup> In addition to geography, interests and preferences along the lines of race, gender, ideology, and political affiliation should also be allowed to combine and flourish in a representative democracy.

According to John Low-Beer of the *Yale Law Journal*, “constitutional values” like minority representation, equally powerful and effective votes for all groups and responsiveness of elected officials are “fully guaranteed” by a system that embodies the

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<sup>35</sup> "Redistricting Commissions: State Legislative Plans." National Conference of State Legislatures. Accessed April 02, 2018. <http://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx>.

<sup>36</sup> *Shelby County v. Holder*, 570 U.S. \_\_\_ (2013), 22.

<sup>37</sup> Mill, John Stuart. *Considerations on Representative Government*. (Indianapolis: Bobbs-Merrill, 1958), 150.

principle of voluntary proportionality.<sup>38</sup> But this principle isn't just desirable because it reinforces values of equality and freedom of association. It is also preferable to the current mode of organizing our elections because it makes votes of citizens who would otherwise be unrepresentative more effective in achieving success. In the next section, I will outline how this effectiveness is achieved and how it is related to other desirable trends like increased rates of voter participation in a democracy.

### **VOLUNTARY PROPORTIONALITY, VOTER TURNOUT, AND THE QUALITY OF DEMOCRACY**

Determining any causation between a democratic system's design and its overall quality is an extremely daunting task. The data this essay is relying on – including information from 36 countries' elections, voting patterns, rates of turnout, implemented policies and political parties' platform changes over the last 50 years – is so vast, and potentially dependent on cultural, historical and economic factors, that it can be extremely difficult to draw any firm connection between a democratic system's structure and its effectiveness in achieving certain goals. Accurately determining any sort of relationship between an electoral design and the impact of that design requires rigorous, multivariate analysis and an aversion to drawing unsupported yet intuitive inferences.

Before we dive into the data on democratic electoral systems, it's important to determine what exactly should be sought for in a democracy. As I've described with the principal of voluntary proportionality, values of equality and freedom of association are crucial to any democratic system. But another desirable factor that I've been focusing on

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<sup>38</sup> Low-Beer, John R. "The Constitutional Imperative of Proportional Representation." *The Yale Law Journal* 94, no. 1 (1984): 163-87.

(as outlined in the introduction) is the rate of voter turnout. I view a high rate of turnout as a precondition for the quality and functioning of a democratic system, or what Douglas J. Amy refers to as a system of “full representation.”<sup>39</sup> This is a system in which the actions of representatives reflect the range of all preferences of all eligible voters. By participating through the vote, citizens become active agents in their own self-government, exerting significant influence on the direction and implementation of policies that influence their lives.<sup>40</sup> Arend Lijphart of Yale University also claims that increased voter turnout is beneficial because it indicates broader interest and more equal participation in democracy. He argues that voting is an indication of a citizen’s interests in the officials and policies that will impact his or her life. He also claims that if general turnout were to increase, political participation would become more equal between upper and lower income groups, which would result in greater political equality between all citizens of democracy.<sup>41</sup>

With these desirable factors in mind, what sort of relationship is there between voter turnout and the degree to which democratic systems embody the principle of voluntary proportionality? To determine this, one should review citizens’ motives for participating in or abstaining from elections, and whether changes in the design of the electoral system would have any plausible (or measureable) impact on these motives.

Some factors that motivate citizens to turn out for an election include that election’s competitiveness, the magnitude of contrast between the opposing candidates’ policy

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<sup>39</sup> Amy, Douglas J., "Full Representation: The Case for a Better Election System." *FairVote: The Center for Voting and Democracy* (1997), 4-45.

<sup>40</sup> Lijphart, Arend, "Unequal Participation: Democracy's Unresolved Dilemma." *American Political Science Review*, 91 (1997), 1-14.

<sup>41</sup> Lijphart, Arend. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. Cumberland: Yale University Press, 2014.

profiles, the perceived efficacy of the citizen's vote and the level of similarity between the preferences of the voters and the candidates.<sup>4243</sup>

All of these factors, which are positively related to a voter's motive to participate in an election, are exacerbated by the current system of majoritarian representation. All of them also have a tendency to feed into one another, resulting in a harmful feedback loop that further depresses the potential motivation to vote. In the U.S., large swaths of votes throughout the nation are deemed "noncompetitive" because of their location in "safe" districts, according to Fred Dews of the Brookings Institution.<sup>44</sup> In the U.S.'s two-party system, these tend to be larger rural districts for Republicans and smaller, more densely populated urban districts for Democrats. This lack of competition in districts drives complacency in parties, which are less motivated to run stronger candidates with credentials or policies that align closer to key constituents. This complacency also infects voters within the district, both the majority that benefits from the large concentration of likeminded citizens *and* the minority that sees no reason to turn out for a party that will never reach past 50 percent. One prominent study in 1997 by Christopher Anderson and Christine Guillory of Rice University highlighted the negative impacts of majoritarian systems like the one in the U.S. Through a cross-national study of electoral systems in Europe that controlled for economic conditions, the authors determined that systems with majoritarian characteristics (like SMD in the U.S.) tended to have much greater gaps in

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<sup>42</sup> Harder, Joshua, and Jon A. Krosnick. "Why Do People Vote? A Psychological Analysis of the Causes of Voter Turnout." *Democracy and Disenfranchisement*, (2009). 525-49.

<sup>43</sup> Karp, Jeffrey A., and Susan A. Banducci. "Political Efficacy and Participation in Twenty-Seven Democracies: How Electoral Systems Shape Political Behaviour." *British Journal of Political Science* 38, no. 02, (2008).

<sup>44</sup> Dews, Fred. "A Primer on Gerrymandering and Political Polarization." Brookings Institution. March 05, 2018. Accessed April 05, 2018. <https://www.brookings.edu/blog/brookings-now/2017/07/06/a-primer-on-gerrymandering-and-political-polarization/>.

satisfaction between majority winners and minority losers.<sup>45</sup> The authors were particularly concerned by the negative impacts of a majoritarian system in making minority voters feel left outside of the political system, recommending “[i]nstitutional reforms that allow those in the political minority more access to the decision-making process.”<sup>46</sup> These were not just racial minorities, but political minorities as well.

Another powerful study on the deficiency of majoritarian systems in ensuring voter satisfaction (by G. Bingham Powell Jr. and Georg S. Vanberg) noted the tendency of winner-take-all systems to distort the vote-seat distribution between citizens and lawmakers. Because of this disproportionality between the number of voters and the number of seats in government, majoritarian systems tended to have governments that did not accurately reflect the “‘revealed preferences’ for the public as a whole.”<sup>47</sup> This mismatch is particularly noticeable in U.S. congressional elections. In 2012, for instance, over a million more U.S. citizens voted for Democratic candidates for the House of Representatives than Republican ones, yet the latter clenched a 33-seat congressional majority.<sup>48</sup>

One major author who has worked to connect these institutional deficiencies of SMD systems with depressed rates of voter turnout is Douglas J. Amy. He hypothesizes that many citizens refrain from voting because “they see few politicians... offering policies that would significantly address their problems.”<sup>49</sup> Drawing on studies that compared hundreds

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<sup>45</sup> Anderson, Christopher J., and Christine A. Guillory. "Political Institutions and Satisfaction with Democracy: A Cross-National Analysis of Consensus and Majoritarian Systems." *American Political Science Review* 91, no. 01 (1997): 66-81.

<sup>46</sup> *Ibid.*, 81.

<sup>47</sup> Powell, G. Bingham and Georg S. Vanberg. "Election Laws, Disproportionality and Median Correspondence: Implications for Two Visions of Democracy." *British Journal of Political Science* 30, no. 3 (2000): 383-411. 384

<sup>48</sup> Coll, Steve. "Building a Better Democracy." *The New Yorker*. June 18, 2017. Accessed April 05, 2018. <https://www.newyorker.com/news/daily-comment/building-a-better-democracy>.

<sup>49</sup> Amy, Douglas J. *Real Choices/New Voices: The Case for Proportional Representation Elections in the United States*. New York: Columbia University Press, 1996. 143.

of national elections from 20 nations, controlling for economic and cultural factors in order to isolate the impact of a democracy's institutional design, Amy concluded that there is a significant, positive link between voter turnout and a system's adherence to principles of voluntary proportionality.<sup>50</sup> He attributed this positive causal link to a proportional system's ability to give citizens better reasons to vote: their votes, rather than being wasted in majoritarian contests, go to minority candidates in multi-member districts; their policy preferences, rather than being distorted, are more accurately reflected as a result of more competitive elections between a greater variety of candidates; and ultimately their participation, or at least their perception of their participation, becomes more meaningful in influencing the substance of policies.<sup>51</sup>

A larger body of data reviewed by Lijphart, who reviewed election data from 36 democracies over 50 years, reinforced Amy's explanations. In addition to uncovering greater rates of satisfaction in systems that aligned with more proportional principles, he also found higher rates of turnout in more proportional democracies. While the usefulness of the data on voter turnout among different nations is limited, particularly when considering the possible impact factors like economic or institutional barriers to voting that are completely separate from a system's majoritarian or proportional character, Lijphart's data still points to potential sources of widespread dissatisfaction in the design of democratic systems and possible remedies for it.<sup>52</sup>

Up until this point, this essay has been discussing the merits of proportional representation in broad, more abstract terms: simply put, it's a system that ensures that

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<sup>50</sup> Ibid., 145.

<sup>51</sup> Ibid., 152.

<sup>52</sup> Lijphart, Arend. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. Cumberland: Yale University Press, 2014.

there is numerical symmetry between the voters choices and the seats of elected lawmakers. The principle of voluntary proportionality adds a further condition of requiring voters themselves, not through representatives, courts or commissions, to determine the salient political issues of the day, whether they fall along party, gender, race, religious or cultural lines. But now that we've established a theoretical connection between this principle and positive benefits like increased voter engagement and satisfaction, what are the concrete steps that a majoritarian system like the U.S. can take to recognize these benefits? In the next section, I will outline some institutional changes that jurisdictions throughout the U.S. can implement to further align its society with the principle of voluntary proportionality, while also noting the political plausibility of such systematic changes.

### **REALIZING VOLUNTARY PROPORTIONALITY: REMEDIES FROM THE LEGISLATURE**

To get an understanding of what steps the legislature can take to realize the principle of voluntary proportionality in our electoral systems, I will revisit the impact of the Voting Rights Act (VRA) in greater detail. The VRA of 1965 is perhaps the most famous example of legislative intervention to correct historical, deep-seated issues with disproportionality in local and congressional elections. The attempts by Congress to ensure parity between large populations of black voters in the south and representatives in Washington D.C. led to massive changes in southern political institutions, changes that were only begrudgingly implemented with occasional pressure from armed federal authorities. While politicians may not have explicitly said their actions were done with the principle of voluntary proportionality in mind, the alignment between their ultimate

accomplishments and that principle was very clear. It also supports the conclusion that allowing an SMD system with historically white majorities to act on its own devices was simply not compatible with constitutional standards of voter equality. Whether or not Congress intended it, the majoritarian systems of multiple southern jurisdictions adopted a distinctly proportional character, to the benefit of majorities and minorities alike.

Examples of this systematic shift include the system of cumulative voting that directly replaced SMD elections in some southern jurisdictions.<sup>53</sup> As a result of lawsuits under Section 2 of the VRA, several southern cities and counties had to make substantial changes to their electoral systems. In Chilton County, Alabama, for instance, a system of cumulative voting replaced a geographically districted majoritarian system in 1988. It works like this: for seven elected positions on the Chilton County Commission, each citizen of the county (regardless of their location) had seven votes to dole out to whatever candidates they preferred. A candidate only needed to secure 12.5 percent of votes to secure a seat. Minority voters had the option to place all seven of their votes in a single candidate, with the hopes that minority black voters would concentrate their votes in one candidate and white voters would be more prone to crossing their votes over to other white candidates. This was in contrast to the original system, which only had five positions on the Board of Education. Candidates that ran for these positions were elected by a majority and citizens had to show residency requirements to vote for specific candidates along geographic lines. The new system of cumulative voting, which eschewed geography and majority rule, resulted in the 1988 election of Bobby Agee to the Chilton County Commission, the first black representative in that jurisdiction since Reconstruction. White

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<sup>53</sup> Pildes, Richard H. and Donoghue, Kristen A. "Cumulative Voting in the United States," *University of Chicago Legal Forum* 10, No. 1 (1995): 241-313.

voters, while still overwhelmingly maintaining a hold on power that was more proportional to their larger numbers, now had to work with a minority official who simply would not have been elected under the previous majoritarian system. Throughout the entire Deep South, elected officials much more accurately reflect the racial composition of voters today than they did 50 years ago.<sup>54</sup> The principle of voluntary proportionality has been more effectively realized as a result, in addition to some of its most important predicted benefits of higher turnout and greater democratic satisfaction from minorities. But while issues with racial composition in voting have been addressed over the years, what about issues with political belief and representation?

I believe that the changes ushered into local jurisdictions as a result of the VRA are applicable to the modern issue of voter-to-lawmaker disproportionality along lines of partisanship. One popular example is election data from the 2012 congressional race, which reveal a major imbalance between the amounts of people that vote for Democratic candidates and the actual power that Democrats yielded in Congress. The problem is no less severe on the state level: in 2011, the lower house of the Wisconsin state legislature was comprised of two-thirds Republican lawmakers and one-third Democratic lawmakers. But the citizens' combined votes for the parties were evenly split.<sup>55</sup> It is also not limited to harming the electoral prospects of just Democratic lawmakers or voters. Throughout the history of the U.S., members of the two major political parties have undergone substantial changes in geography, political belief and demographic composition, yet the system of SMD at the state and federal level has remained largely intact. Earlier in the 20<sup>th</sup> century, it was

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<sup>54</sup> Sutton, John. *Law/society: Origins, Interactions, and Change*. (Thousand Oaks: Pine Forge, 2003).

<sup>55</sup> Wheeler, Russell. "The Supreme Court and Partisan Gerrymandering Cases." Brookings Institution. February 28, 2018. Accessed May 02, 2018. <https://www.brookings.edu/blog/unpacked/2018/02/28/the-supreme-court-and-partisan-gerrymandering-cases/>.

the Republicans who were concentrated in smaller, urban districts and Democrats that dominated larger, less populated rural ones. The corresponding disproportionality that came with such a geographic distribution of voters looks strikingly familiar to modern complaints of partisan imbalance.

Correcting this problem should be a top priority for any concerned citizen for two reasons: 1) it is a severe threat to voter equality and 2) it hampers the ability of our elected officials to effectively respond to the expressed preferences of citizens. It's damaging to equality because voters of a certain party that are "packed" into a single small district or "cracked" into a number of larger ones have their voting power diluted (and correspondingly, the votes of the opposing power are unfairly bolstered).<sup>56</sup> This power asymmetry is problematic for our governing institutions, whose mandate now stems from an inaccurate portrait of the preference profiles of U.S. citizens. This could serve as a partial explanation for the historically low approval ratings of Congress, as well as exceptionally low rates of U.S. voter turnout in comparison to other nations.

To begin addressing these problems requires a change to the SMD system. We know that given U.S. history, this is not impossible. Jurisdictions in the Deep South, an area of historical racial animus and polarization, were able to implement major changes from an SMD design to a more proportional one with cumulative voting, resulting in the election of racial minorities. A similar change is in store at the state and federal level throughout the U.S. on the subject of political affiliation.

Because of our federalist system of government, which grants states almost complete control in crafting and managing their own election systems, the systematic

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<sup>56</sup> Stephanopoulos, Nicholas O., and Eric M. McGhee. "Partisan Gerrymandering and the Efficiency Gap." *The University of Chicago Law Review* 82, no. 2 (2015): 831-900.

overhaul of electoral design will have to begin at the state level. Like Social Security, a proportional election system should be implemented independently by state legislatures before it reaches the national stage. States should be given latitude to explore ways of making their own systems more proportional, crafting changes tailored to their unique demographics and population densities. The Supreme Court must play a guiding role in ensuring no egregious violations of the principle of voluntary proportionality. But an exacting, uniform design for all state legislatures would not only be an unprecedented and extremely onerous change; it would fly in the face of a federalist system that has demonstrated its value as an important check against centralized federal power. States acting as “laboratories of democracy” can help reveal new, innovate methods of voting that are better suited for their unique circumstances, and potentially applicable to a more national standard for the U.S. Congress. To get a sense of what systems can be implemented at the state level, I will review four potential systems of proportional representation that can be applied, taking their various advantages and disadvantages into account.

### *Cumulative Voting*

This system has already been described in some detail. For cumulative voting, every voter has as many votes as there are seats to be filled for a particular jurisdiction. They have the option to combine (or “cumulate”) their votes for only a few, or a single, candidate. In addition to being able to vote multiple times, this system also departs from SMD in that there are multiple lawmakers for each district. One example of this in practice is the Illinois state assembly, which had a cumulative voting system from 1870 until 1982. Each district had three representatives, meaning that each voter had three options for casting votes: one

among all three, a vote and a half for two or all three votes for one. This system's goal was to enhance the prospects of political minorities, who benefitted by being able to pool their votes into at least one candidate. As a result, very few districts had three lawmakers from the same party, to the benefit of minority factions like Socialist and Labor parties. While this system still retained the geographic nature of SMD, and consequently left open the possibility of partisan gerrymandering, the presence of multiple members did an effective job of countering this tendency for major parties to carve out "safe" districts. According to the Illinois Task Force on Political Representation and Alternative Electoral Systems, the cumulative voting system was associated with historical levels of highly competitive races between major and minor parties.<sup>57</sup> When the citizens of Illinois decided to switch back to an SMD system, races became less competitive as a result of only one candidate being able to secure a seat. When reviewing the cumulative system, the authors of the project concluded "fewer votes were wasted" in comparison to the SMD system that replaced it in 1982.<sup>58</sup> This lack of competition and proportionality correspondingly led to depressed rates of voter turnout in the decades preceding the switch from cumulative voting to SMD voting.

Through the examples of Chilton County and the Illinois general assembly, we can see some of the predicted benefits of changing into a cumulative system of voting from SMD. There is more electoral competition, greater representation of minorities, greater symmetry between votes and seats in power, fewer wasted votes and generally higher

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<sup>57</sup>*Executive Summary: Illinois Assembly on Political Representation and Alternative Electoral Systems.* <http://archive.fairvote.org/media/pep/execsum.pdf>. May 4, 2001. Accessed April 2, 2018.

<sup>58</sup> Pildes, Richard H. and Donoghue, Kristen A. "Cumulative Voting in the United States," *University of Chicago Legal Forum* 10, No. 1 (1995): 244.

turnout.<sup>59</sup> But what are some of the negative or unintended effects of these systematic changes? One issue is that the notion of being able to vote for multiple candidates is a major departure from the typical system of SMD, which can be difficult for some voters to initially accept. Reports of several outspoken voters in Chilton County, shortly after its system of cumulative voting was implemented, were very dissatisfied, angry or confused with the current system, (falsely) believing that it had run afoul of the Constitution's principle of one person, one vote.<sup>60</sup> Massive education drives at all levels of the county were employed before the 1988 election to ensure voters understood the new system. Ultimately, voters ended up accepting the system and it is still in use to this day.<sup>61</sup> But the intuitiveness of a system, as well as the costs of ensuring accurate and widespread education of its inner workings, is a major consideration that must be addressed before its implementation.

Another issue with cumulative voting is the possibility of strategic voting among minority parties leading to disproportionate outcomes. Edward Still, a prolific author and voting rights activist, points out that in a cumulative vote system, people in a majority party are more vulnerable to the tendency of spreading their votes among more candidates, resulting in less effective votes. Minority voters, on the other hand, tend to concentrate their votes more effectively as a bloc, which "could obtain an unfairly large representation" in a general assembly.<sup>62</sup> This form of strategic voting among minorities may have been part of why Illinois citizens ended up rejecting their system of cumulative voting for SMD. It's

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<sup>59</sup> Ibid.

<sup>60</sup> Pildes, 247

<sup>61</sup> Pildes. 250

<sup>62</sup> Still, Edward, and Chandler Davidson. "Alternatives to Single-Member Districts." In *Minority Vote Dilution*. Washington, D.C.: Howard University Press, 1989. 257.

clear that a system's susceptibility to manipulation, and consequentially disproportionate results, must be taken into account in gauging its effectiveness.

### *Party-list system*

The party-list system is prominent throughout several European nations, but it's perhaps the most alien to the current system of SMD. It involves citizens casting their votes for a party, which then allocates seats based upon the percentage of votes they receive. If a party has 20 candidates and receives 10 percent of the overall vote from a jurisdiction, the top two lawmakers of that pool of candidates will have won a seat. I will not recommend this system for three main reasons. The first is that it places too much power in the hands of highly organized political parties to determine candidate lists. In the U.S., distrust of the two dominant political parties is at a historically high rate, with particular ire reserved for the party's national committees.<sup>63</sup> Granting them more power to determine the candidates that run and which ones will be selected doesn't jive well with the *voluntary* aspect of voluntary proportionality. If party committees and commissions wish to play a greater role in the electoral process, they should clean their own houses of favoritism and corruption.<sup>64</sup> The second reason I oppose this change is because it does away entirely with geographic districts. While geography certainly does play an outsized role in the current SMD system, doing away with it entirely would be a drastic step that many U.S. citizens may not be fully prepared for. Even John Stuart Mill admitted that there are some general preferences

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<sup>63</sup> "Public Dissatisfaction With Washington Weighs on the GOP." Pew Research Center. April 17, 2017. Accessed May 1, 2018. <http://www.people-press.org/2017/04/17/2-views-of-the-parties/>

<sup>64</sup> O'Hehir, Andrew. "Democratic Corruption: It Was Worse Than We Thought." RealClearPolitics. November 5, 2017. Accessed May 02, 2018. [https://www.realclearpolitics.com/2017/11/05/democratic\\_corruption\\_it\\_was\\_worse\\_than\\_we\\_thought\\_425686.html](https://www.realclearpolitics.com/2017/11/05/democratic_corruption_it_was_worse_than_we_thought_425686.html).

voters hold that fall along geographical lines, usually regarding environmental or economic matters.<sup>65</sup> Proponents of SMD also rightly claim that having separate districts helps to ensure better accountability of elected officials, who are charged with improving the prospects of a single, quantifiable jurisdiction rather than voters throughout the entire nation.<sup>66</sup> A party-list system would completely do away with any advantages of geography. Lastly, a party-list system also holds too much potential to exacerbate, rather than ameliorate, issues with polarization. One nation where these problems are on stark display is Israel, which elects members to its 120-seat parliament (Knesset) through party-list elections. The state of affairs is highly contentious and polarized between the ruling coalition government, which holds only 61 seats, and the opposition, which clings to the remaining 59. As a result of this bare-thin coalition between numerous parties that have stemmed from this party-list system, small, highly radical factions are able to dictate the direction of policies if the ruling party wishes to maintain its hold on power. Recent examples include the decision of the Prime Minister, at the behest of far-right Haredi members, to spurn widely popular conversion and prayer initiatives that the majority of the society approved.<sup>67</sup> The division of the electorate into highly ideological parties, rather than individual candidates with the means to compromise on more detailed issues of policy, results in a heightened possibility for increased polarization.

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<sup>65</sup> Mill, John Stuart. *Considerations on Representative Government*. (Indianapolis: Bobbs-Merrill, 1958), 143.

<sup>66</sup> Powell, G. Bingham. *Elections as Instruments of Democracy: Majoritarian and Proportional Visions*. New Haven, CT: Yale University Press, 1988. 181.

<sup>67</sup> Gur, Haviv Rettig. "As Knesset Dissolves, Ultra-Orthodox Parties Show They're Back." *The Times of Israel*. December 9, 2014. Accessed May 02, 2018. <https://www.timesofisrael.com/as-knesset-dissolves-ultra-orthodox-parties-show-theyre-back/>.

### *Single Transferrable Vote*

The Single Transferable Vote (STV) system has already been adopted by many local jurisdictions throughout the U.S. In this system, voters provide numerical rankings to their preferred candidates. This addresses the problem of wasted votes in SMD, because votes that go beyond what a candidate needs to win (or for a candidate that mathematically can't win an election) go to the next highest rated preference of the voter. STV, unlike party-list, is also much more flexible because it doesn't require candidates to be affiliated with a party, giving voters much more latitude to choose a variety of potential lawmakers. It's also a system that's amenable to major institutional modifications, like changes to the number of candidates and seats for jurisdictions. If local jurisdictions place a high premium on proportionality and equal representation, they can increase the number of seats for a particular jurisdiction to better reflect the preferences of voters. If they believe that smaller numbers of lawmakers could govern more effectively, they could still retain the other positive features of the STV system. Studies on U.S. cities that have adopted STV in their municipal elections show that votes became more effective, elections more competitive and bodies of lawmakers more representative without hampering the efficacy of their governing (although studies have offered nothing conclusive about STV's positive impact on voter turnout).<sup>68</sup>

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<sup>68</sup> Kathleen L. Barber, *Proportional Representation and Election Reform in Ohio*. Columbus: Ohio State University Press (1995).

### *Extra members*

Another very simple institutional change that is compatible with the current form of geographically districted elections is the addition of at-large seats. This system would be similar to Germany's Bundestag, which has 656 seats. Half of these are determined in elections similar to SMD in the U.S.: individual candidates run to represent a particular district, and if they get a plurality of votes, they are elected. The other half of the Bundestag is determined by votes for a party list. Candidates are able to run for both a single district and this party-list, and voters can also vote for one candidate in each. A system adopted for the U.S. would also likely include a party-list system. California, for instance, currently has 80 assembly members that are elected by pluralities in districts. One possible change would be to simply add more at-large seats that are elected by voters throughout the state. Another (and more complicated) option would be to reduce the number of SMD seats and replace them with at-large ones. If 40 seats were added (or replaced), the state would also have to determine exactly how the new seats would be dispersed. In accordance with the party-list system, seats would be allocated based upon the percentage of votes that a party receives in an at-large election. While this option does have the drawbacks that tend to hamper a party-list system, it is beneficial because it retains traditional features while also opening up options for experimentation and comparison between different systems.

### *Summary*

There are a variety of options that democratic activists can implement to align their electoral system with the principle of voluntary proportionality. No system is without flaws, but complacency with the status quo, and its attendant problems with

disproportionality, wasted votes and uncompetitive elections, is not acceptable. All of these options (cumulative voting, STV and extra members) can also be implemented at the local level with cities, the state level with legislatures, or the federal level with our Congress. With an enhanced understanding of the importance of the vote, the values of equality and responsiveness, and knowledge of the history of legislative reforms to electoral systems, citizens are more than capable of improving the quality of their democracy.

### **BOOSTING EQUALITY FROM THE BENCH: REMEDIES FROM THE JUDICIARY**

Another source of potential remedies for disproportionality in the U.S. electoral system is the courts. Like our federal legislature, they have authorized massive interventions in the past to correct systematic and constitutional flaws in state voting systems. Some proponents of proportional principles argue that implementation of these ideals through courts, rather than local or city legislatures, is a more effective means of enhancing voter equality and lawmakers' responsiveness. Stephanopoulos and McGhee, a law professor and a research fellow, argue that because the U.S.'s electoral system is open to a vast "efficiency gap" between the votes of Democrats and Republicans, the Supreme Court can and should impose a detailed standard of efficiency that state commissions must meet. To understand the potential of this proposed remedy, I will detail reasons in favor and against its adoption by the Supreme Court.

#### *In favor of a Supreme Court ruling*

The objective of Stephanopoulos and McGhee's arguments for Supreme Court intervention is to ensure partisan symmetry of votes. This means that each vote must be

numerically equal, both in terms of power *and* effectiveness. They are acutely aware of how strategic gerrymandering cannot only dilute the voting power of minority groups, but partisan groups as well. They wield a vast trove of data on U.S. elections stretching back over a century in making their point that partisan gerrymandering has become an exceptionally problematic phenomenon in modern times. Their research shows that dozens of state and federal jurisdictions, amounting to millions of wasted votes, have been manipulated, whether consciously or not, with the result of enhancing the effectiveness of some votes at the expense of others. If nothing else, they have made a strong case that there is an urgent problem at the heart of the U.S. electoral system that needs addressing.

Their particular remedy, the adoption of standards that regulate how district lines are drawn, stems from a long, detailed history of U.S. Supreme Court opinion. In addition to drawing from the court's historic *Reynold's* decision, Stephanopoulos and McGhee outline a direct pathway of "justification" to their standards of partisan symmetry from the court's ruling in *League of United Latin American Citizens v. Perry*. In this redistricting case, the Supreme Court held that a newly drawn district map for the Texas State Legislature violated section 2 of the voting rights act because it diluted the vote of the Hispanic population. The majority opinion of this case, written by Justice Kennedy, appeared to make the issue of partisan voter dilution a justiciable one before the court.<sup>69</sup> According to an amicus brief submitted to the court by Professors Bernard Grofman and Gary King, this case was a "potential sea change in how the Supreme Court adjudicates partisan gerrymandering claims" under the First Amendment.<sup>70</sup> To address these claims,

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<sup>69</sup> *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006)

<sup>70</sup> King, Gary, Bernard Grofman, Andrew Gelman, and Jonathan N. Katz, Brief of Amici Curiae in Support of Neither Party, *League of United Latin American Citizens v Perry*, No. 05-204,

Stephanopoulos and McGhee present the “efficiency gap,” which is the amount of votes that are wasted as the result of partisan districting. They admit that wasted votes are endemic to any SMD system, but that through adoption of standards that limit the size of efficiency gaps throughout congressional races, wasted votes can be minimized while retaining the overall structure of the SMD system. As a result, they believe that major faults of the majoritarian design of U.S. elections can be addressed through judicial intervention.

Determining the exact efficiency gap for a particular jurisdiction requires some simple calculation. It’s equal to the share of all seats held by a party subtracted from twice the share of votes received by a party:

$$\text{Efficiency gap} = \left( \frac{\text{party seats}}{\text{all seats}} - .5 \right) - \left( 2 \times \left( \frac{\text{party votes}}{\text{all votes}} - .5 \right) \right)$$

This equation takes the U.S.’s two party system into account, represented by the “.5” and “2” values. If we plug in data from a hypothetical (or past) election, we can determine the exact value of a district plan’s efficiency gap (or electoral advantage) for a particular party. In the authors’ example, they present two parties, A and B, running for 10 seats in a jurisdiction. Party A receives 55 percent of a jurisdictions vote (550 votes) and party B receives the remaining 45 (450). But as a result of the geographic distribution of these votes for ten districts, Party A ends up winning eight seats and party B only gets two. With this data in mind, the above equation is as follows:

$$\text{Efficiency gap of Party A} = (.8 - .5) - (2 \times (.55 - .5))$$

In this case, Party A’s efficiency gap would translate to 20 percent. This share of the votes, rather than going to seats that would benefit Part A’s opponents, were wasted because of their distribution among ten single-member districts. By amassing decades of election data, the authors replicate their math to demonstrate its effectiveness in showing

partisan bias in a variety of state and federal elections. They also demonstrate that determining the efficiency gap for a particular map does not require any hypothetical predictions of election results. Using the most updated data on voter trends and patterns on elections, the authors demonstrate that determining an accurate efficiency gap for any given election is a simple, highly feasible activity. With this efficiency gap in mind, the author's determine a quantifiable doctrinal threshold that the Supreme Court can impose on electoral maps. This threshold prohibits electoral maps with efficiency gaps that exceed seven percent, and whose authors can't offer any reasonable explanation other than partisan bias. Similar to the courts previous one person, one vote standard, this proposal would be grounded in a clear, objective mathematical formula. But rather than just ensuring that votes are equally weighted, the authors claim that it would truly fulfill the *Reynolds* court's promise of every citizen being entitled to "an equally effective voice."<sup>71</sup>

The clarity of Stephanopoulos and McGhee's arguments and solutions is astounding. The power of their data, Supreme Court jurisprudence, and statistical calculations is also extremely admirable, making the case for the efficiency gap look like the culmination of a massive, intense battle to secure meaningful votes for all citizens. The potential impacts of its implementation, while obviously extremely drastic, represent the severity of partisan gerrymandering, the extent of voter dilution and the harm it does to our democracy. But while the subject of their case is urgent and their solution is well argued, is it truly a better alternative than systematically altering our electoral system from the ground up through proportional reforms?

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<sup>71</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964), 563.

*Against a Supreme Court ruling*

One of the greatest strengths of Stephanopoulos and McGhee's solution, its mathematical exactitude, is also something many opponents consider its most crippling weakness. Chief Justice Earl Warren, of the court that crafted the *Reynolds* opinion and the one person one vote standard, contended that "mathematical... precision is hardly a workable constitutional requirement."<sup>72</sup> This is why the one person, one vote rule, in deference to special political subdivisions or highly compact political groups, allowed some deviation from this stringent mathematical standard. The justices appeared aware in crafting their decision that qualitative and quantitative equality, while both extremely important for the value of voting rights, could also inadvertently degrade one another. For instance, the pursuit of strict quantitative symmetry between a series of districts that run through a compact, insular political minority could have the unintended effect of breaking up that group's voting power, making its members' votes less *effective* in electing lawmakers of their choice. While the court did not shy away in imposing a standard that thousands of jurisdictions would have to reform to accommodate for, there was still a substantial level of deference to the qualitative differences between local jurisdictions. But unfortunately, according to David K. Ryden, an assistant professor of political science at Hope University, the court's initial deference gave way to a stricter adherence to "a principle that equated representation with equipopulous districts."<sup>73</sup> This fixation on quantitative equality, imposed from a high court, resulted in the invalidation of numerous districts that strayed even slightly from mathematical equality. Even worse, it put the issue

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<sup>72</sup> *Reynolds v. Sims*, 377 U.S. 533, (1964), 565-570.

<sup>73</sup> Ryden, David K. *Representation in Crisis: The Constitution, Interest Groups, and Political Parties*. Albany: State University of New York Press, 1996. 37.

of equal effectiveness, which was explicitly highlighted by Justice Warren in 1963, on the back burner. The court's emphasis on strict quantitative equality between individuals, according to Ryden, harmed the ability of local jurisdictions to craft electoral remedies tailored to their specific group interests, and led to "the exclusion of a broader pluralistic, group-inclusive concept of political rights."<sup>74</sup>

Ryden's concern with the court overstepping its boundaries speaks to a deeper constitutional debate that dates back to the founding of the country. The exact scope of the Supreme Court's power, or what it can rule on as unconstitutional, covers what observers refer to as *legal* questions. This would include determining the breadth of rights like freedom of speech and freedom from search and seizure, which requires the use of highly generalizable principles and abstract arguments that set the standard for laws throughout the country. In contrast, the scope of the other two branches of government covers the realm of *political* questions. These include issues of the effectiveness of particular policies whose legal status is not in question, like health care mandates or statutes governing police responses to potential crimes. Voting rights, and the attendant concerns about the institutional effects of electoral systems, resides at the intersection of political and legal questions. For the last century, the court has straddled this line, attempting to impose uniform constitutional standards to realize fundamental freedoms while also deferring to the specific policy needs of various localities. But many prominent commentators, Ryden included, believe the court has gone too far in imposing a constitutional standard on smaller jurisdictions. Constitutional historian Gordon S. Wood, who is not necessarily an

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<sup>74</sup> Ibid., 38

opponent of expansive judicial powers, admits “the twentieth century... has witnessed an extraordinary expansion of the Court’s power” in the realms of culture and public policy.<sup>75</sup>

It seems clear that in the realm of voting rights, it is the legislature, not the courts, that has done a more effective job in realizing the needs of citizens within a constitutional framework. While it is true that the court’s rulings can offer immediate remedies for pressing social, political and constitutional problems, their decisions have widespread effects that can lead to unintended, generational consequences. When we consider the nature of voting rights, we must realize that their substance is closely related to the electoral systems in which they operate. These electoral systems operate in response to changing needs at the local, state and federal level. These needs are not just those of individuals, but of constantly changing political groups as well, whose allegiances and positions are based upon an accelerating, constantly changing political landscape. When the court pushes hard to impose a standard to address an immediate concern (one person, one vote for reapportionment problems, the efficiency gap for gerrymandering ones), it is not clear what other (possibly negative) impacts these extremely far reaching decisions may have. In the court’s *Reynolds* decision, for instance, the crucial standard of quantitative equality between votes was established throughout the nation. But the courts eager pursuit of this standard resulted, in the words of Ryden, “*qualitative* factors” of voter effectiveness being “sacrificed at the altar of *quantitative* standards of equality.”<sup>76</sup> A similar situation is before the court on the issue of partisan gerrymandering and the efficiency gap. This solution, while desirable on its face, is built for a predominately two-party system with

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<sup>75</sup> Wood, Gordon S. “The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less,” *Washington & Lee Law Review*. No. 56, 787 (1999). 791.

<sup>76</sup> Ryden, David K. *Representation in Crisis: The Constitution, Interest Groups, and Political Parties*. Albany: State University of New York Press, 1996. 39-40.

well-defined cleavages of political belief. But it is a given that the current composition of political groups, divided between mainly rural Republicans and urban Democrats, will most likely undergo major demographic and ideological changes within the next decade or so, just as they have undergone massive changes in years past. Imposing a strict efficiency gap will have the effect of preserving this particular two-party structure through judicial fiat, which is arguably something that millions of U.S. citizens, who have professed historical disapproval with both parties, would not find desirable.<sup>77</sup>

Legislatures, on the other hand, whether they are state, federal or local, are much better equipped to address systematic issues with partisan asymmetry in the effectiveness of votes. Unlike the Supreme Court, whose remedies are large, clunky and long lasting, the legislature can impose fixes that can be more quickly repealed or expanded upon to meet changing needs. The VRA is a powerful example of this. In response to the changing needs of racial minorities, the act was expanded upon and tailored to achieve the goal of equally effective representation over the course of several decades. Even in the face of historical racial and political polarization, policies were crafted and implemented at the state, local and federal level to enhance the rights of millions of U.S. citizens. To say that citizens must outsource the issue of partisan asymmetry to a body of unelected judges because of legislative polarization ignores this history. And as the authors of the efficiency gap have pointed out, the courts have already outline the importance of equally effective votes for all citizens, regardless of racial, geographical or political factors.<sup>78</sup> While perhaps more

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<sup>77</sup> Jones, Jeffrey M. "Approval of Parties in Congress Near Record Lows." Gallup. October 05, 2017. Accessed April 03, 2018. <http://news.gallup.com/poll/220238/approval-parties-congress-near-record-lows.aspx>.

<sup>78</sup> Stephanopoulos, Nicholas O., and Eric M. McGhee. "Partisan Gerrymandering and the Efficiency Gap." *The University of Chicago Law Review* 82, no. 2 (2015): 831-900.

challenging and time consuming, allowing the legislative branch, and not a majority of justices, to address the systematic problems of voter inequality will more likely result in effective, lasting changes that more citizens will find palatable.

## **CONCLUSION**

Addressing the problem of widespread voter apathy requires a multipronged approach that accounts for legal, economic, political, scientific, and cultural questions. This essay only focuses on a small, yet crucial part of a solution to a problem that keeps millions of U.S. citizens from exercising their constitutional right to vote. Creating an electoral system that can effectively realize the constitutionally protected right to an equally powerful and effective vote is not an easy task. Turning the principle of voluntary proportionality into concrete policy will be monumental. It will require extensive changes to thousands of city, county, state, and federal legislatures. But it is indispensable to the effective functioning of a representative democracy that wishes to have responsive lawmakers, engaged citizens and a widely supported government. Citizens, who have largely lost faith in their national institutions, must reflect upon to the impact that their local and state governments have on their ability to influence policy. By implementing the proposed systematic changes outlined above, and recounting the history of systematic overhauls to address similar nationwide problems, citizens have the chance to revitalize their democratic system to better reflect their needs and desires. As is usual in a democratic society, the choice to make votes count is in our hands, and the substance of our

rights will only be as valuable as the effort we put towards lasting improvements in our local, state and federal electoral systems.

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