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# A Vote Cast; A Vote Counted: Quantifying Voting Rights Through Proportional Representation in Congressional Elections

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### **I. INTRODUCTION: REASSESSING “WINNER-TAKE-ALL” VOTING SYSTEMS**

The current “winner-take-all” or “first-past-the-post” system of voting places enormous obstacles on minority ascension to congressional office. In this system, representatives are selected from a single district in which the candidate with the plurality of

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votes gains victory. History has shown, however, that candidates who purport to represent “minority” interests can rarely, if ever, expect to receive the most votes in any congressional race. Some thought that the so-called “minority-majority” districts of the early 1990s were a solution, particularly since more minority congresspersons were elected because of such redistricting. The net political result of minority-majority districts, however, was the election of more candidates unsympathetic to minority views, as many minority votes were packed into minority-majority districts. Moreover, such redistricting measures are now considered illegal, as the Supreme Court has essentially invalidated the use of race in redistricting.

Additionally, because white voters constitute at least a plurality of voters in every state except Hawaii, minorities in the forty-nine other states have had historically little success in gaining election to the United States Senate.<sup>1</sup> As a consequence, the only real opportunity for minorities to gain access to federal elected office remains limited to the United States House of Representatives, thus highlighting the notion that opportunities for minority congressional candidates should be expanded, not contracted.

Some commentators believe that the flaws of the winner-take-all-system and single member district are readily apparent. First, critics note that significant blocs of voters – including minority voters – are consistently denied the right to *elect* a truly preferred candidate, because such candidates can almost never expect to receive the most votes. Consequently, many potential candidates are deterred from running because the prospect for victory is so slim. As a result, large numbers of voters are often forced not to select their preferred candidates, but instead to select the candidate they believe has the greatest chance of winning.

In addition, many voters in a winner-take-all system are represented by persons they did not support. In 1994, while Democratic candidates for Iowa’s five seats in the United States House of Representatives received 42% of the total votes cast in Iowa, none of Iowa’s five congressional seats was won by a Democrat.<sup>2</sup> Similarly, in 1992, Republican congressional candidates garnered 48% of the two-party statewide vote in North Carolina, but won only four of twelve seats.<sup>3</sup> As stated by Stephen K. Medvic, Director of the non-partisan Center for Voting and Democracy, a sizable number of these voters are represented by someone they do not support.<sup>4</sup> In this respect, many losing votes are simply “wasted.”

Alternatively, critics of the “winner-take-all” system, such as Mary A. Inman, point out that wasted votes should also include those cast for the victorious candidate: “The United States’s congressional electoral system . . . [is] aptly labeled ‘extreme majority rule’ because the votes of members of any group constituting a majority in a given district are essentially wasted.”<sup>5</sup> Consequently, any vote cast in addition to the number needed for victory might as well have never been cast at all. In landslide races, where the prospect of “wasting” one’s vote is high, the incentive to vote,

therefore, seems almost non-existent.<sup>6</sup> Moreover, most congressional races *are* landslide races. A study by the Center for Voting and Democracy found that 317 of the 435 House races in November 2000 were “essentially already decided.”<sup>7</sup> That is, most voters are not even offered two competitive candidates in a congressional race.

Consequently, many voters simply do not vote because they are consistently denied the right to elect a candidate of their choosing, or, as Inman asserts, some voters may rightly feel that their votes are “wasted.” Therefore, “winner-take-all systems” discourage voter participation.<sup>8</sup> To illustrate this point, among the voting participation rates of the twenty-one democracies in Western Europe and North America, the United States ranks 20<sup>th</sup>, with only 36% of eligible voters casting ballots in the 1994 Congressional elections, and only 44% voting in 1996 – even when offered the opportunity to select the president as well.<sup>9</sup>

## II. AN ALTERNATIVE: PROPORTIONAL REPRESENTATION

Some opponents of the “majority-take-all” voting system believe there is a superior system: proportional representation. As will be discussed below in greater detail, a party or candidate need not finish first to be elected in a system of proportional representation. Instead, political parties or candidates receive the percent of legislative seats that actually reflect the vote tally. As a result, proportional representation systems may prove the fairest, most efficient method to ensuring that all voting interests are accurately reflected in the legislative process.

There are two basic forms of proportional voting: “List Systems” and “Choice Voting/Single Transferable Vote.”

In the list system, the most widely-used form, a voter simply selects one party and its slate of candidates. Thereafter, the seats are allocated on the basis of the share of votes each party earned. For instance, in the Iowa congressional example discussed above, instead of receiving zero congressional seats with 42% of the statewide vote, the state Democratic Party would have earned two seats out of the available five.<sup>10</sup> Often, with the list system, a minimum share of votes is required for a party to earn any representation; typically a 3% to 5% threshold is used. Proponents of this system argue that it is ideal for large legislatures on state and national levels.

Alternatively, in a “choice voting” or “single transferable” vote system, a voter merely ranks candidates in order of preference (first choice, second choice, etc.). Unlike with the list system, voters in choice voting elections usually select individual candidates as opposed to parties. In practice, once a voter’s first choice is elected or eliminated, the voter’s “excess votes” are transferred to subsequent preferred candidates until all the seats are filled.<sup>11</sup> Advocates of this form of proportional representation note that with the single transferable vote, very few votes are “wasted,” for voters can be certain that should their first choice not garner enough votes for

victory, those votes will “transfer” to their secondary choices. For instance, a voter most interested in reducing the size of government could select, as his first choice, a Libertarian candidate, and as his second choice, a Republican. In this instance, the voter can have confidence that, in the event his most preferred candidate loses, his second choice will receive the vote.

If employed in congressional elections, proportional representation could be applied in different ways, depending likely on the number of seats available in a state and the cultural and geographic ties within a state. For instance, a state with few congressional seats – such as Iowa with its five seats – could simply use statewide elections to determine its representation. Alternatively, a more populous state such as North Carolina (with eleven seats) could be divided in ways that preserve certain historical and geographical ties. For instance, voting rights advocate Lee Mortimer proposes that North Carolina be divided into three geographic regions, each then having larger multi-member districts ranging from three to five seats.<sup>12</sup> Importantly, no counties within North Carolina would have to be divided under this proposed alignment.

### **III. THE BENEFITS OF PROPORTIONAL REPRESENTATION: EXPANDING THE DEMOCRATIC EXPERIENCE FOR MORE AMERICANS**

From a public policy perspective, proportional representation offers several enhancements over the winner-take-all-system, particularly in relation to improving the political voice of minority groups. Under a winner-take-all system, minority groups are often precluded from forming alliances with similarly situated groups, especially when districts are drawn in a way that isolates one group. African Americans, for example, may share some of the same beliefs as another isolated group. As Professor Lani Guinier notes, “where blacks and whites are geographically separate, race-conscious districting by definition isolates blacks from potential white allies, such as white women, who are not geographically concentrated.”<sup>13</sup>

In contrast, coalition-building would more likely occur under a system of proportional representation, and would advance opportunities for minority groups to win congressional seats. For example, if we were to follow the aforementioned multi-district plan for North Carolina, because African-Americans constitute a quarter of the state’s population and are reasonably well dispersed within the state, they could expect to win in each of the three districts. More importantly, as noted by Mortimer, coalition-building would likely enhance the opportunity for more seats: “Since African-American candidates in a multi-member election would undoubtedly attract some white voters, proportional representation holds out the possibility of additional

minority winners. Any group of voters — racial, geographic, political, rural — can carve out a constituency based on shared interest.”<sup>14</sup>

Importantly, coalition-building can and does happen, even within single member districts in a “winner-take-all” system. A good illustration of alliance building is North Carolina’s 12<sup>th</sup> Congressional District, where Mel Watt has served as a congressman since 1992. Indeed, since his first election following a redistricted racial gerrymander, Watt has consistently attracted over 70% of the district’s vote, in a district where 41% of the voters are white and 56% are black.<sup>15</sup> According to Congressman Watt, those who live in urban communities “share a common set of concerns: unemployment and poverty, drugs and gun violence, inadequate childcare and public transit, and a paucity of federal dollars to deal with these problems.”<sup>16</sup> Significantly, although his district is racially diverse, Watt has usually received the majority support of both black *and* white voters,<sup>17</sup> a fact attesting to the notion that political alliances can occur when different racial or ethnic groups share economic and educational obstacles.

Coalition-building under a system of proportional representation may become amplified over time, particularly as voters develop “their own political identities.”<sup>18</sup> Specifically, Professor Guinier argues that individual voters should be able to determine their own identities, as opposed to being grouped together in a particular category.<sup>19</sup> In her book, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy*, Professor Guinier states, “no one needs to decide whether a minority group identity is the only or primary identity.”<sup>20</sup> Echoing Professor Guinier’s reasoning, Steven J. Mulroy, an Assistant United States Attorney General in the Department of Justice, Civil Rights Division, notes that when a voter ranks candidates, that voter may be more inclined to support a candidate from another party, race, gender, ethnicity without sacrificing support for the voter’s “insider” candidates, who are often from that voter’s class, race, gender, etc.<sup>21</sup>

Advocates of alliance building often refer to its long-term implications for cross-group interest alignment as the “anti-balkanization” effect, where cross-racial coalitions, among other collations, could both emerge and strengthen over time. Steven Hill and Rob Richie of the Center for Voting and Democracy argue that cross-racial electoral coalitions “among people of color and white progressives could unite across a state in electing a common slate of candidates rather than isolate voters in separate one-seat districts.”<sup>22</sup> To illustrate this point, an African-American voter could rank an African-American candidate first, but then rank second a non-African-American candidate who holds similar views.

Mulroy argues that “this voting pattern increases the incentive for candidates — even candidates associated with a particular race, party, ideological persuasion, or other cohesive voting bloc — to reach out to members of other constituencies for ‘crossover’ votes.”<sup>23</sup> In practice, as noted by Barry Yeoman of the *Nation*, politicians,

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under a system of proportional representation, would be well served by reaching out, because, “voters with common economic concerns — but who live far apart — can band with one another to back a candidate who addresses their needs.”<sup>24</sup> In contrast, unless a state has only one congressional representative, the current single member districts preclude state wide or larger regional coalitions.

Coalition building can also have important effects on public policy, particularly when one considers how politics can often be a “plus sum” rather than a “zero sum” game. That is, agreement finding between groups can lead to a greater net political result for each group involved in a policy compromise, rather than group isolation or distrust. This phenomenon is particularly integral to the advancement of minority groups’ interests, as many minority groups share common pursuits that, if unaligned with other minority groups, are often frustrated by the dynamics of a majoritarian democracy.

For instance, if we assume that the commonwealth of Massachusetts employed a statewide (one district) proportional representation system for its election of ten congressional representatives, and that 12% of the voters are Chinese-Americans, and that there are two candidates of Chinese-American decent, coalition building could be an important tool for greater representation amongst the Chinese-American community. In this setting, if the two Chinese-American candidates appealed solely or even mostly to the interests of the Chinese-American community, only one of the candidates would likely gain victory. If one or both of those candidates found issues that are embraced by multiple communities, however, it is far more likely that both candidates would gain victory because they would attract support in addition to their 12% base. For example, if those candidates advocated financial assistance to recent immigrants to the United States, they not only would appeal to many within their own community, but also other communities in Massachusetts that would likely find such a policy appealing – such as voters of Puerto Rican decent residing in Lawrence or Fall River or those of Cambodian decent living in Lowell or Chelmsford.<sup>25</sup> Notably, such coalition building would only be possible with proportional representation, since a winner-take-all system would place geography and district lines in the way of commonality-searching amongst otherwise disparate groups.

Coalition building could also benefit the many moderate voters who, under the winner-take-all system, are left without representation of their choosing. For instance, pro-choice or pro-affirmative action Republicans, like pro-life or tax-cutting Democrats, are often discouraged from seeking office because their platforms are incongruous with their parties’ base (thus making victory in their respective parties’ primaries exceedingly difficult). Moreover, to run and win as an independent is generally an implausible goal. Indeed, third party candidates who represent “the middle” are often ignored because winning only 10% of the vote makes them “spoilers” at best, and many voters are disinclined to expend their votes on candidates

who have no chance of winning.<sup>26</sup> As a result, many potential supporters of moderate candidates are spurned by the prospect of wasting their votes on sure losers, a phenomenon described as, “the vicious cycle of third party marginalization.”<sup>27</sup>

To illustrate how moderate voters are often un-represented in the current political climate, and how proportional representation may prove beneficial, the Georgia congressional delegation currently consists of eight conservative white Republicans and three liberal black Democrats, a composition not particularly reflective of “middle America.”<sup>28</sup> Alternatively, under a system of proportional representation, a more evenly spaced ideological distribution in the composition of electors may improve voter efficacy, as more interests would be served with candidates reaching out to voters of different characteristics across the state (or the multi-seat district).<sup>29</sup> In that respect, coalition building would serve the interests of moderate voters of all racial and ethnic groups.

A final benefit of coalition building relates to the increasing diversity of American cities, particularly as cross-racial alliances seem beneficial in improving integration and engendering unity. For instance, the 2000 Census reveals that for the first time in Boston’s history, whites constitute a minority with 49.5% of the population – a 9.5% decline from the 1990 census, with African-American residents at 23.8% (a 1.2% increase), Latinos at 14.4% (a 49.1% increase) and Asians with 7.5% (a 67.5% increase).<sup>30</sup> Because of this increasing diversity, it is plausible that these distinct minority groups would be well served by finding positions of agreement. A system of proportional representation would encourage such unification.

A second valuable public policy rationale for the implementation of proportional representation concerns the political effects of minority-majority districting. Essentially, critics of such districting, such as Guinier and Inman, argue that minority-majority districts “pack” minority votes, thus ensuring a super-majority of minority votes in one particular district (a related issue to the notion of “wasted votes”), and causing the remaining districts to have white majorities. Indeed, Inman argues that this districting plan “isolates the minority groups, leaving other districts whiter . . . . The representative of a majority-minority district is unlikely to exert significant influence within the legislature, so the white representatives from the remaining districts will likely predominate.”<sup>31</sup>

There is statistical evidence to corroborate the political loss endured by minority interests under minority-majority districting. According to Maurice T. Cunningham, former Assistant Attorney General for the Commonwealth of Massachusetts, “political scientists differ on how many districts maximization may have cost the Democrats, but a moderate consensus is that that seven to twelve seats were lost to the Democrats in 1992 and 1994 due to racial redistricting.”<sup>32</sup> Such a loss is enormously significant in terms of leadership and influence in Congress. Essentially, while more minorities were elected to Congress, “as the new minority

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officeholders found their way around the capital, senior members of the Congressional Black Caucus lost three chairmanships and seventeen subcommittee chairmanships when the Republicans took over.”

Anecdotal evidence also supports the notion that not only was the loss of minority power a real issue under minority-majority districting, it may have been a real intention as well. A remarkable excerpt from *Smith v. Beasley*,<sup>33</sup> illuminates this point, explaining that strange bedfellows emerged to ensure that while minorities would gain more seats under minority-majority districting, they would also, paradoxically, lose influence over the legislative process:

It is obvious from the notes of telephone conversations, memoranda, correspondence, and testimony presented that the Black Caucus, the South Carolina Republican Party, and the Department of Justice were seeking to maximize black representation in the South Carolina House of Representatives with little concern for compactness of districts, contiguity, or communities of interest.

Alternatively, a system of proportional representation would preserve the integrity of elections by making political motivations transparent. Indeed, the reduction (if a state moved to larger multi-member districts) or elimination (if a state moved to one state-wide district) of political machinations in the redistricting process would better serve all voters, for the commonality of interests could be aligned in ways that overcome previously polarized barriers between groups.

A third major policy justification for the use of proportional representation involves the creation of authentic representation for minority groups.<sup>34</sup> This justification has been most often illustrated through its application to the African-American community. Specifically, University of Maryland Professor Mark A. Graber defines “authentic black representation” as follows: “when a significant number of black voters support candidates committed to serving their perceived common interests as African-Americans, that group will have the power to elect an ‘authentic black representative.’”<sup>35</sup> Importantly, authentic representation is often viewed as a substantially better form of representation than “surrogate” or “trusted” representation. In other words, some argue that a representative from one’s own group is more reliable to advance the interests of that group than would be a representative from another group.

Proportional representation would, in the opinion of both Professors Guinier and Graber, advance the likelihood of authentic black representation. According to Professor Guinier, proportional representation would prevent, “black officials [from] defining their political agenda without reference to or consultation with a community base.”<sup>36</sup> Moreover, Professor Graber deduces that under a system of proportional representation, “racial minorities could be confident that the officials they choose actually would represent them in legislative debates.”<sup>37</sup>

To illustrate the importance of “authentic” representation, particularly as it pertains to both the advancement of a legislative agenda and the necessity of compromise within a legislative body, the German Green Party and the German system of proportional representation provides a telling example. In 1994, the German Greens won less than 10% of the national vote, and were unable to win a single district election.<sup>38</sup> The Greens, however, because they had both a concentrated agenda and actual seats in the Legislature, as opposed to surrogate sympathizers, were able to force some of their most important environmental positions onto the national scene. Subsequently, a number of those positions have become law, not because a majority of the legislature would, in the absence of the Greens, vote for those positions, but rather because once the Greens secured actual seats in the Legislature, other parties were forced to acquiesce to greater environmental safeguards in order to secure passage of their own agendas. Moreover, since that time, the German Greens have increased their share of legislative seats by six times and have become the third largest political party in the German parliament. If Germany had employed a “winner-take-all” system, however, the Greens may never have earned a seat in the Legislature.<sup>39</sup>

Another example of authentic representation can be demonstrated through the use of proportional representation in the early 20<sup>th</sup> Century, where a number of localities in the Midwest employed proportional representation. For instance, during the city council elections in Ashtabula, Ohio, Irish Catholics were able to unite behind an Irish Catholic candidate and elect the first ever Irish Catholic city councilman in Ohio.<sup>40</sup> Prior to the implementation, Irish Catholics were a residentially dispersed minority and were unable to elect a ward member or an at-large representative. With proportional representation and a multi-member district, however, the Irish Catholics gained a voice for the first time and were able to better advance issues of particular import to that community.

Like many Americans of Irish Catholic decent from a century ago, many African-Americans today are economically disadvantaged, particularly in relation to other ethnic and racial groups in the United States. As Professor Guinier notes, however, African-Americans are also “a poor and historically oppressed group.”<sup>41</sup> History shows that as Americans with Irish Catholic heritage gained access to legislative positions, not only did the prospect of electing such Americans become less foreign to voters, but the interests of the Irish Catholic community were served by having actual community members represent them – those individuals who could share in the struggles and the history of being both of Irish Catholic decent, and simultaneously, being American. Moreover, they became a collective player in politics, and were able to use the greatest political asset – a vote in the legislative process – as a tool for maximizing the interests of the Irish-American community.

The challenges of being simultaneously African-American and American in achieving a political office are likely far greater than those experienced by any other

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American minority group. Consequently, it seems tremendously important that authentic African-American candidates are available to the African-American community. On the other hand, the current winner-take-all system, according to Professor Guinier, is far more likely to produce “establishment-endorsed blacks” or “marginal community members whose only real connection with the black community is skin color.”<sup>42</sup> Professor Guinier sharply criticizes how, “electoral support by a majority of black voters is thus a convenient proxy for political authenticity.”<sup>43</sup> As a result, these representatives are “not elected as the representatives of choice in the black community, but instead preferred by the larger society.”<sup>44</sup>

Congressman Watt shed light on the issue of establishment-endorsed candidates. After the Supreme Court held his minority-majority congressional district invalid in *Shaw v. Hunt*,<sup>45</sup> Congressman Watt feared that he could lose his black authenticity if forced to seek office in a more heterogeneous district, and thus have to embrace positions incongruous with his and the African-American community’s beliefs:

The thing I loved about the old 12th District is that I could be their representative and never feel like I was bending to their wishes. . . . If elected to a more heterogeneous district] I’m not going to be Mel Watt the progressive. I’m going to be Mel Watt the representative. Does that mean I’ll have to bend my positions? I don’t know. Does that mean I’ll be uncomfortable representing my new district? I don’t know. If it becomes too uncomfortable, then it becomes incumbent on me to admit that, and go on to something else.<sup>46</sup>

Indeed, other scholars endorse Professor Guinier’s argument that more authentic minority office holding will produce a more egalitarian legislative process. According to Douglas Amy, a professor of Government at Mount Holyoke College, “increased representation means minority communities can better promote their political and economic interests and focus more attention on what they see as pressing.”<sup>47</sup> In an illuminating illustration of this idea, Professor Amy rhetorically asks, “imagine . . . if twelve black United States senators, rather than none, were pushing legislation on civil rights, affirmative action, urban renewal, and social welfare spending. Would this not make a significant difference?”<sup>48</sup> Such a question reiterates Professor Guinier’s belief that, “the issue here is one of procedure and process, not substantive justice.”<sup>49</sup>

Like Professors Guinier and Amy, Professor Nan D. Hunter of Brooklyn Law School endorses proportional representation as a way to “encourage the growth of intracommunity diversity of interests and viewpoints,” particularly when, in a majoritarian democracy, minority voters will always be in a perpetual disadvantage in securing passage of legislation.<sup>50</sup> Similar to Professor Graber, Professor Hunter argues that minority representatives should not depend on the support of other

representatives.<sup>51</sup> Specifically, Professor Hunter argues that proportional representation permits African American voters to cluster votes so as to, “maximize the likelihood of influencing policy even where . . . a minority [representative] . . . cannot attract coalition support from members of the majority.”<sup>52</sup>

Authentic African-American and other minority interests have been served in the past through proportional voting. As illustrated by Mulroy, when New York City employed its first preference vote election for its community school boards in 1970, “the percentage of black and Hispanic community school board members jumped to close to the corresponding black and Hispanic percentages of the citywide population.”<sup>53</sup> Similarly, the percentages of black and Hispanic representatives increased commensurate with subsequent population increases.<sup>54</sup>

The goals of authenticity should not interfere with alliance-building, because a group can acquire more votes in the legislative process by promoting candidates who serve both the interests of that group and of other groups. That is, agreement finding between groups should not be ignored because of concerns for authenticity. In contrast, Professor Guinier asserts, “even a mildly sympathetic white official will not dependably consider black interests if that individual must also accommodate the more dominant views of the white constituents.”<sup>55</sup> Unfortunately, distrust of other groups only heightens the barriers between groups and harms commonality finding. While authenticity is an important benefit of proportional representation, particularly as minority constituencies could better hold accountable their elected officials by better defining group concerns, such a benefit may, on balance, prove detrimental if it discourages candidates from reaching out to other groups.

A fourth reason highlighting proportional representation’s likely benefit to our democracy relates to voter turnout in congressional elections. Simply put, most races in a winner-take-all system are already decided long before even the primaries take place. In fact, a study by the Center for Voting and Democracy concluded that, “congressional incumbents nationally are re-elected more than 98% of the time . . . government does not tolerate business monopolies.”<sup>56</sup> “[Yet] when districts are drawn to insulate legislators from competition, voters are robbed of having a choice.”<sup>57</sup> Moreover, as noted earlier, many voters are not satisfied with either party, yet simultaneously do not want to waste their votes on unelectable non-mainstream candidates. Collectively, these voting disincentives explain why voter turnout in the United States is comparatively low in relation to other democracies.

Conversely, proportional representation encourages voter turnout. As argued by Mulroy, because elections using proportional representation “mathematically tend to lead to results that more accurately reflect the entire electorate’s preferences,” these elections encourage more issue-specific candidates to seek office, as third parties have realistic chances for success under proportional representation.<sup>58</sup> As a result, added competition and expanded choice lead to higher participation rates.<sup>59</sup>

To illustrate this point, John Moot, a resident of Cambridge, Massachusetts, explains how his vote seems more significant because of Cambridge's proportional voting system, particularly when compared to his experience as a Republican voter in a historically Democratic congressional district:

Since becoming a resident of Cambridge in the 1950's, I have been fortunate to have always had a representative of my choice on the City Council, thanks to proportional representation. In contrast, I have never had a representative of my choice in the U.S. House of Representatives because I am a Republican in what was Tip O'Neill's and is now Joe Kennedy's district.<sup>60</sup>

Indeed, Mr. Moot's anecdotal evidence seems to reinforce the idea that with proportional representation, voters appreciate the reduced chance of being "shutout" at the polls. Importantly, this appreciation translates into higher voting percentages.

Voters' perceptions of elections may also impact turnout, particularly when winner-take-all and proportional representation are compared. For instance, in winner-take-all elections, a 10% lead by one candidate in the polls immediately preceding an election often translates into a likely "blowout" for the leading candidate. Consequently, many supporters, on either side, may be unconvinced their votes will actually affect the outcome. Therefore, these voters will view waiting in line to vote as an opportunity cost, and thus not vote. Conversely, in a proportional representation system, a 10% deficit to the leading candidate is by no means fatal. In fact, with multi-seat or statewide elections, usually more than two positions will be available, and voters can be assured that their votes will be transferred instead of wasted.<sup>61</sup>

Not only are voters more encouraged to vote under proportional representation, thus increasing voter turnout, but political parties, particularly those consisting of minority or issue-specific groups, have heightened incentives to increase "get-out-the-vote efforts" – a phenomenon itself likely raising voter turnout.<sup>62</sup> Moreover, numerous scholars have attested to the fact that greater voter turnout has the additional qualitative effect of improving political culture. "Without exception, countries using proportional representation enjoy a higher level of voter turnout and more vibrant political discourse."<sup>63</sup>

Some data supports these notions. First, voting studies that control for other voting influences find that proportional representation has increased voter turnout in European elections from 9% to 12%.<sup>64</sup> Second, based on election results collected from proportional representation elections held in Ohio in the twentieth century, most voters could expect to have a candidate elected that they had supported.<sup>65</sup> On the other hand, the change in Ohio's electoral systems did not have an independent effect on turnout. Indeed, "turnout rose and fell with local issues and candidates[;] . . . in Toledo, a measurable drop in turnout occurred during the period of PR [proportional representation] elections."<sup>66</sup>

Although the data on proportional representation's independent effect on voter turnout is mixed, it is clear that many voters, including minority voters, are "turned off" by winner-take-all systems. In contrast, with proportional representation, voters of all groups can be assured their votes will not be "wasted," and, consequently, get-out-the-vote campaigns will likely have a greater impact on voter turnout. Indeed, get-out-the-vote campaigns appear to be particularly effective in encouraging voting by minority groups, especially in those states with close elections – that is, states where voting really matters. To illustrate this point, David A. Bositis, a senior research associate at the Joint Center for Political and Economic Studies, concluded that the NAACP's 2000 drive to increase the African-American vote in Florida not only brought many first-time voters to the polls, but helped increase by 65% the number of African-American Florida residents voting in the 2000 election compared to four years earlier.<sup>67</sup> Similarly, the \$12 million NAACP effort to increase African-American voting nation-wide increased the turnout from the African-American community by one million votes from 1996, with early estimates of up to 50% of voting-age African-Americans casting ballots in 2000.<sup>68</sup>

Significantly, the states featuring the greatest four year increases in African-American voting were those with hotly contested elections, most notably in Missouri, where 140% more African-Americans voted in 2000 to choose between John Ashcroft and Mel Carnahan than had cast ballots in 1996.<sup>69</sup> As a result, it is likely that with a system of proportional representation, where voters can be certain that their votes will not be wasted, similar increases in voting will occur. Certainly, bringing more minorities into the political process can only enhance our democracy, as all people should have a right – and a reason – to participate in the American experience.

A fifth and final rationale for the use of proportional representation in congressional elections relates to the present Supreme Court's drive against majority-minority districts – and, as critics note, integrated legislatures. Numerous civil rights leaders, such as Professor Guinier and Reverend Jesse Jackson, have noted that more than seventy-five localities have adopted proportional representation to settle voting rights cases.<sup>70</sup> Indeed, Professor Kathleen Barber notes, "as the U.S. Supreme Court draws the noose ever more tightly around districts drawn to expand minority representation, the alternative of proportional representation becomes ever more compelling."<sup>71</sup>

More importantly, particularly with the elimination of minority-majority districting, proportional representation offers a substitute for minority ascension to political office. Indeed, scholars such as Professor Graber maintain that, "proportional representation would increase the number of black legislators without any recourse to the contentious racial gerrymanders that the Supreme Court recently declared unconstitutional."<sup>72</sup> Likewise, Professor Amy explains that contentious race and election issues would become moot under a system of proportional representation: "the

controversial issues of reverse discrimination and reserving seats by race become irrelevant under proportional representation . . . [because] it allows for the election of minority candidates, if they have voter support.”<sup>73</sup> As a latent consequence, the elimination of politically designed districts would also reduce incumbency protection, for many recognize that, “the process of gerrymandering districts is typically a means to another end — incumbency protection. [In contrast] proportional representation eliminates the need for drawing legislative districts.”<sup>74</sup> In the following section, we will address the issue of incumbency protection and how it pertains to proportional representation.

#### **IV. THE DRAWBACKS OF PROPORTIONAL REPRESENTATION: TAILORING A NEW VOTING SYSTEM TO ADDRESS LEGITIMATE CONCERNS**

Opponents of proportional representation offer several arguments countering the benefits of proportional representation. First, because independent and issue-specific parties are encouraged under proportional representation, such an electoral system may help elect authentic racist, sexist, or other extremist groups. Indeed, Professor Graber, by incorporating Professor Guinier’s language, maintains that, “cumulative voting schemes permit the same number of whites, Klu Klux Klan members, plumbers, and Brooklyn Dodger fans to elect the ‘authentic’ representatives of their choice.” As a result, the range of all who feel unrepresented in “winner-take-all” systems will be better able to elect more “authentic” representatives, including those who simply hate other kinds of people. If elected, these hateful people could be both disruptive and isolated, thus potentially stymieing the legislative process.

The history of proportional representation — when unrestricted — has validated this complaint. For instance, the prominence of religious extremist parties in Israel has been associated with Israel’s use of proportional representation.<sup>75</sup> Germany has experienced a recent rise in Neo-Nazi activity, some of which has been attributed to the belief that such groups are motivated by the realistic prospect of gaining elected office under Germany’s system of proportional representation.

Some opponents offer recent public opinion polls to suggest that “proportional representation is more likely to augment the overall political strength of extreme racists than of persons committed to racial justice” if implemented in the United States.<sup>76</sup> Some polls confirm that “politically ineffectual white reactionaries” may be more numerous than “politically ineffectual progressive persons of color.”<sup>77</sup>

On the other hand, steps can be made to limit the opportunity of fringe parties and candidates to gain office. Most notably, some nations have employed the “5% bar.” With this modification, a candidate is unable to gain office unless she has garnered at least 5% of the total vote. Germany employs this hurdle and has thus far

been able to legislate without the presence of Neo-Nazi party members.<sup>78</sup> Similarly, if such a bar were instituted in the United States, extremist candidates would be hindered, if not altogether excluded.

A second complaint offered by opponents of proportional representation entails the alleged “balkanization” of voting patterns, a phenomenon referring to racial bloc voting and the fragmentation of the legislative process into competing racial and ethnic factions. According to proponents of this position, minority voters would tend to favor candidates who extremely favor the interests of that minority group, thus electing those who would be inclined to fully disassociate themselves from other congressional members.

There are several flaws to this argument. First, there is no empirical evidence from other systems using proportional representation that racially polarized voting increases upon adoption of proportional representation.<sup>79</sup> Indeed, in our last Presidential election – the greatest “winner-take-all” election imaginable – 92% of African-American voters did not vote for the eventual winner, George W. Bush, thus making one wonder whether a vote could be any more polarized under a system of proportional representation.<sup>80</sup>

Second, history demonstrates the converse of this argument to be most accurate. That is, proportional voting actually improves relations between groups, because more groups will have a “seat at the table,” thus making their interests more real and understandable to other parties. To illustrate this point, a former Cambridge, Massachusetts school committee member reflects that while much of Boston suffered from race-riots following a decision to desegregate busing, Cambridge managed to escape such upheaval: “[P]roportional representation is the reason Cambridge didn’t burn during the years of demonstrations, the reason desegregation of the schools was achieved without any significant disruption.”<sup>81</sup>

Quantitative data reinforces this point. According to a study of proportional representation races in Ohio in the early twentieth century, “there were no significant differences in the percentage of divided votes on council issues [prior to proportional representation].”<sup>82</sup> In fact, this study reveals that, “factionalism, based on non-unanimous votes on substantive issues, actually declined in Hamilton and Toledo. In Cleveland and Cincinnati, there were no significant differences.”<sup>83</sup>

Some even speculate that because relations between groups are more likely to improve under proportional representation, racial bloc voting might actually decrease in time. According to Mulroy, “to allow minority candidates to be elected and to show white voters that they can function effectively[,] . . . [proportional representation] might have the long-term effect of reducing racial bloc voting.”<sup>84</sup> In fact, the history of proportional representation may corroborate Mulroy’s inclination, as “evidence in some communities suggests alternative systems encourage not only the formation of cross-racial coalitions but also representatives of different racial and ethnic groups to

work together. That was the experience in Cincinnati and New York City during their use of preference voting earlier this century.”<sup>85</sup>

A third charge leveled by opponents of proportional representation relates to their belief that, under a system of proportional representation, representatives who are white or non-black minorities would be motivated to more regularly oppose programs and policies that benefit the African-American community. These proponents contend that because ties between constituents and representatives are tightened under proportional representation, white and other non-black conservatives would more likely oppose liberal racial policies than in a system of winner-take-all, because with proportional representation, as noted by Professor Guinier with her authenticity argument, representatives must be especially responsive to the needs of their constituency.<sup>86</sup> Simply put, representatives elected in a system of proportional representation have less independence from their constituencies.

Similarly, others argue that because non-black minorities, like Asian-Americans, would gain representation under a system of proportional representation, studies which suggest that these groups are more inclined than whites to hold negative views of blacks may prove troublesome to the African-American community. For instance, Professor Graber finds that, “changes in electoral systems that increase the power of Asian-Americans in California, for example, are not likely to result in more affirmative action policies at state colleges and universities.”<sup>87</sup> Moreover, Michael Lind, in a *New Leader* editorial, notes that non-black minorities may benefit substantially from the diminishment or even elimination of certain affirmative action programs, particularly those used for college admissions:

In 1997, the last year affirmative action was practiced at the University of California’s Berkeley campus, 1,266 Latinos, 562 blacks, 2,911 whites and 2,925 Asians were accepted; in 1999, 741 Latinos, 276 blacks, 3,018 whites and 3,196 Asians were accepted. As the statistics demonstrate, a significant number of Asian-American and white applicants had previously lost their places to less qualified Latinos and African Americans.”<sup>88</sup>

Consequently, critics maintain that with more non-black minorities as representatives, African-Americans may find themselves worse off policy-wise under a system of proportional representation than under our current winner-take-all system.

Other evidence, however, points in a different direction. For instance, while Lind can offer numbers suggesting that non-black minorities should not support affirmative action for college admissions, other numbers show that they are far more supportive than Lind suspects. Specifically, as noted by the *Washington Post*, 61% of California’s Asian-American voters voted against the state’s “Proposition 209,” an act which bars the consideration of race or sex in hiring, government contracting, and admissions to public colleges and universities.<sup>89</sup> Though the Proposition passed, and

though evidence suggests that Asian-Americans have benefited from its enactment, the fact that most Asian-Americans opposed the Proposition suggests that more Asian-American representatives would benefit African-Americans, not harm them, as argued by Lind and, to a certain extent, Graber.

A fourth argument offered by critics of proportional representation states that such a system ignores the importance of geography, which, according to these critics, serves as a useful proxy for community interests on the part of voters. As a result, with the elimination of single-member districts, representatives will have less incentive to cater to the local desires and interests of current congressional districts. To illustrate this point, former Boston Mayor Raymond Flynn conveyed great resistance to the prospect that Boston could be redistricted so as not to have a geographic-exclusive seat. In the process, Mayor Flynn exhibited the emotional and historical attachment some have towards their congressional districts: “Can you imagine a big American city like Boston without a resident in Congress? I think people are going to wake up and say that can’t happen, not in the home of Joe Moakley, John McCormack and Tip O’Neill.”<sup>90</sup>

Indeed, the Congressional Research Service concludes that many districts “come about as the result of line-drawers consciously trying to accommodate geographic features, such as rivers, or by following . . . jurisdiction lines, such as cities.”<sup>91</sup> Equally important, as argued by Professor Jerome Raskin, the Supreme Court has demonstrated an affinity for geographically-conscious districts, even when such districts are designed more to protect incumbency than to advance geographic interests. For instance, in *Abrams v. Johnson*,<sup>92</sup> “the Court found it permissible to redistrict with the intent of protecting ‘incumbents from contests with each other.’”<sup>93</sup> Similarly, in *Burns v. Richardson*,<sup>94</sup> the Court found that tailoring the geographic dimensions of districts with the effect of protecting incumbents does not violate Equal Protection.<sup>95</sup>

Several counter-arguments have been offered in response to the geographic-centric approach. First, most eligible voters in a district are not represented by someone they voted for in a winner-take-all system. To illustrate this point, in the 1996 Congressional elections, with only 44% of eligible voters voting, only 28% of eligible voters cast ballots for those ultimately elected to Congress.<sup>96</sup>

Second, most districts are drawn primarily to protect incumbents, not to advance geographic interests. That is, since 98% of Congresspersons are re-elected, and over 33% of state house races are unopposed, proportional representation advocates like Mulroy argue that geography appears to be a greater proxy for political self-interest than anything else.<sup>97</sup> On the other hand, such a reality has not, as demonstrated by the Court’s holdings in *Abrams* and *Burns*, upset the highest court in the land.

Finally, proponents of proportional representation state that it would not preclude geographic groupings. Rather, it would allow citizens themselves to

determine how and whether they should be grouped in electing representatives. Indeed, as illustrated by Barry Yeoman, “those who identify with a particular area can join with others who feel the same way and elect a candidate who is promoting issues of issues of concern to that locality.”<sup>98</sup> Or, as argued by Congresswoman Cynthia McKinney, “districts are a construct of politics, not geography[;] . . . redistricting allows legislators to choose their constituents before their constituents choose them.”<sup>99</sup> In fact, some even suggest that in this “information-technology age,” physical location has become increasingly less important in one’s life, and as a result, geographic groupings seem increasingly less meaningful.<sup>100</sup> Lastly, the prospect of coalition building would be enhanced by the removal of incumbency-generated geographical barriers, for candidates could more readily seek out alliances with other groups.

## **V. THE LEGAL VIABILITY OF PROPORTIONAL REPRESENTATION IN CONGRESSIONAL ELECTIONS**

Contingent upon legislation, a system of proportional representation can be employed in congressional elections. There are a number of reasons corroborating this point. First, and most importantly, the United States Constitution does not explicitly ban the use of proportional representation, instead inviting Congress to use whatever election system it deems appropriate.<sup>101</sup> Such authority for Congress to take action would likely emanate from Article I of the Constitution: “The Times, Places and Manner of holding Elections, for Senators and Representatives, shall be prescribed in each state by the Legislature thereof, but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.”<sup>102</sup> It is clear from this language that the Constitution allows states, contingent upon congressional approval, to have discretion in selecting their election system(s).

Indeed, advocates of proportional representation are quick to assert that proportional representation could be adopted for all U.S. legislative elections without a constitutional amendment. That is, only a legislative act or passage of an initiative would be required.<sup>103</sup> Other scholars, however, maintain that Congress has already spoken on proportional representation and explicitly banned multi-member districts for U.S. House elections in 1967, though such critics concede that this legislation could be reversed.<sup>104</sup> In particular, Public Law 90-196 requires that, “no district is to elect more than one Representative . . . .” As a matter of fact, the Congressional Research Service notes that “the United States has implicitly rejected the concept of proportional representation by party for Congress by adopting the single-member district standard.”<sup>105</sup> Whether Congress has spoken or not, since proportional representation is predicated on the use of multi-member districts, congressional action would be required for U.S. House elections to incorporate proportional representation.

Some in Congress would like to reverse the 1967 legislation. In the past 4 years, Congresswoman McKinney has sponsored both the *Voter's Choice Act* and the *State's Choice of Voting Systems Act*, two legislative acts that would restore the pre-1967 opportunity for states to use proportional systems to elect their delegations to the House.<sup>106</sup> Although both the United States Term Limits Organization and the National Women's Political Caucus supported Congresswoman McKinney, neither bill received much attention, and even less support. From a politick perspective, Congresswoman McKinney was essentially requesting "politicians to adopt a system that will cost them the near-guarantee of a lifetime seat."<sup>107</sup> In terms of its potential effect on incumbency, Congresswoman McKinney's bill was like a super McCain-Feingold bill – thus not an attractive option for many incumbents on either side of the aisle.

While Congresswoman McKinney was unable to persuade her colleagues, Congressman Watts is presently attempting to do so. In House Resolution 1173, Congressman Watts has reintroduced Congresswoman McKinney's *State's Choice of Voting Systems Act*.<sup>108</sup> Interestingly, support for Congressman Watt's proposal extends to members of both the Democratic and Republican parties, as former Congressman Tom Campbell (R-Ca), an opponent of affirmative action, supports the legislation.<sup>109</sup> As a matter of fact, statistical data suggests that proportional representation may help Republican candidates as much as it helps minority candidates, thus defusing any contention that proportional representation is part of a particular ideological agenda.<sup>110</sup> Other conservative advocates, such as Lind, explain their support for proportional representation by recognizing that, "whites where Latinos are the majority [would be] empowered."<sup>111</sup> Moreover, Lind believes that with a system of proportional representation, liberal activists could no longer blame the winner-take-all system for the comparatively low number of minority representatives.<sup>112</sup>

Skeptics, however, have already concluded that unless the NAACP is willing to spend resources on advancing the bill, passage seems unlikely. In the past, the NAACP did not undertake such an effort. For example, Jacqueline Berrien, an NAACP official, remarked on the infeasibility of choosing to spend money on election reform when that same money could be used to address current redistricting and voter turnout: "The practical reality is that unless the McKinney bill passes, the elections must be held from single-member districts. As long as that is true, our advocacy centers on the redistricting process."<sup>113</sup> As a result, "mainline civil rights organizations are reluctant to devote much political capital to the uphill effort."<sup>114</sup>

A second legal consideration reflects upon the available case law on proportional representation. Generally, case law supports proportional representation as a viable method of electing candidates. For example, in *Holder v. Hall*, Justice Clarence Thomas opines, "[N]othing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from . . . securing proportional representation based on transferable votes."<sup>115</sup>

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Moreover, in *Reynolds v. Sims*,<sup>116</sup> Chief Justice Earl Warren held that individuals have a right to fair and effective representation – language that may suggest, as Professor Virginia Hench notes, that a system such as proportional representation, which encourages the fairest of voting results, would be valid.<sup>117</sup>

On the other hand, the current Court has several members who likely oppose the use of proportional representation. In fact, according to Professor Hench, “the greatest difficulty with [proportional representation] . . . is that the current Court’s willful color-blindness is unlikely to permit it to be implemented.”<sup>118</sup>

In particular, Justice Sandra Day O’Connor, a former state legislator, is likely to serve as proportional representation’s most ardent opponent. As Professor Judith Reed points out, “Justice O’Connor has an expressed fidelity to the two-party system.”<sup>119</sup> To illustrate this argument, Professor Reed finds that, “In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366 (1997), Justice O’Connor joined the majority opinion upholding a prohibition on multiparty candidacies.”<sup>120</sup> Specifically, Justice O’Connor has expressed an avowed belief in “the strong interest in the stability of [their] political systems.”<sup>121</sup> To illuminate this point, in *Metro Broadcasting, Inc. v. F.C.C.*, Justice O’Connor referred to proportional representation as a form of “outright racial balancing.”<sup>122</sup> In practice, while Justice O’Connor has not supported the capacity of states to ban third parties to ensure such stability, she has unequivocally stated that states preserve the right to “enact reasonable election regulations that may, in practice, favor the traditional two-party system[;] . . . political stability is best served through a healthy two-party system.”<sup>123</sup> Consequently, notes Professor Reed, “for Justice O’Connor, whether independent voters are discriminated against, or other voters are deprived of the option of voting for a third party candidate or at least the opportunity . . . is less important than honoring the ultimate legislative goal of maintaining a two-party system.”<sup>124</sup>

The 4<sup>th</sup> Circuit has also weighed in on proportional representation, and, like Justice O’Connor, it appears to find its possible implementation in violation of section two of the Voting Rights Act. In *McGhee v. Granville County*,<sup>125</sup> the court found that when section two states that “nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population,” it “means that statutorily protected are not entitled to ‘proportional representation.’”<sup>126</sup> Further analysis suggests that the court’s ruling would not prevent the use of proportional representation in congressional elections. In particular, Mulroy argues that “the language only refers to the idea that a consistent failure of black candidates to win 40% of the jurisdiction’s population would not, by itself, constitute a Section 2 violation.”<sup>127</sup> In a sense, therefore, the court, as interpreted by Mulroy, only opposes a guarantee to proportional representation.

A third line of evidence for the legality of proportional representation relates to the fact that local elections have employed proportional representation with results that

have helped racial minorities gain access to the legislative process. As Professor Barber notes, proportional representation was particularly appealing during the “Progressive Era” as a form of a fairer system of elections.<sup>128</sup> For instance, localities in Illinois, Alabama, New Mexico, South Dakota, Colorado, New York, Ohio, and Massachusetts have all at one time utilized proportional representation.<sup>129</sup> In addition, twenty-two cities have employed this system.<sup>130</sup> The results of such use were admirable, particularly in terms of expanding minority opportunity to elected office, as “the single-transferable vote enabled African-Americans to get elected decades before that became commonplace.”<sup>131</sup>

There have been other important local examples. For instance, New York City held five City Council elections from 1937 to 1945 that employed proportional representation.<sup>132</sup> Importantly, “those elections helped break the stranglehold of the city’s political machines and elected Adam Clayton Powell as the Council’s first African-American member.”<sup>133</sup>

Despite its apparent achievements, proportional representation presently exists only in Cambridge, Massachusetts.<sup>134</sup> Other communities eliminated proportional representation for either of two reasons. First, during the late 1940s, a small number of Communists won city council elections in cities that employed proportional representation, thus leading several of those cities to repeal proportional representation.<sup>135</sup> A second related point, as Steven Hill and Rob Richie point out, is that “old style politics” never really fades away, and many in that category were opportunistic in targeting candidates who did not tow the party line: “[F]ormerly dominant political forces outlasted reformers and were successful in repealing proportional representation everywhere. Their general tactic was targeting unpopular minorities like blacks and leftists.”<sup>136</sup> As noted by Professor Barber, minorities were most affected by proportional representation’s repeal: “After proportional representation was repealed, minorities lost their foothold in public office in the winner-take-all plurality at-large elections that supplanted proportional representation.”<sup>137</sup> Moreover, it is important to note that the legality of proportional representation in local elections does not necessarily translate into legality in federal elections, as such elections are covered by federal law.

A final legal justification for the use of proportional representation rests in the fact that most democracies use some form of proportional representation. In fact, of the world’s thirty-six most economically prosperous democracies, thirty-three employ some form of proportional representation for their national elections.<sup>138</sup> For instance, Germany, Norway, New Zealand and South Africa all use proportional representation.<sup>139</sup> Interestingly, South Africa, upon holding its first multi-racial elections in April 1994, abandoned its single-member districts in favor of proportional representation, thus signifying a new era as a real multi-racial democracy.<sup>140</sup> Most recently, Japan has approved a proportional representation system to “clean up

corruption-plagued politics.”<sup>141</sup> As with the use of proportional elections in local elections, however, the use of proportional representation in other democracies does not necessarily suggest that proportional representation would be valid for use in this democracy’s federal elections. On the other hand, a legal argument for proportional representation in the American democracy should be generally strengthened by the fact that almost all other liberal democracies employ this system.

## VI. CONCLUSION

Proportional representation is an intriguing and largely appealing alternative to our present winner-take-all voting system. In particular, proportional representation would provide greater opportunities for minority groups to gain access to legislative positions and would offer greater incentives for all groups to vote. Moreover, proportional representation, in conjunction with statewide or larger multi-seat districts, would diminish or eliminate the highly politicized re-districting process.

While critics of proportional representation highlight its potential for encouraging the growth of hate groups, other nations featuring proportional representation have avoided such unintended aid by employing a minimum vote percentage requirement. Similarly, concerns that proportional representation would “balkanize” the legislative process into entrenched factions are not only uncorroborated, but the history of proportional representation demonstrates that varying groups are more likely to understand and appreciate each others’ concerns when all those groups are represented in the legislative process. Likewise, criticism that African-Americans would be harmed by the election of more individuals from other minority groups proves contradicted both by those groups’ voting trends on Affirmative-Action measures and by the likely heightened appreciation that those groups would have for one another upon their common presence in the legislative body. Finally, while some political commentators express concern that proportional representation would dismantle historical geographic boundaries, those same commentators fail to recognize that many geographic boundaries are designed solely to protect incumbency, not to preserve community ties. Besides, should states remain committed to their geographic boundaries, they could, under a system of proportional representation, implement several larger multi-seat districts rather than one statewide multi-seat district.

Provided it garnered political support, adoption of proportional representation would likely require only legislative enactment by Congress that could either mandate the use of proportional elections in congressional elections, or, more likely, allow states to choose between proportional representation or winner-take-all systems. Importantly, though the present Supreme Court may be unwelcoming to proportional

representation, the United States Constitution specifically empowers Congress to determine its system of elections. Moreover, proportional representation has already been used in local elections and is currently being used by as many as 90% of the world's liberal democracies.

Above all, however, proportional representation would encourage collaboration between otherwise disparate groups. Indeed, such collaboration may not only unite groups for political causes, thus increasing their opportunities for mutually beneficial reforms, but it would likely lead to greater social and cultural understandings between those groups. As a result, racism and cultural discrimination are likely to diminish over time following adoption of proportional representation. And should that occur, our democracy will be more than just a united states. We will have also become a united people.

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**Notes**

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1. Jerome Raskin, *The Supreme Court's Racial Double Standard in Redistricting: Unequal Protection in Politics and the Scholarship that Defends It*, 14 J.L. & POL. 591, 604-05 (1998) (noting that presently, there are no African-American United States senators).
2. Stephen K. Medvic, *The Case for Proportional Representation*, VIRGINIAN-PILOT, Sept. 26, 1998 at B7; *see generally* Lee Mortimer, *Proportional Representation Could End Racial Gerrymandering in North Carolina: A Better Alternative*, GREENSBORO NEWS & REC., Jan. 9, 1994 at F3 (asserting that voters in winner-take-all systems are forced to participate in an electoral system that may readily ignore popular will).
3. *See* Mortimer, *supra* note 2, at F3.
4. *See* Medvic, *supra* note 2, at B7.
5. Mary A. Inman, *Change Through Proportional Representation*, 141 U. PA. L. REV. 1991, 1993 (1993).
6. *Id.*
7. *See* Medvic, *supra* note 2, at B7; *see also* Melanie Eversley, *Battle for the House: Maximizing Incumbency*, ATLANTA J. & CONST., Nov. 8, 2000, at 10E (estimating that only ninety-three of the 435 House races were “competitive” in the 2000 election cycle); *see also* David Finkel, *Power of Incumbency Works for Many Politicians*, S. BEND TRIB., Nov. 5, 2000, at C4 (estimating that only twenty of the 435 House races were “competitive” in the 2000 election cycle).
8. *See* Medvic, *supra* note 2, at B7; *See also* Majid Allan and Brian Pruksa, *Making the Case for Two Changes*, WIS. ST. J., Jan. 28, 2001, at B1.
9. *See* Medvic, *supra* note 2, at B7; *but see* David Flick, *Dallas County Turnout Down, but Voting up Elsewhere*, DALLAS MORNING NEWS, Nov. 9, 2000, at 17A (noting a possible upward trend in voting percentages in the United States, as 51% of Americans voted in the 2000 Presidential election).
10. This illustration assumes that the Iowa vote would have resulted in the same figures if voters were to select a party instead of a candidate. As will be later discussed, because proportional representation encourages third parties, this illustration is somewhat simplistic. Moreover, voter turnout is likely to increase with proportional representation, thus further complicating the assumption.
11. *See* Medvic, *supra* note 2, at B7.
12. *See* Mortimer, *supra* note 2, at F3 (the three districts would be delineated as follows: Western (three members), Piedmont (five members) and Eastern (four members)).
13. Lani Guinier, *The Representation of Minority Interests: The Question of Single Member Districts*, 14 CARDOZO L. REV. 1135, 1163 n.70 (1993).
14. *See* Mortimer, *supra* note 2, at F3.
15. Barry Yeoman, *'Virtual Disenfranchisement': Minority Congressional Districts are Becoming Casualties of the Courts*, NATION, Sept. 7, 1998, at 18.
16. *Id.*
17. *See* E.J. Dionne, Jr., *The Minorities' Vote*, WASH. POST, Dec. 1, 1998, at A25.
18. LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE

- DEMOCRACY 151-52 (1994).
19. *Id.*
  20. *Id.*
  21. Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. REV. 1867, 1912 (1999); see also Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 251-57 (1995) (noting that ranking candidates may enable voters to preserve potentially disparate voting preferences).
  22. Steven Hill & Rob Richie, *The Case for Proportional Representation*, available at <http://bostonreview.mit.edu/BR23.1/richie.html>.
  23. See Mulroy, *supra* note 21, at 1912.
  24. See Yeoman, *supra* note 15, at 18.
  25. Lawrence, Fall River, Lowell and Chelmsford are located in Massachusetts.
  26. See Hill & Richie, *supra* note 22.
  27. *Id.*; see generally Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, n. 316 (1996) (arguing that third-party candidates have little hope of winning in winner-take-all systems even when such candidates offer positions that are more popular than those held by either Democratic or Republican candidates).
  28. Mulroy, *supra* note 21, at 1896.
  29. *Id.*
  30. Steve Marantz & David R. Guarino, *Melting Pot: Census Shows Non-White Majority in Hub*, BOSTON HERALD, Mar. 22, 2001, at 1.
  31. Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 787 (1998) (citing Inman, *supra* note 5, at 2052 (citing Guinier, *infra*. note 38, at 1163)).
  32. MAURICE T. CUNNINGHAM, MAXIMIZATION, WHATEVER THE COST: RACE, REDISTRICTING, AND THE DEPARTMENT OF JUSTICE 6 (2001).
  33. *Smith v. Beasley*, 946 F. Supp 1174, 1185 (D.S.C. 1996).
  34. See GUINIER, *supra* note 18, at 62.
  35. Mark A. Graber, *Conflicting Representations: Lani Guinier and James Madison on Electoral Systems*, 13 CONST. COMMENT. 291, 292 (1996) (citing GUINIER, *supra* note 18, at 13).
  36. See GUINIER, *supra* note 18, at 62.
  37. See Graber, *supra* note 35, at 294.
  38. See William Drozdiak, *Socialists Seek Coalition with German Greens*, WASH. POST, Sept. 29, 1998, at A01.
  39. See Steven Hill, *An Argument for PR from the Left: Winner-Take-All Elections Make the Left Losers*, available at <http://www.fairvote.org/reports/1995/chp1/hill1.html>.
  40. KATHLEEN L. BARBER, *The True Experience of Proportional Representation in American Cities* in PROPORTIONAL REPRESENTATION AND ELECTION REFORM IN OHIO 220, 241 (1995); cf. Thomas J. Brazaitis, *Proportional Representation Pushed to Cut Voter Apathy*, PLAIN DEALER, May 3, 1994, at 12A (noting that the first female city council members were elected in 1923 under a proportional representation voting system).
  41. See GUINIER, *supra* note 18, at 36-37.
  42. Lani Guinier, *The Triumph of Tokenism: The Voting-Rights Act and the Theory of Black Electoral*

- Success, 89 MICH. L. REV. 1077, 1105 (1991).
43. *Id.*
44. *Id.*
45. Shaw v. Hunt, 517 U.S. 899 (1996).
46. See Yeoman, *supra* note 15, at 18.
47. Douglas J. Amy, Real Choices/New Voices: The Case for Proportional Representation Elections in the United States 115 (1993).
48. *Id.*
49. See GUINIER, *supra* note 18, at 187.
50. Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*. 35 HARV. C.R.-C.L. L. REV. 1, 16-17 (2000).
51. *Id.*
52. *Id.*
53. See Mulroy, *supra* note 21, at 1893
54. *Id.*
55. See GUINIER, *supra* note 18, at 37.
56. Eric Olson, *Electoral reforms needed*, BALT. SUN, May 18, 2000 at 23A; see generally Diane Lewis, *Cambridge Votes to the Beat of a Different Drummer*, BOSTON GLOBE, Nov. 8, 1989, at 31 (describing the history of Cambridge's use of proportional representation).
57. *Id.*
58. See Mulroy, *supra* note 21, at 1894.
59. *Id.*
60. See Hill & Richie, *supra* note 22.
61. See Mulroy, *supra* note 21, at 1896.
62. *Id.* at n.144.
63. See Allan & Pruka, *supra* note 8, at B1.
64. See Mulroy, *supra* note 21, at 1894.
65. BARBER, *supra* note 40.
66. *Id.*
67. Eugene Kiely, *Success of black vote has huge implications for future*, PHILA. INQUIRER, Jan. 16, 2001, available at LEXIS, News Library, USNews file.
68. *Demographic Watch: Missouri Leads the Nation in Increased Black Turnout*, HOTLINE, Dec. 20, 2000, available at LEXIS, News Library, Hotline file.
69. See Kiely, *supra* note 67.
70. See Hill & Richie, *supra* note 22.
71. See BARBER, *supra* note 40.
72. See Graber, *supra* note 35, at 295.
73. See Amy, *supra* note 47, at 132.
74. See Medvic, *supra* note 2, at B7.
75. See Mulroy, *supra* note 21, at 1904-05.
76. See Graber, *supra* note 35, at 296.
77. *Id.* at 296 (Graber offers an argument that would negate Guinier's belief that racial minorities will be able to win votes on matters of lesser importance to racist whites: "both the history of the populist movement and contemporary voting studies, however, indicate that many less fortunate

- whites place higher priority on measures that maintain the racial status quo than on redistributive measures that might improve the lot of most lower-middle and lower class citizens.”). *Id.* at 297.
78. Yojana Sharma, *Racism-Germany: Government Likely to Ban Right-Wing Party*, INTER PRESS SERVICE, Oct. 13, 2000, available at LEXIS, News Library, USNews file; see also Ray Mosley & Tom Hundley, *Right-Wing Views Beginning to Influence Official Policies*, CHI. TRIBUNE, May 7, 2000, at 19 (noting that “the chances of extreme right groups coming to power are remote” in Europe).
79. See Mulroy, *supra* note 21, at 1903.
80. Elizabeth Abbot, *Race Against Time*, PROVIDENCE J., Feb. 8, 2001, at 1B; see also Bruce Fein, *The New Stirring of Racial Politics*, WASH. TIMES, Jan. 9, 2001, at A13 (arguing that the 2000 Presidential election demonstrated “the prominence of race as a prime and potentially polarizing national political issue”).
81. See Amy, *supra* note 47, at 166; cf. Lekan Oguntoyinbo, *Lower-income Voices Not Heard at Race Session*, DET. FREE PRESS, Dec. 3, 1997, at 5 (employing remarks made by Mike McCurry, President Clinton’s spokesman, to show that the Clinton Administration, in selecting individuals for positions within the Administration, deliberately sought a representative sample of the population in order to stimulate better awareness for the interests of sometimes disparate groups).
82. See BARBER, *supra* note 40.
83. *Id.*
84. See Mulroy, *supra* note 21, at 1903.
85. *Id.* at 1903.
86. See Graber, *supra* note 35, at 296.
87. *Id.* at 297.
88. Michael Lind, *The Diversity Scam*, NEW LEADER, July 1, 2000 at 9.
89. Michael Fletcher, *For Asian Americans, a Barrier or a Boon?; Washington State Debate Over Affirmative Action Reveals Ambiguities on the Issue*, WASH. POST, June 20, 1998, at A09.
90. David R. Guarino, *Redistricting Throws Polls Into Turmoil*, BOSTON HERALD, Mar. 22, 2001, at 004.
91. David C. Huckabee, *Congressional Redistricting: Federal Law Controls a State Process*, CONGRESSIONAL RESEARCH SERVICE REPORT, Feb. 15, 2001, at 25.
92. *Abrams v. Johnson*, 521 U.S. 74 (1997).
93. See Raskin, *supra* note 1, at 613.
94. *Burns v. Richardson*, 384 U.S. 73 (1966).
95. See Raskin, *supra* note 1, at 613.
96. See Hill & Richie, *supra* note 22.
97. See Mulroy, *supra* note 21, at 1900; see e.g. John Anderson & Rob Richie, *Giving Voters a Real Choice*, 151 N.J.L.J. 1017, 1020 (1998) (noting that in the 1992 election, (1) 26 of 27 Texas incumbents were re-elected; (2) the three open seats went to Democratic state legislators who had served on redistricting committees; (3) the eight Republican incumbents were put in districts packed with conservative voters, allowing Democrats to win twenty-one of the remaining twenty-two seats with less than 50% of the statewide vote; and (4) all but one race was won by margins of at least 10%).
98. *Id.* at 18.
99. Cynthia McKinney, *Proportional Representation Next Step For Democracy*, ROLL CALL, Feb. 14,

- 2000, at 5.
100. See Mulroy, *supra* note 21, at 1900.
101. See Huckabee, *supra* note 91, at 16.
102. U.S. CONST. art. I, § 4, cl. 1.
103. See Hill & Richie, *supra* note 22.
104. See Medvic, *supra* note 2, at B7; see also Lee Mortimer, *No Constitutional Barrier to Multi-Member Districts*, GREENSBORO NEWS & REC, Nov. 13, 1994, at F2 (noting that Congress has already “flip-flopped” on this issue before. In 1842 it required single-member districts for House elections, but then repealed the statute in 1852, only to reinstate it 1862. Then Congress repealed it again in 1929, only to reinstate it for the second time in 1967).
105. See Huckabee, *supra* note 91, at 16.
106. See McKinney, *supra* note 99, at 5; see generally John Nichols, *New Weight for Voting Rights*, CAP. TIMES, Jan. 23, 2001, at 6A (noting that McKinney was animated by the perceived voting irregularities from 2000 Presidential election when she reintroduced this legislation).
107. See Yeoman, *supra* note 15, at 18.
108. See McKinney, *supra* note 99, at 5.
109. *Id.*
110. Roberta Barta, *An Argument for PR from the Right: Conservatives Can Win on PR’s Level Playing Field*, available at <http://www.fairvote.org/reports/1995/chp1/barta.html>. Findings by Roberta Barta reaffirm this conclusion, and extrapolate it to its national implications: “[T]he Republican Party, with the exception of last year’s election, has regularly won around 45%-47% of the nationwide vote for the House of Representatives but only about 40%-42% of the seats. Such a discrepancy has meant a loss of about 25 seats out of a total of 435.”
111. See Lind, *supra* note 88, at 9.
112. *Id.*
113. See Yeoman, *supra* note 15, at 18.
114. *Id.*
115. Holder v. Hall, 512 U.S. 874, 910 (1994) (Thomas, J. concurring).
116. Reynolds v. Sims, 377 U.S. 533, 560 (1963).
117. See Hench, *supra* note 31, at 753-54; but see e.g. City of Mobile v. Bolden, 446 U.S. 55, 75-76 (1980) (mentioning that the Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative right of a political organization).
118. See Hench, *supra* note 31, at 787; see e.g. Miller v. Johnson, 515 U.S. 900, 928 (1995) (holding that the majority-black Eleventh Congressional District in Georgia was unconstitutional because race was the predominant factor in configuring the district); see also Frank R. Parker, *The Damaging Consequences of the Rehnquist Court’s Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 770-771 (1996) (suggesting that the Rehnquist Court has employed misguided notions of fairness to prevent equity in the political process).
119. Judith Reed, *Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court’s View of the Right to Vote*, 4 MICH. J. RACE & L. 389, 428 (1999); see e.g. Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3011 (1990) (Justice O’Connor referring to proportional representation as “outright racial balancing”).
120. See Judith Reed, *supra* note 119, at 428 (1999); see also T. Alexander Alienkoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1100 (1991) (mentioning Justice O’Connor’s

- aversion to third-parties).
121. See Judith Reed, *supra* note 119, at 428.
  122. Metro Broadcasting, Inc. v. F.C.C., 110 S. Ct. 2997, 3035 (1990) (O'Connor, J. Dissenting).
  123. See Reed, *supra* note 119, at 428; see e.g. Thornburg v. Gingles, 478 U.S. 30, 84-85 (1986) (O'Connor finding that the proportional representation preserves "order" of political process) (O'Connor, J. concurring).
  124. See Reed, *supra* note 119, at 429.
  125. 860 F.2d 110 (4<sup>th</sup> Cir. 1988).
  126. *Id.* at 116-17.
  127. See Mulroy, *supra* note 21, at 1989.
  128. See BARBER, *supra* note 40.
  129. See Mortimer, *supra* note 2, at F3; see e.g. Martin Dyckman, *One City May Experiment with a Fairer, Better Way to Vote*, ST. PETERSBURG TIMES, Oct. 20, 1996, at 1D (noting that Illinois employed cumulative voting to elect its Legislature from 1870 to 1980).
  130. See BARBER, *supra* note 40.
  131. See Mortimer, *supra* note 2, at F3.
  132. See Allan & Pruka, *supra* note 8, at B1.
  133. *Id.*
  134. Cf. Mulroy, *supra* note 21, at 1989 (noting that in a 1991 initiative, a plurality (45%) of Cincinnati voters endorsed proportional representation for city council elections, yet because the initiative was under a winner-take-all system, the initiative failed).
  135. See Hill & Richie, *supra* note 22.
  136. *Id.*
  137. See BARBER, *supra* note 40.
  138. See McKinney, *supra* note 99, at 5 (defining "most economically prosperous" as those with the greatest gross domestic product); see also Paul L. McKaskle, *Of Wasted Votes and No Influence*, 35 HOUS. L. REV. 1119, n.273 (1998) (observing that "all economically advanced countries that use proportional representation for their legislatures are parliamentary democracies in which the legislature forms the executive branch of government").
  139. See Yeoman, *supra* note 15, at 18; see also Hill & Richie, *supra* note 22.
  140. See Mortimer, *supra* note 2, at F3.
  141. *Id.*