Our Electoral Exceptionalism

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Election law suffers from a comparative blind spot. Scholars in the field have devoted almost no attention to how other countries organize their electoral systems, let alone to the lessons that can be drawn from foreign experiences. This Article begins to fill this gap by carrying out the first systematic analysis of redistricting practices around the world. The Article initially separates district design into its three constituent components: institutions, criteria, and minority representation. For each component, the Article then describes the approaches used in America and abroad, introduces a new conceptual framework for classifying different policies, and challenges the exceptional American model.

First, redistricting institutions can be categorized based on their levels of politicization and judicialization. The United States is an outlier along both dimensions because it relies on the elected branches rather than on independent commissions and because its courts are extraordinarily active. Unfortunately, the American approach is linked to higher partisan bias, lower electoral responsiveness, and reduced public confidence in the electoral system.

Second, redistricting criteria can be assessed based on whether they tend to make districts more heterogeneous or homogeneous. Most of the usual American criteria (such as equal population, compliance with the Voting Rights Act, and the pursuit of political advantage) are diversifying. In contrast, almost all foreign requirements (such as respect for political subdivisions, respect for communities of interest, and attention to geographic features) are homogenizing. Homogenizing requirements are generally preferable because they give rise to higher voter participation, more effective representation, and lower legislative polarization.

Lastly, models of minority representation can be classified based on the geographic concentration of the groups they benefit and the explicitness of the means they use to allocate legislative influence. Once again, the United States is nearly unique in its reliance on implicit mechanisms that only assist concentrated groups. Implicit mechanisms that also assist diffuse groups—in particular, multimember districts with limited, cumulative, or preferential voting

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rules—are typically superior because they result in higher levels of minority representation at a fraction of the social and legal cost.

INTRODUCTION

In July 2011, Texas's Republican governor signed into law the congressional redistricting plan that previously had been

passed by the Republican-dominated legislature.[1] In a state in which President Barack Obama captured 44 percent of the vote in 2008, the plan was expected to produce twenty-six Republican-leaning districts and ten Democratic-leaning districts.[2] The plan also had to comply with just a handful of legal criteria. Its districts had to have the same population, the predominant motive for their formation could not be racial, and they could not violate either of the Voting Rights Act's[3] (VRA) key provisions.[4]

Both before and after the plan's passage, litigation inundated courthouses in Texas and Washington, DC. More than two dozen lawsuits were filed, mostly by aggrieved Democrats and minority groups, alleging an array of constitutional and statutory infractions.[5] At the urging of the Department of Justice, one district court, in the District of Columbia, enjoined the plan from going into effect.[6] A different district court, in San Antonio, designed the districts that were actually used in the 2012 elections—though only after the panel's first effort was invalidated by the Supreme Court.[7]

Texas's experience in the 2010 cycle exemplifies all three elements of what I call the "American model" of redistricting. First, with respect to institutions, the elected branches of the state government wield the power to draw district lines—and may exercise this authority on any basis, including political advantage. However, the elected branches' decisions are then subject to rigorous scrutiny by the courts. Second, with respect to

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1 See *Texas Redistricting 2011* (Texas Legislative Counsel), online at http://www.tlc.state.tx.us/redist/pdf/Redistricting%20101_web.pdf (visited May 11, 2013).

2 See Lorraine C. Miller, *Statistics of the Presidential and Congressional Election of November 4, 2008* 58 (Clerk of the House of Representatives July 2009), online at http://artandhistory.house.gov/congress/111/2008election.pdf (visited May 11, 2013); Ross Ramsey, *Updated: Perry Adds Redistricting to Agenda*, Texas Weekly (The Texas Tribune May 31, 2011), online at http://www.texastribune.org/texas-redistricting/redistricting/updated-perry-adds-redistricting-to-agenda (visited May 11, 2013).

3 Voting Rights Act of 1965, Pub L No 89-110, 79 Stat 437, codified as amended at 42 USC § 1973 et seq.

4 See National Conference of State Legislatures (NCSL), *Redistricting Law 2010* 126 (2009).

5 See Justin Levitt, *All about Redistricting: Professor Justin Levitt's Guide to Drawing the Electoral Lines; Litigation in the 2010 Cycle* (Loyola Law School 2012), online at http://redistricting.lls.edu/cases-TX.php#TX (visited May 11, 2013).

6 *Texas v United States*, 831 F Supp 2d 244, 246–47 (DDC 2011) (denying Texas's motion for summary judgment in suit for preclearance pursuant to VRA).

7 See *Perry v Perez*, 132 S Ct 934, 940–44 (2012) (holding that district court improperly substituted its own district plan for that of legislature and remanding); *Perez v Perry*, 2012 WL 4094933, *1–2 (WD Tex) (denying motion to stay implementation of interim plan and adopting Plan C235 for 2012 election).

criteria, the only universal requirements are equal population, the ban on racial gerrymandering, and compliance with the VRA. But the equal population mandate is enforced extremely strictly, especially for congressional districts. And third, with respect to minority representation, its level is set through ad hoc litigation in conjunction with review by the Department of Justice. Lawsuits and bureaucrats determine in which districts minority groups will be able to elect the candidates of their choice.

As familiar as the American model may be to us, it is highly unusual—indeed, exceptional—compared to its analogues around the globe. In all other liberal democracies, constituencies are crafted by independent commissions, not politicians, and the courts play a minimal (and highly deferential) role in the process. The equal population requirement is also applied less stringently abroad, but it is supplemented by a host of other criteria: for instance, respect for political subdivisions, respect for communities of interest, and attention to geographic features. And minority representation is sometimes ignored in other countries, sometimes addressed through explicitly race-conscious mechanisms, and sometimes achieved by multimember districts with clever voting rules. But it is never realized through the uniquely American combination of extensive grassroots litigation and centralized administrative review.

On several occasions, Supreme Court justices have expressed interest in how the rest of the world handles the thorny topic of redistricting. Chief Justice Earl Warren once referred to the British approach as "interesting and enlightening,"[8] while Justice Stephen Breyer more recently catalogued some of "the systems used by other countries utilizing single-member districts."[9] Despite the Court's curiosity, however, almost no literature exists on the comparative aspects of district design.[10] Many political scientists have written about electoral systems in their

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8 *Reynolds v Sims*, 377 US 533, 567 n 44 (1964).

9 *Vieth v Jubelirer*, 541 US 267, 363 (2004) (Breyer dissenting). See also *Baker v Carr*, 369 US 186, 305–06 (1962) (Frankfurter dissenting) (discussing British approach to redistricting).

10 See Lisa Handley, *A Comparative Survey of Structure and Criteria for Boundary Delimitation*, in Lisa Handley and Bernie Grofman, eds, *Redistricting in Comparative Perspective* 265, 265 (Oxford 2008) ("[T]here has been no systematic, comparative study of constituency delimitation laws and practices conducted to date."). Professor Lisa Handley's study is the most helpful work that I have located, thanks to its invaluable descriptions of the redistricting institutions and criteria used by different countries. However, the study does not seek either to classify or to assess redistricting models. See id.

entirety,[11] and a few election law scholars have incorporated some comparative analysis into works that are otherwise focused on the American experience.[12] But there has not yet been any sustained examination of the choices that countries face in organizing and regulating the redistricting process.

In this Article, I provide such an examination. My first goal is conceptual—to introduce frameworks for classifying and better understanding the redistricting models that are employed around the world. With respect to institutions, I identify two key taxonomic dimensions: the involvement of the elected branches in the task of district design, and the vigor with which the courts supervise this activity. In recent years, levels of *politicization* and *judicialization* have been highly correlated. The courts have tended to intervene aggressively where, as in America, political actors are responsible for shaping districts. But they have usually held their fire where independent commissions are in charge. In addition, almost all recent policy shifts have been from high politicization and high judicialization to lower levels on both fronts. There seems to be an emerging global consensus in favor of commissions and against the elected branches as well as the courts.

Next, with respect to criteria, I divide them into two categories based on their implications for constituencies' internal composition. Most American requirements, such as equal population

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[11] See Louis Massicotte, André Blais, and Antoine Yoshinaka, *Establishing the Rules of the Game: Election Laws in Democracies* 4 (Toronto 2004) (noting that "[t]here is a vast literature on electoral systems" and that "[i]t is one of the most developed subfields of the discipline"). See, for example, Lawrence LeDuc, Richard G. Niemi, and Pippa Norris, eds, *Comparing Democracies: Elections and Voting in Global Perspective* 7 (Sage 1996); Vernon Bogdanor and David Butler, eds, *Democracy and Elections: Electoral Systems and Their Political Consequences* vii (Cambridge 1983) ("Our aim in *Democracy and Elections* has been to analyze electoral systems in their political context."); Bernard Grofman and Arend Lijphart, eds, *Electoral Laws and Their Political Consequences* 1–4 (Agathon 1986); Arend Lijphart, *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies 1945–1990* 1 (Oxford 1994) (aiming "to analyse the operation and the political consequences of electoral systems, especially the degree of proportionality of their translation of votes into seats and their effects on party systems"); Matthew Soberg Shugart and Martin P. Wattenberg, eds, *Mixed-Member Electoral Systems: The Best of Both Worlds?* 2 (Oxford 2001).

[12] See, for example, Christopher S. Elmendorf, *Representation Reinforcement through Advisory Commissions: The Case of Election Law*, 80 NYU L Rev 1366, 1385–1405 (2005) (discussing advisory commissions used by foreign countries); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv L Rev 593, 629–30 n 145 (2002) (discussing foreign courts' emphasis on the value of electoral competition); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 Harv L Rev 28, 78–80 (2004) (discussing foreign redistricting institutions).

and compliance with the VRA, are *diversifying* because they tend to make districts more heterogeneous in terms of demography, socioeconomic status, and ideology. Conversely, almost all other common criteria—respect for political subdivisions, attention to means of communication and travel, consistent population density, and so forth—are *homogenizing* because they tend to produce districts whose residents resemble one another in key respects. The intrinsic makeup of constituencies is significant both for its own sake and because of its connection to the distribution of views in the legislature. Districts that are individually heterogeneous typically give rise to a legislature that is more homogeneous, while individually homogeneous districts typically generate a more diverse legislature.

Lastly, with respect to minority representation, I present two axes that can be used to assess different countries' approaches: whether only *concentrated* minority groups are assisted or also *diffuse* groups; and whether legislative seats are allocated *explicitly* or *implicitly* to these groups. In America, the VRA applies only to dense minority populations and it allocates seats to them implicitly—that is, the statute does not set any specific level of minority representation. In several other countries, parallel electoral systems or party slating requirements ensure a legislative presence for all minority groups, including dispersed ones, through explicit race-conscious mechanisms. The representation of concentrated groups via explicit means is a rarer policy choice, but it is sometimes accomplished through reserved seats in particular locations. And diffuse groups are often allocated seats implicitly through multimember districts that use limited, cumulative, or preferential voting rules.

My second aim in this Article is normative—not just to categorize redistricting models but also to evaluate them. In brief, my position is that the exceptional American model is deeply flawed along all three dimensions of district design. With respect to institutions, the crucial problem with the American approach of high politicization and high judicialization is that courts are less effective than commissions at mitigating the agency costs of redistricting. According to a growing literature, commission-crafted plans exhibit lower partisan bias, higher electoral responsiveness, and higher voter participation than do plans

drawn by legislatures and then monitored by courts.[13] The low-politicization, low-judicialization position is also attractive because it allows courts to extricate themselves from the political thicket without incurring any democratic harms in the process.

Next, with respect to criteria, several scholars (myself included[14]) have found that heterogeneous districts—the kind produced by America's diversifying requirements—are linked to lower participation, less effective representation, and greater legislative polarization. Districts drawn pursuant to homogenizing criteria have the opposite consequences and are also more conceptually consistent with an electoral system that is founded on the principle of territorial representation. If districts are to be drawn geographically, it is preferable that they correspond to actual geographic realities,[15] the most important of which is the spatial clustering of the population.[16]

Lastly, with respect to minority representation, the VRA ignores diffuse groups, generates large volumes of bitter litigation, and fails to achieve a proportional minority presence in the legislature. It is true that more explicit policies such as reserved seats or party slating requirements would likely be unconstitutional. But implicit methods of seat allocation that take into account geographically dispersed groups—that is, the innovative voting schemes used abroad in conjunction with multimember districts—would seem to hold great promise. They would enable all groups, not just concentrated ones, to secure approximately proportional representation, and they would do so without triggering lawsuits or even recognizing race explicitly.

This Article proceeds in comparative fashion not only because the Court is interested in this sort of analysis but also because there is much that we can learn by looking beyond our borders.[17] District design is an issue that many countries have

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[13] Partisan bias refers to the divergence in the share of seats that each party would win given the same share of the statewide vote. Electoral responsiveness refers to the rate at which a party gains or loses seats given changes in its statewide vote share. See Andrew Gelman and Gary King, *Enhancing Democracy through Legislative Redistricting*, 88 Am Polit Sci Rev 541, 544–45 (1994).

[14] See Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 Harv L Rev 1903, 1941–48 (2012).

[15] See Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U Pa L Rev 1379, 1389–97 (2012).

[16] See Stephanopoulos, 125 Harv L Rev at 1940 n 188–89 (cited in note 14) (finding very high spatial autocorrelation scores for array of demographic and socioeconomic factors).

[17] See Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 Am J Comp L 947, 956 (2008) (noting that "the key benefit of comparison is that it allows U.S.

confronted, and there is no reason to blind ourselves to the lessons of their experiences. However, not all jurisdictions' policy choices are relevant here. I take territorial districting as a given,[18] which means that I omit from my analysis nations that employ large multimember districts with party-list proportional representation (such as much of continental Europe). What I am left with is a moderate number of countries and subnational entities, many but not all from the British Commonwealth, that use single-member or small multimember districts.[19] These are the jurisdictions that actually need to redraw their districts at reasonably frequent intervals—and that may therefore have something useful to contribute to the American debate.[20]

With the 2010 cycle currently drawing to a close, now is a particularly good time to revisit the peculiar manner in which American constituencies are crafted. This is also a timely moment for self-reflection because reform is in the redistricting air as never before. In 2010, the country's most populous state, California, transferred the power to draw district lines from political actors to an independent commission,[21] and New York,[22] Ohio,[23]

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courts to gain insights about the moral conclusions of a large number of relatively independent constitutional decision-makers"); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L J 1225, 1308 (1999).

[18] I do so because the American commitment to territorial districting is so strong that prescriptions that call it into question are highly implausible. See Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 Tex L Rev 1589, 1602–05 (1993); Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 Mich L Rev 483, 502 (1993).

[19] More precisely, I examine jurisdictions that use either (1) single-member districts or (2) multimember districts with limited, cumulative, or preferential voting rules. Because these voting rules become cumbersome when the number of members per district is high, the districts around the world that employ the rules are typically small in magnitude. I also consider US states, counties, and cities when their policies diverge from the usual American model. When discussing all of these jurisdictions, I am mindful of Professor Mark Tushnet's admonition that "we can learn from experience elsewhere only to the extent that we avoid too much detail about that experience." Tushnet, 108 Yale L J at 1308 (cited in note 17). I provide the factual context that I consider to be necessary for each case, but I try to avoid becoming overly enmeshed in each jurisdiction's unique circumstances.

[20] See Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 Am J Comp L 125, 133–34 (2005) (discussing how to select cases in comparative legal analysis). See also David Butler and Bruce E. Cain, *Reapportionment: A Study in Comparative Government*, 4 Electoral Stud 197, 197 (1985) (selecting similar cases in one of only extant studies of comparative redistricting).

[21] See Cal Const Art XXI. See also Nicholas O. Stephanopoulos, *Communities and the California Commission*, 23 Stan L & Pol Rev 281, 293–302 (2012) (assessing record of new California commission with respect to preservation of geographic communities of interest).

and Texas[24] have recently considered similar proposals. Florida allowed the elected branches to retain their authority, but enacted an array of new requirements (most of them homogenizing) that politicians must now follow.[25] And the VRA itself was renewed by Congress in 2006[26] but now faces serious challenges to one of its core provisions,[27] meaning that minority representation in America is also in a state of unusual flux.

The Article proceeds in three Parts, addressing in turn each of the central issues of district design: first, the institutions that are involved in the process; second, the criteria that are used to shape constituencies; and third, the mechanisms that exist to provide representation to minority groups.[28] Each Part is organized identically, beginning with a brief description of practices in America and abroad, then introducing a new framework for classifying redistricting models, and ending with a critique of America's electoral exceptionalism. The conclusion considers

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[22] S6698, 235th Leg, Reg Sess (NY 2012) (proposing in Senate a resolution to initiate constitutional amendment process in order to establish an independent redistricting commission); A9526, 235th Leg, Reg Sess (NY 2012) (proposing same resolution in Assembly).

[23] In Ohio, this proposal was a ballot initiative labeled "Issue 2," which failed to win voter approval. *Voters First Ohio: People, Not Politicians* (Voters First), online at http://votersfirstohio.org (visited May 11, 2013) (providing home page for initiative aiming to establish redistricting commission in Ohio); Ohio Secretary of State, *Proposed Amendment to the Ohio Constitution: State Ballot Issues Information for the November 6, 2012 General Election* *2–5 (Sept 21, 2012) online at http://www.sos.state.oh.us/sos/upload/ballotboard/2012/2012stateissues.pdf (visited May 11, 2013); Ohio Secretary of State, *State Issue 2: Redistricting Proposal; November 6, 2012*, online at http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2012Results/20121106issue2.aspx (visited May 11, 2013) (providing voting results on Issue 2).

[24] SB 22, 82d Leg, Reg Sess (Tex 2011) (proposing establishment of Texas Congressional Redistricting Commission). This bill was passed by the Texas Senate on June 22, 2011. *History: SB 22* (Texas Legislature Online), online at http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=821&Bill=SB22 (visited May 11, 2013) (providing full legislative and voting history of bill).

[25] See Fla Const Art III, §§ 16, 20, 21 (including as new criteria compactness and respect for existing political and geographic boundaries).

[26] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub L No 109-246, 120 Stat 577, codified at 42 USC § 1973.

[27] See *Northwest Austin Municipal Utility District Number One v Holder*, 557 US 193, 205–06 (2009) (declining to reach merits of constitutional challenge to § 5 of VRA); *Shelby County, Alabama v Holder*, 679 F3d 848, 852–53 (DC Cir 2012), cert granted, 133 S Ct 594 (2012) (upholding § 5 against constitutional challenge).

[28] The Article does not dwell on the *linkages* between these elements of district design, for instance, how the institutions responsible for redistricting affect district composition or how multimember districts alter the consequences of district homogeneity and heterogeneity. I leave these interesting (and difficult) questions for another day.

some of the ways in which reforms of the American system might actually be achieved.

I. INSTITUTIONAL ACTORS

The most fundamental question faced by any country whose districts must periodically be redrawn is which institutions should be involved in the redrawing. Should the task be left to the elected branches, just like any other matter? Or should it be entrusted to a specialized body composed of judges, professors, bureaucrats, and the like? Should the courts rigorously assess district plans for compliance with applicable legal norms? Or should they defer to the judgment of the line drawers (whoever they might be)?

In this Part, I first summarize the redistricting roles that different institutional actors play in different countries. In America, both the elected branches and the courts are extremely active participants, while in most other jurisdictions, independent commissions are responsible for designing districts and the judiciary is largely absent from the stage. Next, I identify two dimensions along which nations' institutional choices can be classified: the politicization and the judicialization of the redistricting process. These dimensions can be used both to sort the policies that are currently in place around the world and to track policy changes over time. Finally, I argue that the low-politicization, low-judicialization model is preferable to the American approach. It is more effective at curbing the agency costs of redistricting, and it allows the courts to exit a domain in which their presence is often fraught with controversy.

A. Global Models

1. America.

For most of American history, political actors in each state had almost exclusive control over redistricting. Independent commissions did not exist anywhere in the country,[29] and a 1946 Supreme Court decision rendered most disputes over district boundaries nonjusticiable—beyond the adjudicative capabilities of the federal courts.[30] A few venturesome state courts occasionally

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[29] See Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J L & Polit 331, 346 (2007).

[30] See *Colegrove v Green*, 328 US 549, 551–52 (1946).

subjected district plans to scrutiny,[31] but as a general matter there was no check on the power of the elected branches.[32]

This regime ended in 1962 with the launch of what became known as the "reapportionment revolution."[33] From this date onward the judiciary became progressively more involved in evaluating (and sometimes even designing) district plans. First the Supreme Court required districts within each state to contain the same population;[34] next the Court barred racial vote dilution as a constitutional matter;[35] then Congress created a statutory cause of action for vote dilution;[36] then the Court sought to regulate the ubiquitous practice of political gerrymandering;[37] and finally the Court prohibited the crafting of constituencies with race as the predominant motive.[38] The state courts became much more aggressive during this period as well, deploying doctrines that sometimes mirror and sometimes diverge from the federal requirements.[39] As a consequence, all American redistricting now takes place under either direct judicial supervision or the shadow of potential judicial intervention. In the 2010 cycle, for example, more than 190 lawsuits were filed in 41 states, resulting in 11 states' plans being invalidated and 9 states' plans being drawn by the courts.[40]

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[31] See, for example, *Denney v Basler*, 42 NE 929, 931 (Ind 1896); *Baird v Board of Supervisors of Kings County*, 33 NE 827, 832 (NY 1893); *Brown v Saunders*, 166 SE 105, 111 (Va 1932).

[32] See Seth Warren Whitaker, Note, *State Redistricting Law:* Stephenson v. Bartlett *and the Judicial Promotion of Electoral Competition*, 91 Va L Rev 203, 203 (2005).

[33] See *Baker v Carr*, 369 US 186, 230–37 (1962) (distinguishing *Colegrove* and holding reapportionment disputes to be justiciable). See generally Gary W. Cox and Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution* (Cambridge 2002).

[34] See *Reynolds v Sims*, 377 US 533, 561, 567 (1964); *Wesberry v Sanders*, 376 US 1, 14, 17–18 (1964).

[35] See *White v Regester*, 412 US 755, 765–66, 769–70 (1973).

[36] See Voting Rights Act Amendments of 1982 § 3, Pub L No 97-205, 96 Stat 131, 131, codified as amended at 42 USC § 1973a. Prior to 1982, the statutory cause of action for vote dilution was identical to the constitutional claim. See *City of Mobile, Alabama v Bolden*, 446 US 55, 60–61 (1980) (Stewart) (plurality).

[37] See *Davis v Bandemer*, 478 US 109, 113 (1986). See also *Vieth v Jubelirer*, 541 US 267, 278–81 (2004) (Scalia) (plurality) (rejecting standard offered in *Bandemer* and leaving political gerrymandering cause of action in doctrinal limbo).

[38] See *Shaw v Reno*, 509 US 630, 657–58 (1993).

[39] See James A. Gardner, *Foreword: Representation without Party—Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 Rutgers L J 881, 925–55 (2006) (discussing history of state court doctrine and more recent state court efforts to combat gerrymandering).

[40] See Levitt, *Litigation in the 2010 Cycle* (cited in note 5).

Although the judiciary's increasing involvement is the most important institutional development of the last half-century, another notable trend is the transfer of line-drawing authority from political actors to commissions in a minority of states.[41] Commissions are now responsible for designing state legislative districts in thirteen states and congressional districts in seven states.[42] Most of these bodies are bipartisan in composition, some are deliberately skewed in favor of the majority party, and two (Arizona's and California's) are more or less independent.[43] Interestingly, commission-drawn plans fare somewhat better in litigation than plans enacted by the elected branches. Over the last four cycles, 76 percent of commission-drawn plans were upheld by the courts, compared to 65 percent of conventional plans.[44]

2. Abroad.

Most countries with territorial districts *used* to redistrict in the same fashion as pre-1962 America—through political actors free from judicial oversight. Canada, for example, redrew its parliamentary districts nine times between 1872 and 1964, and "[w]ithout exception, each [effort] was carefully managed by the government of the day, whether Conservative or Liberal, in its

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[41] See Stephanopoulos, 23 J L & Polit at 332–33, 342–43, 345–78 (cited in note 29) (discussing reasons for success or failure of popular initiatives aimed at establishing redistricting commissions); Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 Yale L J 1808, 1813 (2012).

[42] See NCSL, *Redistricting* at 161–62 (cited in note 4). California began employing a commission for congressional districts after this report's publication. See Cal Const Art XXI. For present purposes, I consider redistricting boards to be equivalent to commissions.

[43] See NCSL, *Redistricting* at 163–71 (cited in note 4). See also Cain, 121 Yale L J at 1813–20 (cited in note 41) (discussing various commission models used in United States).

[44] See *Redistricting Plan Success Rates: Legislatures vs. Commissions* (Redistricting and Elections Committee for the National Conference of State Legislatures Jan 9, 2008), online at http://www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/success_rates.htm (visited May 11, 2013). See also Christopher C. Confer, *To Be about the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 Kan J L & Pub Pol 115, 131–32 (Winter 2003–04); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 Tex L Rev 1643, 1689–90 (1993); Jonathan Winburn, *Does It Matter if Legislatures or Commissions Draw the Lines?*, in Gary F. Moncrief, ed, *Reapportionment and Redistricting in the West* 137, 149 (Lexington 2011) (finding that use of bipartisan commission resulted in statistically significant improvement in judicial success rate in 2000 cycle); Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L Rev 77, 124–26 (1985).

own interest."[45] Similarly, redistricting in nineteenth- and early twentieth-century Britain was an "extremely political activit[y], with constituency boundaries drawn up . . . to promote the majority party's electoral interests."[46] However, no liberal democracy still employs this model. Today the only nations that allow the elected branches to draw district lines, untrammeled by any court-imposed limits, are more authoritarian states such as Cameroon, Kyrgyzstan, Malaysia, and Singapore.[47]

No liberal democracy employs the *current* American approach (in noncommission states) either, although several jurisdictions did so until fairly recently. In France, for instance, political actors were responsible for redistricting prior to 2010,[48] and their decisions were closely monitored by the *Conseil constitutionnel* (the French constitutional court). Between 1986 and 2010, the *Conseil* held that the French constitution includes an equal population requirement;[49] invalidated a statute that authorized large population deviations in the name of "considerations of general interest";[50] and twice instructed the French

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45 John C. Courtney, *From Gerrymanders to Independence: District Boundary Readjustments in Canada*, in Handley and Grofman, eds, *Redistricting* 11, 12 (cited in note 10). See also Royal Commission on Electoral Reform and Party Financing, 1 *Reforming Electoral Democracy* 10, 138 (Minister of Supply and Services Canada 1991); R.K. Carty, *The Electoral Boundary Revolution in Canada*, 15 Am Rev Can Stud 273, 276–79 (1985).

46 D.J. Rossiter, R.J. Johnston, and C.J. Pattie, *The Boundary Commissions: Redrawing the UK's Map of Parliamentary Constituencies* 2 (Manchester 1999). See also Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* 23–25, 36 (Federation 2010) (discussing redistricting processes used in past by Australian states); Royal Commission on the Electoral System, *Report: Towards A Better Democracy* 133 (1986) (same for New Zealand); Handley, *A Comparative Survey* at 267 (cited in note 10) ("During the nineteenth century . . . the drawing of constituency boundaries was the responsibility of the legislature.").

47 See Handley and Grofman, eds, *Redistricting* at appendix B (cited in note 10) (listing institutions involved in redistricting in multiple countries). See also Joel S. Fetzer, *Election Strategy and Ethnic Politics in Singapore*, 4 Taiwan J Dem 135, 142–47 (2008); Jeremy Grace, *Malaysia: Malapportioned Districts and Over-Representation of Rural Communities* (ACE Electoral Knowledge Network), online at http://aceproject.org/ace-en/topics/bd/bdy/bdy_my (visited May 11, 2013).

48 See David Butler and Bruce Cain, *Congressional Redistricting: Comparative and Theoretical Perspectives* 117, 125–28 (Macmillan 1992); Michel Balinski, *Redistricting in France under Changing Electoral Rules*, in Handley and Grofman, eds, *Redistricting* 173, 178–79, 183–84 (cited in note 10); Richard S. Katz, *Malapportionment and Gerrymandering in Other Countries and Alternative Electoral Systems*, in Mark E. Rush, ed, *Voting Rights and Redistricting in the United States* 245, 255 (Greenwood 1998).

49 See Conseil Constitutionnel, Décision No 86-208 DC (July 2, 1986) (France). See also Balinski, *Redistricting in France* at 182 (cited in note 48) (describing this decision as "a strong warning concerning the definition of districts").

50 Conseil Constitutionnel, Décision No 2008-573 (Jan 8, 2009) (France).

Parliament to redraw all of the country's districts.[51] In Japan, likewise, redistricting was a political exercise prior to 1994,[52] and the Japanese Supreme Court repeatedly entered the fray to address issues of population inequality. On at least four occasions, the Court held that malapportioned lower house plans, featuring interdistrict population deviations as high as 400 percent, "could not be considered reasonable" and were therefore unconstitutional.[53]

In Ireland as well, constituencies were designed by the legislature and then reviewed by the judiciary prior to 1980.[54] During this period, Irish redistricting was "characterized by overt partisanship, attracting bitter and heartfelt opposition,"[55] and the High Court struck down a district plan that resulted in particularly "grave inequalities of parliamentary representation."[56]

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[51] See Conseil Constitutionnel, *Observations about Elections of 2007* (July 7, 2005) (France); Conseil Constitutionnel, *Observations about Legislative Elections of June 9 and 16, 2002, May 21, 2003* (France). However, the *Conseil*'s aggressiveness should not be overstated, as it has also backed down from confrontations with the Parliament on several occasions. See Balinski, *Redistricting in France* at 183, 186 (cited in note 48).

[52] See Ray Christensen, *Redistricting in Japan: Lessons for the United States*, 5 Japanese J Polit Sci 259, 263 (2004); Toshimasha Moriwaki, *The Politics of Redistricting in Japan: A Contradiction between Equal Population and Respect for Local Government Boundaries*, in Handley and Grofman, eds, *Redistricting* at 107, 111 (cited in note 10). Japan employed multimember districts with a single nontransferable vote prior to 1994. Id at 107. These districts were small enough (with three to five members each) that they had to be redrawn at regular intervals. See Christensen, 5 Japanese J Polit Sci at 259–63 (cited in note 52).

[53] 30 Minshu 233 (Saikō Saibansho, Apr 14, 1976) (Japan). See also 47 Minshu 67 (Saikō Saibansho, Jan 20, 1993) (Japan); 39 Minshu 1100 (Saikō Saibansho, July 17, 1985) (Japan); 37 Minshu 1243 (Saikō Saibansho, Nov 7, 1983) (Japan); J. Mark Ramseyer and Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 Am Polit Sci Rev 331, 336 (2001) (noting that sixty-nine lower court opinions in Japan have dealt with malapportionment issues). However, the Japanese Supreme Court refrained from questioning the validity of the elections held under the malapportioned district plans, and it tolerated population disparities as high as three to one in other cases. See Christensen, 5 Japanese J Polit Sci at 263 (cited in note 52).

[54] John Coakley, *Electoral Redistricting in Ireland*, in Handley and Grofman, eds, *Redistricting* at 155, 160–62 (cited in note 10).

[55] Id at 160. See also Andrew McLaren Carstairs, *A Short History of Electoral Systems in Western Europe* 207–09 (George Allen 1980); Katz, *Malapportionment* at 249, 254–55 (cited in note 48). Ireland employs multimember districts with a single transferable vote. As in Japan, these districts are small enough (with three to five members each) that they must regularly be redrawn. See Coakley, *Electoral Redistricting in Ireland* at 158–59 (cited in note 54).

[56] *O'Donovan v Attorney General*, IR 114, 150 (High Ct 1961) (Ireland). The Irish Supreme Court's one decision in this period, however, was not quite as aggressive. See *In the Matter of Article 26 of the Constitution and in the Matter of the Electoral (Amendment) Bill, 1961*, 1 IR 169, 183 (S Ct 1961) (Ireland) ("The decision as to what is practicable [with respect to population equality] is within the jurisdiction of the [Parliament].").

Lastly, several Canadian provinces either severely limited the discretion of their commissions or did not use commissions at all prior to 1996.[57] Certain of these provinces—Alberta, British Columbia, and Prince Edward Island—were the only ones to have their district plans called into question by the courts.[58] As the Alberta Court of Appeal put it, a lower "level of deference is appropriate when the author of the boundary is some [entity] . . . who is not insulated from partisan influence, and who may be tempted to engage in some traditional political games."[59]

If foreign jurisdictions now embrace neither the historical nor the current American model, to what approach *do* they subscribe? The nearly universal answer is that they use independent redistricting commissions whose plans are subject to highly deferential judicial review. This is the policy that all of the major Commonwealth countries have adopted: Australia, Bangladesh, Britain, Canada, India, New Zealand, Nigeria, and Pakistan.[60] This is also the policy adopted by, among others, Albania, Belarus, Germany, Indonesia, Lithuania, Mexico, and the Ukraine.[61] And this is the policy to which France, Ireland, Japan, and the last few Canadian provinces switched after deciding to abandon redistricting by political actors.[62]

Under this model, commissions are typically composed of nonpartisan government officials, judges, or academics, who receive their positions either ex officio or by appointment. For example, Australia's and New Zealand's commissions are made up mostly of technocrats such as surveyors, statisticians, and electoral officers,[63] while Britain and Canada's rely more heavily on

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57 See Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 Election L J 425, 426 (2006) (highlighting Parliament's establishment of Law Commission of Canada in 1996, which began examining Canadian election law and promoting national reform).

58 See *Reference re Electoral Divisions Statutes Amendment Act, 1993*, 119 DLR 4th 1, 2 (Alberta App 1994) (Canada) ("1994 Alberta Reference Case"); *Dixon v British Columbia (Attorney-General)*, 59 DLR 4th 247, 284 (BC S Ct 1989) (Canada); *MacKinnon v Prince Edward Island*, 101 DLR 4th 362, 399 (PEI S Ct 1993) (Canada).

59 *1994 Alberta Reference Case*, 119 DLR 4th at 19.

60 See Handley and Grofman, eds, *Redistricting* at appendix B (cited in note 10).

61 See id.

62 See id at appendix A–B.

63 The Australian commission for each state is initially composed of the federal electoral commissioner, the state electoral officer, the state surveyor-general, and the state auditor-general, and is then augmented with two additional members of the federal election commission. See Commonwealth Electoral Act 1918 §§ 60(2), 70(2) (Australia). The New Zealand commission is composed of the surveyor-general, the government statistician, the chief electoral officer, the chairperson of the local government commission,

appointees such as judges and professors.[64] Some nations use a single commission to design all of their districts (for instance, France, Japan, and New Zealand[65]), while other nations employ multiple commissions, each responsible for a particular subnational jurisdiction (for instance, Australia, Britain, and Canada[66]). Each Australian state and Canadian province actually has *two* commissions, one for districts in the national parliament, the other for districts in the state or provincial legislature.[67]

Certain commissions are only in charge of redistricting (as in most Commonwealth countries), while other commissions supervise the entire electoral system (as in Indonesia, Mexico, and the Ukraine).[68] Almost all commissions provide extensive opportunities for concerned parties to comment on proposed district plans.[69] And commissions' final plans sometimes are binding without the need for further government action (as in Australia, India, and New Zealand), and sometimes require legislative approval before becoming law (as in Britain, Canada, and France).[70] Where legislative approval is required, however, it is

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two representatives of political parties, and a chairperson appointed by the governor-general. See Electoral Act 1993 § 28(2) (New Zealand).

64 The Canadian commission for each province is composed of a judge appointed by the chief justice of the province and two members appointed by the speaker of the House of Commons. See Electoral Boundaries Readjustment Act, RSC 1985, ch E-3, §§ 4–6 (Canada). The commission for each country in the United Kingdom is composed of the Speaker of the House of Commons, one appointed judge, and two members appointed by the Secretary of State. See Parliamentary Constituencies Act, 1986, sch 1 (UK).

65 See Balinski, *Redistricting in France* at 182 (cited in note 48); Moriwaki, *The Politics of Redistricting in Japan* at 108 (cited in note 52); Alan McRobie, *An Independent Commission with Political Input: New Zealand's Electoral Redistribution Practices*, in Handley and Grofman, eds, *Redistricting* at 27, 28 (cited in note 10).

66 See Rod Medew, *Redistribution in Australia: The Importance of One Vote, One Value*, in Handley and Grofman, eds, *Redistricting* at 97, 99 (cited in note 10); Ron Johnson, Charles Pattie, and David Rossiter, *Electoral Distortion Despite Redistricting by Independent Commissions: The British Case, 1950–2005*, in Handley and Grofman, eds, *Redistricting* at 205, 207 (cited in note 10); John C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* 94 (McGill-Queen's 2001).

67 See John C. Courtney, *Electoral Boundary Redistributions*, in Malcolm Alexander and Brian Galligan, eds, *Comparative Political Studies: Australia and Canada* 45, 48 (Pitman 1992).

68 See Handley and Grofman, eds, *Redistricting* at appendix B (cited in note 10).

69 See generally Boundary Commission for England, *Fifth Periodical Report* (Crown 2007) (discussing comments received with respect to proposed English districts); Delimitation Commission of India, 1 *Changing Face of Electoral India: Delimitation 2008* 3–9 (2008) (same with respect to Indian districts); Irish Constituency Commission, *Report on Dáil and European Parliament Constituencies 2007* 9, 14–36 (2007) (same with respect to Irish districts); New Zealand Representation Commission, *Report of the Representation Commission 2007* 6–9, 12–13, 36–146 (2007) (same with respect to New Zealand districts).

70 See Handley and Grofman, eds, *Redistricting* at appendix B (cited in note 10).

essentially a formality—as Professor Christopher Elmendorf has noted, "Legislatures almost uniformly accede to the recommendations of nonpartisan districting commissions."[71]

In all countries where districts are redrawn by independent commissions, the courts have taken a strikingly deferential stance toward the commissions' output. There *has* been litigation in these countries, but it has almost always resulted in judgments upholding the challenged plans, often accompanied by effusive statements about the commissions' expertise and the respect to which their decisions are entitled. In Canada, for instance, the Supreme Court rejected an equal population challenge to a Saskatchewan plan, holding that the Canadian Charter requires "effective representation" for constituencies rather than perfect population equality.[72] The Court added that district plans should not be disturbed unless "reasonable persons applying the appropriate principles . . . could not have set the electoral boundaries as they exist."[73] In the United Kingdom, similarly, the Court of Appeal rebuffed an attack on the 1954 plan for England, reasoning that judges are not "competent . . . to determine and pronounce on whether a particular line which had commended itself to the commission was . . . the best line or the right line."[74] A lawsuit against the 1982 plan for England also failed, with the court remarking that the commission's decisions should be reversed only if they were ones "to which no reasonable commission could have come."[75]

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71 Elmendorf, 80 NYU L Rev at 1388 (cited in note 12).

72 *Reference re Provincial Electoral Boundaries (Sask)*, 2 SCR 158, 177–78, 183–84, 194–96 (S Ct 1991) (Canada) ("1991 Saskatchewan Reference Case").

73 Id at 189 (discussing role of courts), quoting *Dixon*, 59 DLR 4th at 267. See also *Raiche v Canada (Attorney General)*, 1 FCR 93, 108 (Fed Ct 2005) (Canada) ("[T]he courts will therefore respect the choices made by the commissions if their decisions are defensible."); John C. Courtney, *Commissioned Ridings* at 173 (cited in note 66) ("By transferring the power to design constituency boundaries to independent electoral boundary commissions, Canadian legislators have effectively headed off . . . [a] plethora of court challenges."); Ronald E. Fritz, *Challenging Electoral Boundaries under the Charter: Judicial Deference and Burden of Proof*, 5 Rev Const Stud 1, 1, 33 (1999).

74 *Harper v Secretary of State for the Home Department*, [1955] Ch 238, 251 (1954) (Eng).

75 *Regina v Boundary Commission for England*, [1983] 1 QB 600, 627, 637 (1983). See also *Hammersmith BC v Boundary Commission for England*, reported in Times (London) 4 (Dec 15, 1954) (stating that evaluation of commission's decisions was a matter that "seemed entirely unsuited to judicial intervention"); Rossiter, Johnston, and Pattie, *Boundary Commissions* at 95, 114 (cited in note 46). Of course, the British courts' deference is also attributable to the doctrine of parliamentary sovereignty, which requires that the commissions' decisions be upheld unless they violate the statutes that created the bodies in the first place.

Lawsuits against district plans have failed as well in Australia,[76] India,[77] and New Zealand.[78] More interestingly, recent litigation has been unsuccessful in the jurisdictions—France, Ireland, Japan, and certain Canadian provinces—that used to feature high levels of political and judicial involvement in redistricting. In France, the *Conseil constitutionnel* upheld the country's first commission-crafted plan in 2010, describing approvingly the commission's methodology and noting that the *Conseil* does not possess the same "general power of judgment and decision" as the commission.[79] In Japan, all equal population challenges to lower house plans have been rejected since the Demarcation Council was established in 1994.[80] In Ireland, the High Court refused to expedite the redistricting process in the wake of a 2006 census, ruling instead that the Constituency Commission should draw the lines so that "the constituencies as enacted into law have [a] high degree of public confidence."[81] And in Prince Edward Island, the only Canadian province that has had district plans disputed both before and after adopting a commission, the court in the more recent decision dismissed a series of claims and then went out of its way to offer its "opinion [that] the process here was fair."[82]

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76 See *McGinty v Western Australia*, 186 CLR 140, 178–79 (High Ct 1996) (Australia) (Brennan) (denying a constitutional challenge); *McKinlay v Commonwealth*, 135 CLR 1, 33–35 (High Ct 1975) (Australia) (Barwick) (plurality) (summing up Chief Justice Garfield Barwick's views about "suits brought to test the validity" of the relevant legislation); Orr, *The Law of Politics* at 42–44 (cited in note 46).

77 See *Election Commission of India v Ghani*, 6 SCC 721, ¶ 2, 10 (S Ct 1995) (India); *Kothari v Delimitation Commission*, 1 SCR 400, ¶ 11 (S Ct 1967) (India) (holding that a commission plan "is to have the force of law and not to be made the subject matter of controversy in any court").

78 See *Timmins v Governor-General*, 2 NZLR 298, 302 (High Ct 1984) (New Zealand) ("The Court has no jurisdiction to inquire into the merits of the decisions of the Commission adjusting electoral boundaries.").

79 Conseil Constitutionnel, Décision No 2010-602, 68 (Feb 18, 2010) (France).

80 See *Claim on the Invalidation of the Election*, 61 Minshu ___ (Saikō Saibansho June 13, 2007) (Japan); *Case to Seek Invalidity of Election*, 53 Minshu 1441 (Saikō Saibansho Nov 10, 1999) (Japan); *Case to Seek Nullification of Election*, 49 Minshu 1443 (Saikō Saibansho June 8, 1995) (Japan). But see 65 Minshu ___ (Saikō Saibansho Mar 23, 2011) (Japan) (urging legislature to alter rule requiring each prefecture to have at least one seat, in order to make districts more equal in population).

81 *Murphy v Minister for Envt, Heritage & Local Govt*, IEHC 185, ¶¶ 7.5, 10.1 (High Ct 2007) (Ireland).

82 *Charlottetown (City) v Prince Edward Island*, 142 DLR 4th 343, 352 (PEI S Ct 1996) (Canada).

B. Politicization and Judicialization

These brief summaries of different jurisdictions' practices show that three types of institutions are involved in redistricting around the world: the elected branches of government, commissions of one kind or another, and the courts. The first two of these, of course, are essentially substitutes for each other; there is no need for commissions if political actors draw district lines, and vice versa. The three institutions can therefore be situated along two key axes: the *politicization* and the *judicialization* of the redistricting process.[83] The process is politicized when the elected branches have exclusive or predominant authority over how districts are designed. Conversely, the process is depoliticized (and bureaucratized) when commissions are responsible for crafting constituencies. Of course, commissions themselves can be located at different positions along the politicization spectrum. Commissions made up of elected officials are the least insulated from political considerations; commissions whose members are appointed and whose plans require legislative approval fall somewhere in the middle; and commissions whose members are nonpartisan technocrats and whose plans are enacted automatically are the most independent.[84]

Judicialization also varies along a spectrum. At one end are jurisdictions where the courts are barred from evaluating district plans and have almost never been asked to do so by aggrieved parties. At the other end are jurisdictions where redistricting litigation is common and the courts stand ready to invalidate plans that, in their view, violate constitutional or other legal rules. And in the middle are jurisdictions where litigation is infrequent but not unheard of, and where the courts are willing to engage with the merits of redistricting claims but unlikely ultimately to find them persuasive.

These two axes are useful individually, but they have more analytical bite when considered in tandem. Below I use the axes to construct matrices that illuminate the policy choices that

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[83] Another potential axis is the *centralization* of the redistricting process. The process is centralized when a single commission designs all of a country's districts, and decentralized when a separate commission is responsible for redistricting in each subnational jurisdiction. I do not discuss this axis further because it does not seem to have significant implications for the measures of democratic health that I discuss below in Part I.C. That is, there is no evidence that centralization (or lack thereof) is relevant to commission performance.

[84] See Cain, 121 Yale L J at 1817–19 (cited in note 43) (analyzing politicization dimension at length).

different jurisdictions have made, both currently and historically, with respect to redistricting institutions. The matrices show that politicization and judicialization are not separate phenomena, but rather closely interrelated aspects of any model of district design. To focus on only one axis at a time, as much of the literature has done,[85] is to miss a good deal of the institutional picture.

1. Current policies.

Figure 1 below is a matrix in which politicization is captured by the vertical dimension and judicialization is captured by the horizontal dimension. Although finer gradations are possible, for the sake of simplicity each axis is divided into just two subcategories: low and high politicization, and low and high judicialization. In addition, only the policies *currently* in place in different jurisdictions are displayed. Jurisdictions' specific positions within each quadrant are based on my (admittedly subjective) assessments of their laws, practices, and judicial decisions.

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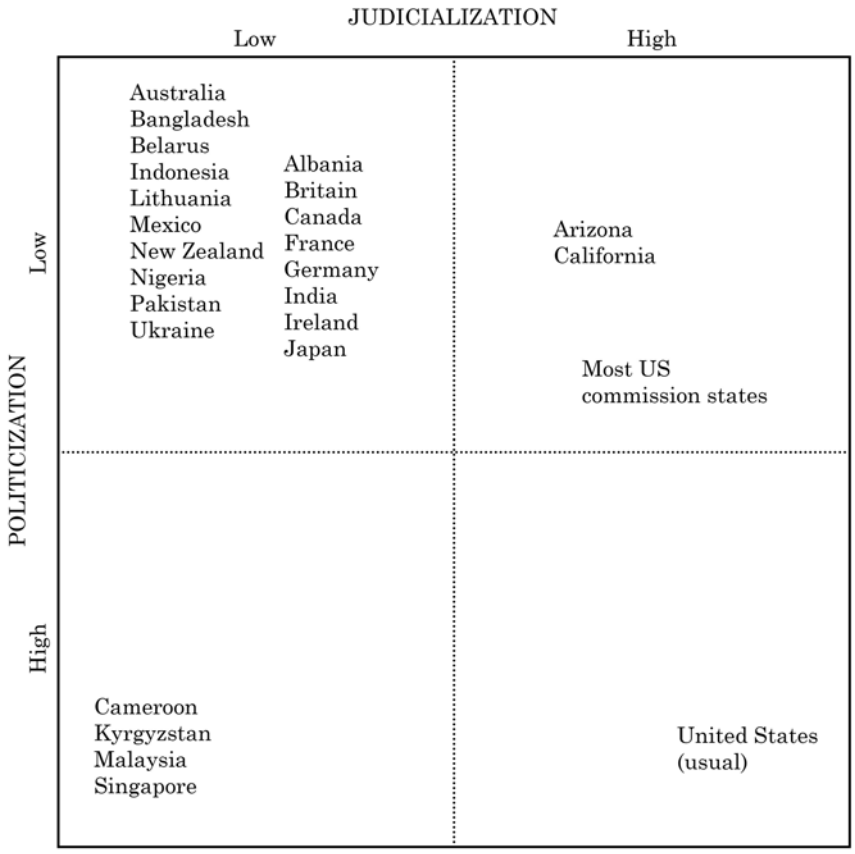
[85] See, for example, Butler and Cain, 4 Electoral Stud at 206–11 (cited in note 20) (focusing analysis of districting regimes on politicization); Erin Daly, *Idealist, Pragmatists, and Textualists: Judging Electoral Districts in America, Canada, and Australia*, 21 BC Intl & Comp L Rev 261, 262 (1998) (finding "different results [to be] largely attributable to" the differences in judicialization between electoral systems).

FIGURE 1. CURRENT REDISTRICTING MODELS



As is obvious from Figure 1, three of the four possible matrix positions are highly unpopular today. The only countries in the high-politicization, low-judicialization space, with political actors shaping districts without judicial oversight, are relatively authoritarian states such as Kyrgyzstan and Malaysia.[86] With its extremely high levels of both political and judicial involvement, the United States is the only nation in the high-politicization, high-judicialization space.[87] And American states

[86] See Brent T. White, *Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies*, 43 Cornell Intl L J 307, 348–49 (2010); Randall Peerenboom, *Show Me the Money: The Dominance of Wealth in Determining Rights Performance in Asia*, 15 Duke J Comp & Intl L 75, 76 (2004).

[87] The reason the United States is not further to the right along the judicialization axis is that the courts have largely refrained from adjudicating political gerrymandering

that employ commissions are the only jurisdictions in the low-politicization, high-judicialization space. However, the level of judicialization is arguably lower in these states than in their peers, thanks to the lower success rate of litigation against commission-crafted plans.[88] In addition, the level of politicization in these states is still higher than in most foreign countries, because partisan and bipartisan commissions are not very well insulated from the political process. Only Arizona and California have commissions whose independence is comparable to that of most foreign line-drawing bodies.[89]

The second point illustrated by Figure 1 is that almost all liberal democracies currently belong in the low-politicization, low-judicialization space, with commissions designing districts without much judicial supervision. Countries' positions *within* this space reflect how independent their commissions are and how deferential their courts have been. For example, Australia and New Zealand have especially autonomous commissions, with nonpartisan officials designated ex officio and district plans that become law automatically.[90] The court decisions in these countries have also been very respectful of the choices that the commissions have made. Conversely, the British, Canadian, French, and Japanese commissions are somewhat less independent since their members are appointed by political actors and their plans require legislative approval.[91] These countries' court decisions have been more frequent and substantively intrusive as well (even after the recent redistricting reforms in France and Japan[92]).

What accounts for the fact that every liberal democracy is in either the low-politicization, low-judicialization space or the

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claims. See note 37. There is thus room for the American redistricting process to become still more judicialized.

88 See note 44 and accompanying text.

89 See Cain, 121 Yale L J 1819 (cited in note 43). Arizona's and California's commissions may most closely resemble their foreign counterparts with respect to insulation from the political process, but it is Iowa's system, which relies in the first instance on the nonpartisan technocrats of the Legislative Services Bureau, that is most analogous to foreign approaches in terms of staffing. See Iowa Code §§ 42.5–42.6.

90 Two of the seven members of New Zealand's commission (a clear minority of the body) are representatives of political parties. See note 63. See also Commonwealth Electoral Act 1918 § 59(1) (Australia) (declaring that redistributions "shall commence" whenever the commission directs); Electoral Act 1993 § 38 (New Zealand).

91 Handley and Grofman, eds, *Redistricting* at appendix B (cited in note 10).

92 Balinski, *Redistricting in France* at 182 (cited in note 48); Moriwaki, *The Politics of Redistricting in Japan* at 112 (cited in note 52).

high-politicization, high-judicialization space? A likely answer is that the agency costs[93] associated with the high-politicization, low-judicialization space are intolerable. (Or, rather, that the costs are now tolerated only in countries that are not fully democratic.) When political actors have the unfettered authority to redistrict, they typically produce districts that are highly malapportioned, that seek to benefit one party at the expense of others, and that fail to provide sufficient opportunities for minority representation.[94] Unconstrained political actors, in other words, systematically pursue their own interests instead of those of the broader public, which include districts of roughly equal size that treat both parties and minority groups fairly. These costs were all incurred in pre-1962 America,[95] and they were also endured in every other country that used to allow the elected branches to design districts without judicial oversight.[96] As Professor John Courtney observed about pre-1964 Canada, "Biases against urban and in favor of rural voters were common to all provinces," and "federal redistributions amounted to little more than acts of political expediency."[97]

The appeal of the low-politicization, low-judicialization and high-politicization, high-judicialization positions, then, is that they promise to reduce the agency costs of redistricting. Courts can require districts to have the same population, they can reject attempts to dilute minority representation, and in theory they can invalidate gerrymanders that advantage either a single party or incumbents of both parties (though in practice they have not done so).[98] Similarly, commissions can be staffed with

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93 Agency costs arise whenever the interests of the principal (in this case, the public) diverge from the interests of the agent (here, the actor responsible for redistricting). Institutions are often designed so as to minimize agency costs. See Tom Ginsburg and Eric A. Posner, *Subconstitutionalism*, 62 Stan L Rev 1583, 1585, 1587–88 (2010) (using agency costs to analyze state constitutional design). See also D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv L Rev 671, 706 (2013) ("Political representation presents a complex agency problem and, unsurprisingly, gives rise to agency costs.").

94 See, for example, Courtney, *District Boundary Readjustments in Canada* at 15–18 (cited in note 45).

95 See Cox and Katz, *Elbridge Gerry's Salamander* at 4, 13, 52, 59–60 (cited in note 33) (discussing malapportionment and partisan bias in pre-1962 America).

96 See notes 45–46 and accompanying text.

97 Courtney, *Commissioned Ridings* at 20, 23 (cited in note 66). See also Fetzer, 4 Taiwan J Dem at 142–47 (cited in note 47) (describing redistricting abuses by political actors in present-day Singapore). See Grace, *Malaysia* (cited in note 47) (same in present-day Malaysia).

98 See notes 34–38 and accompanying text (briefly summarizing the main lines of American redistricting doctrine).

nonpartisan members who are personally unaffected by redistricting and then instructed to design districts based on criteria such as equal population, equitable representation for minority groups, and partisan fairness. Both courts and commissions can thus limit the divergence between the interests of the public and the policies that actually emerge from the redistricting process. As Professors Tom Ginsburg and Eric Posner have put it, "Judicial review provides [one] distinct device for monitoring" the behavior of agents, but "other monitoring devices, including . . . commissions," can improve the fit between public policy and the public interest as well.[99]

This agency cost perspective also explains why the low-politicization, high-judicialization space is nearly empty. Since the harms of unconstrained line drawing by political actors can be alleviated *either* judicially or bureaucratically, there is no need to involve *both* courts and commissions in the redistricting process. Put another way, the judiciary can exit the stage once commissions are established because there is no realistic threat that properly designed commissions will carry out the problematic policies—malapportionment, partisan and bipartisan gerrymandering, and minority vote dilution—for which the elected branches are known. We may therefore expect jurisdictions in the low-politicization, high-judicialization space to migrate over time to the low-politicization, low-judicialization space. Indeed, there is evidence that such a migration is already underway in the minority of American states that currently employ commissions.[100]

2. Changes over time.

Although it is interesting to speculate about future policy shifts, the politicization-judicialization matrix can also be deployed to track *past* changes in the redistricting models used by different jurisdictions. Figure 2 below includes the same two axes as Figure 1, but it displays approaches that used to be in place (in italics) in addition to current policies (in bold). It also

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[99] Ginsburg and Posner, 62 Stan L Rev at 1590–91 (cited in note 93). See also Pildes, 118 Harv L Rev at 44 (cited in note 12) (noting that both courts and independent commissions can help address the "constantly looming pathology of democratic systems"); Kim Lane Scheppele, *Congress in Comparative Perspective: Parliamentary Supplements (or Why Democracies Need More Than Parliaments)*, 89 BU L Rev 795, 810 (2009).

[100] See note 44 and accompanying text.

lists only jurisdictions that have undergone major shifts in how they design districts, not all jurisdictions. And, for ease of exposition, it does not identify where within each quadrant each jurisdiction is located.[101]

FIGURE 2. PAST AND PRESENT REDISTRICTING MODELS

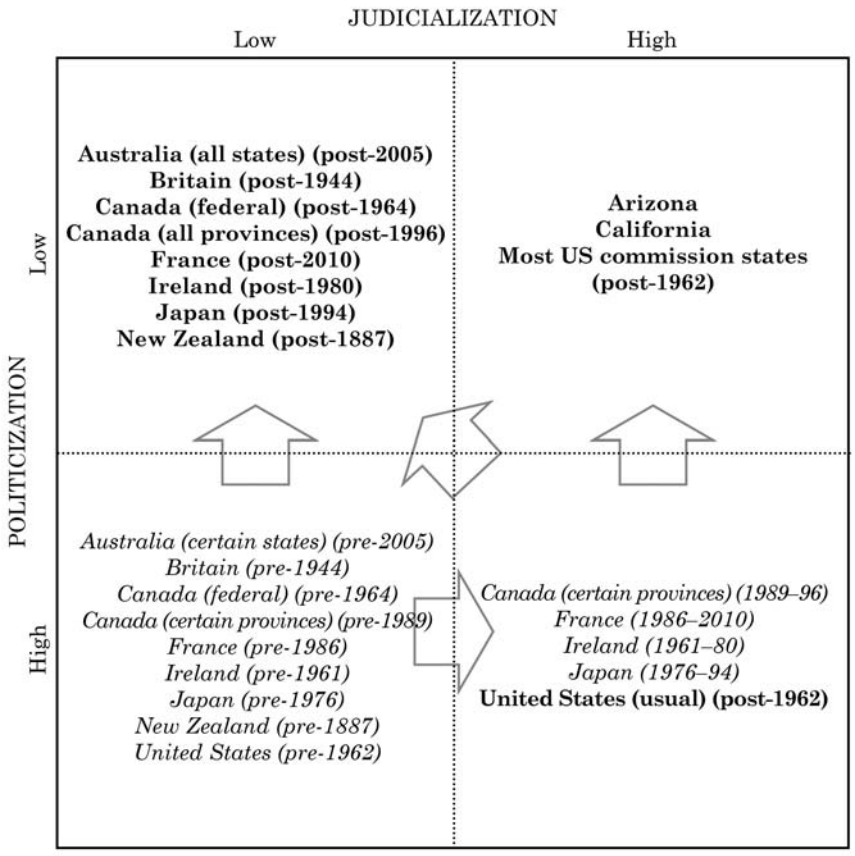

Figure 2 shows that when jurisdictions initially abandoned unconstrained line drawing by political actors, they moved to either the low-politicization, low-judicialization or high-politicization, high-judicialization spaces. Certain Australian

[101] Two additional points: First, I consider jurisdictions to be highly judicialized if they had a court decision that invalidated a district plan during the relevant time period. Second, I deem jurisdictions that used commissions in the past but limited their discretion through criteria that resulted in malapportionment in favor of rural areas (for example, Alberta, British Columbia, Queensland, South Australia, Western Australia) to be in the high-politicization, high-judicialization quadrant, not in the low-politicization, high-judicialization quadrant.

states, Britain, Canada, and New Zealand established commissions and thus largely excluded both the elected branches and the courts from the redistricting process. On the other hand, certain Canadian provinces, France, Ireland, Japan, and the United States did not adopt commissions but rather experienced surges in their levels of judicial involvement. As noted earlier, no liberal democracy still remains in the original high-politicization, low-judicialization space.[102]

Figure 2 also depicts the policy shifts that have taken place away from the high-politicization, high-judicialization space. Certain American states instituted commissions but remain subject to significant (though perhaps lessening) judicial supervision, and thus find themselves in the low-politicization, high-judicialization space. In addition, certain Canadian provinces, France, Ireland, and Japan adopted commissions in recent years, and have not had their district plans invalidated by the courts since doing so. They now comprise part of the long list of jurisdictions in the low-politicization, low-judicialization space.[103] The only jurisdictions still remaining in the high-politicization, high-judicialization space, of course, are most American states.

Figure 2 further illustrates that, on the politicization axis, all of the movement across the world has been from higher to lower levels. No liberal democracy has ever embraced a commission only later to dismantle it.[104] Lastly, Figure 2 suggests that a shift from high- to low-judicialization can occur only if accompanied by a shift from high- to low-politicization. The courts cannot be removed from the redistricting process unless the elected branches also are removed. If political actors retain their line-drawing authority, then the courts must retain their power of oversight as well—or else a jurisdiction would find itself back in the untenable high-politicization, low-judicialization space.

Again, all of these policy changes are explicable in terms of agency costs. Liberal democracies eventually depart from the

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102 See Part I.A.

103 It is admittedly somewhat of a judgment call whether these Canadian provinces, France, Ireland, and Japan are now in the low-politicization, high-judicialization space or in the low-politicization, low-judicialization space. Because these jurisdictions' plans have not been struck down since they adopted commissions, I place them in the low-politicization, low-judicialization space. See note 101.

104 See Butler and Cain, *Congressional Redistricting* at 124 (cited in note 48) (noting the "sustained international trend toward keeping incumbent legislators out of the redistricting process and relying more on neutral commissions").

high-politicization, low-judicialization space because the costs associated with it are unbearably high. They tend to leave the high-politicization, high-judicialization space because its costs, while lower, are still substantially higher than those of the two low-politicization positions.[105] And the few jurisdictions in the low-politicization, high-judicialization space may be moving toward the low-politicization, low-judicialization space because extensive judicial involvement does not reduce costs very much when political actors already have been excluded from the process of district design.

Of course, the relative magnitude of agency costs is not a sufficient explanation for jurisdictions' movement from one policy position to another. The agents that are the principal beneficiaries of agency slack in this domain—that is, the elected branches—typically must approve all policy changes. They typically do *not* approve changes that harm their own interests, no matter how great the resulting benefits to the public might be. The point here is only that when policy shifts do occur in the realm of redistricting, they tend to result in reductions in agency costs. In other words, when political actors are either circumvented or compelled to accept alterations to the status quo, the new policies tend to be superior to the old ones from the perspective of the public. Policy change in this arena is usually synonymous with policy improvement.

C. Rethinking the American Approach

The positions taken by other jurisdictions, as well as the changes over time in these positions, have implications for the exceptional American model. In particular, they suggest that the majority of American states, currently located in the high-politicization, high-judicialization space, would benefit by moving to the low-politicization, low-judicialization space. Below I present the case for such a policy shift, drawing on political science findings about both the United States and foreign jurisdictions, and then consider a number of potential objections. The argument on behalf of redistricting commissions is not a new one,[106] but it has not previously been made using detailed comparative and empirical evidence.

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[105] See Part I.C.

[106] See, for example, Confer, 13 Kan J L & Pub Pol at 123–33, 138 (cited in note 44); Issacharoff, 116 Harv L Rev at 644–48 (cited in note 12). I should also note that I focus here on the *normative* case for commissions. I do not devote much attention to what

I note that I do not attempt here (or in the Article's two subsequent normative sections) to defend a particular theory of representative democracy. My aim, rather, is to show that my policy prescriptions are compatible with a wide range of theoretical perspectives. For example, both advocates of unbiased elections[107] and believers in the primacy of electoral responsiveness[108] should be able to agree that independent commissions produce better district maps than political actors. Similarly, whether one is normatively committed to high participation, accurate representation, or low polarization, one should prefer homogenizing line-drawing criteria to diversifying requirements.[109] And multimember districts with alternative voting rules should be appealing not only to those who oppose race-conscious government action but also to those who support proportional representation for minority groups.[110] Of course, my prescriptions are not consistent with *every* plausible democratic theory. But they are consistent with a good number of them, which is more than can be said for many other proposals in this area—or for the status quo.

1. Less politics, less law.

Two points in favor of the low-politicization, low-judicialization space are that it is preferred by almost every foreign jurisdiction and that almost all recent policy movement has been in its direction. Of course, what Professor Mark Tushnet refers to as the "nose-counting o[f] bottom-line results" provides little reason, standing alone, for American states to alter their redistricting practices.[111] But it is surely probative that liberal

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Professor Heather Gerken has dubbed the "here to there" problem in election law, that is, how to actually *enact* beneficial policy reforms. See Heather K. Gerken, *Getting from Here to There in Election Reform*, 34 Okla City U L Rev 33, 33–34 (2009). See also Stephanopoulos, 23 J L & Polit at 342–45 (cited in note 29) (addressing "here to there" problem in context of redistricting initiatives).

[107] See, for example, Gelman and King, 88 Am Polit Sci Rev at 543, 553–54 (cited in note 13); Bernard Grofman and Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after* LULAC v. Perry, 6 Election L J 2, 5–6 (2007).

[108] See, for example, Issacharoff, 116 Harv L Rev at 598–600 (cited in note 12); Richard H. Pildes, *The Constitution and Political Competition*, 30 Nova L Rev 253, 254–56 (2006).

[109] See Part II.C.

[110] See Part III.C.

[111] Mark Tushnet, *How (and How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 SLU L J 671, 673 (2005).

democracies in every corner of the globe have decided, again and again, to embrace commissions and to exclude the elected branches and the courts from the task of district design. As Professor Rosalind Dixon has noted, the more countries that independently adopt a given policy, the more likely it is that this policy is superior in some meaningful sense.[112]

A more substantive reason to prefer the low-politicization, low-judicialization position is that, by definition, the judiciary is less involved in redistricting when judicialization is low. American judges[113] and scholars[114] have long complained that it is unseemly, perhaps even illegitimate, for the courts to invalidate district plans that have been duly enacted by political actors. The courts have no choice but to remain in the political thicket as long as otherwise intolerable agency costs are generated by the involvement of the elected branches. But judicial intervention can cease, or at least decline dramatically, when independent commissions are made responsible for designing districts pursuant to specified criteria. In this case, no wide gap between public policy and the public interest is likely to arise, and the courts can stay their hand without worrying about the democratic consequences of their inaction.[115]

With respect to the other key axis, politicization, there are two reasons why lower levels are preferable to higher levels, the

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[112] See Dixon, 56 Am J Comp L at 956–57 (cited in note 17); Rosalind Dixon and Eric A. Posner, *The Limits of Constitutional Convergence*, 11 Chi J Intl L 399, 413 (2011) (arguing that countries should change their policies "when other states with similar demographic and social conditions have a different [policy] norm that produces a better outcome, and those other states are sufficiently numerous").

[113] See, for example, *Vieth*, 541 US at 301 (Stevens) (plurality) (arguing against "regular insertion of the judiciary into districting"); *Holder v Hall*, 512 US 874, 892 (1994) (Thomas concurring); *Colegrove*, 328 US at 556 (1946) (Frankfurter) (plurality) ("Courts ought not to enter this political thicket.").

[114] See, for example, Daniel H. Lowenstein and Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L Rev 1, 4, 75 (1985); Nathaniel Persily, *In Defense of Foxes Guarding Hen Houses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv L Rev 649, 680–81 (2002); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum L Rev 1325, 1325–30 (1987).

[115] See Courtney, *Commissioned Ridings* at 152, 173 (cited in note 66) (noting that use of commissions in Canada has enabled courts to avoid becoming involved in redistricting litigation); Rave, 126 Harv L Rev at 733 (cited in note 93) (arguing that courts should deferentially review redistricting decisions made by independent commissions). However, it would be unwise to remove the courts *entirely* from the redistricting process. There is at least a theoretical possibility that commissions will be hijacked by political actors or will make irrational line-drawing decisions. It would therefore seem sensible to retain something like judicial review of commission actions for arbitrariness or capriciousness.

first related to intent, the second to results. The point about intent is simply that properly designed commissions will not *deliberately* seek to draw district lines that discriminate against a particular party. If a district plan is considered gerrymandered when it is "deliberately engineered so as to favor one political party over another," in the words of a major 1989 Canadian decision, then gerrymandering cannot be carried out by a commission.[116] And if one of the agency costs of redistricting is the disillusionment fostered by the perception that political actors are manipulating boundaries in order to advance their own interests, then this cost cannot be incurred in a system in which an independent body is responsible for district design. Not surprisingly, public opinion polls show that American voters are more likely to believe that redistricting is conducted fairly in states that use commissions,[117] and voter knowledge and turnout are higher in these states as well.[118]

The argument about results is also easy to articulate—commissions in fact produce district plans with lower agency costs than do political actors—but requires more in the way of empirical corroboration. Here I have two kinds of costs in mind, both commonly assessed by political scientists and pertaining to plans' actual electoral consequences. The first is a high level of *partisan bias*, that is, the divergence in the share of seats that each party would win given the same share of the overall vote in a jurisdiction. For example, if the left-wing party would win 48 percent of the seats with 50 percent of the vote (in which case the right-wing party would win 52 percent of the seats), then a district plan would have a right-wing bias of 2 percent. High bias is usually thought to be undesirable because it means that the electoral system treats parties differently in terms of the conversion of votes to seats.

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[116] *Dixon v British Columbia (A.G.)*, 59 DLR 4th 247, 259 (BC S Ct 1989) (Canada). See also *Vieth*, 541 US at 271 n 1 (Scalia) (plurality) (also defining political gerrymandering in terms of illicit intent).

[117] See Joshua Fougere, Stephen Ansolabehere, and Nathaniel Persily, *Partisanship, Public Opinion, and Redistricting*, 9 Election L J 325, 335 (2010) (finding that 45 percent of voters in commission states who have opinions about redistricting believe that redistricting is carried out fairly, compared to 25 percent in states where legislature is responsible for designing districts).

[118] See James B. Cottrill, *Redistricting Reform and Political Efficacy: Do Non-legislative Approaches to Redistricting Enhance Voter Engagement and Participation?* *16–19 (Annual Meeting of the Midwest Political Science Association, Apr 12–15, 2012) (on file with author) (presenting regression results that indicate positive impact of independent commissions on voter knowledge and various measures of voter participation).

The second potential cost is a low level of *electoral responsiveness*, that is, the rate at which a party gains or loses seats given changes in its overall vote share. For instance, if the left-wing party would win 10 percent more seats if it received 5 percent more of the vote, then a plan would have a responsiveness of 2.00. Low responsiveness is typically deemed problematic because it means that changes in public opinion do not translate into sufficiently large changes in legislative representation.[119]

With respect to bias, several studies have found that commission-crafted plans are more symmetric in their treatment of the major parties than are plans devised by partisan actors. Professor Bruce Cain and others recently calculated the biases of fifty legislative chambers in twenty-six American states based on the results of the 2002 elections.[120] The median bias was 4.7 percent in states that use commissions, compared to 8.6 percent in states that allow the elected branches to draw district lines.[121] Similarly, Professors Andrew Gelman and Gary King analyzed the results of US state legislative elections between 1968 and 1988, and concluded that bipartisan plans (including those devised by commissions) had biases about 2 percentage points lower than did partisan plans.[122]

Abroad, Professor Simon Jackman demonstrated that South Australia and Queensland experienced dramatic drops in their levels of bias after instituting commissions, respectively, in 1975 and 1992.[123] Specifically, bias in these Australian states declined

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[119] See Gelman and King, 88 Am Polit Sci Rev at 544–45 (cited in note 13) (defining bias and responsiveness). Reducing bias all the way to zero is unproblematic. However, very high rates of responsiveness are undesirable because they result in large changes in seat shares despite only small shifts in vote shares. Fortunately, the responsiveness scores discussed here are not nearly high enough to raise such concerns.

[120] This data is on file with the author. The twenty-six states that Professor Cain and others analyzed account for about 75 percent of the country's population.

[121] These calculations are on file with the author. See also Bruce E. Cain, John I. Hanley, and Michael P. McDonald, *Redistricting and Electoral Competitiveness in State Legislative Elections* *13 (working paper, Apr 13, 2007) (on file with author) (finding that bias decreased in all nine states that used bipartisan commissions in 2000 cycle).

[122] See Gelman and King, 88 Am Polit Sci Rev at 552 (cited in note 13); Vladimir Kogan and Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans*, 4 Cal J Polit & Pol art 2, 22–24 (Jan 2012), online at http://www.degruyter.com/view/j/cjpp.2012.4.issue-1/1944-4370.1197/19444370.1197.xml?format=INT (visited May 11, 2013) (presenting seat-vote curves that show close to zero bias for new commission-drawn plans in California, compared to substantial pro-Democratic bias for old plans).

[123] See Simon Jackman, *Measuring Electoral Bias: Australia, 1949–93*, 24 Brit J Polit Sci 319, 345 (1994).

from almost 20 points to no more than 6 points.[124] In Quebec, likewise, according to Professor Alan Siaroff's calculations, bias fell by approximately 50 percent after the province adopted a commission in 1972.[125] And in Japan, Professor Ray Christensen determined that the electoral system "show[ed] very little discernible bias" after the 1994 reforms were enacted,[126] while Professor King showed that the system had been quite biased during the forty preceding years, particularly against the Communist Party.[127]

The story is similar with responsiveness. Professor Cain's figures indicate that US commission states had a median responsiveness of 1.22 in the 2002 elections, compared to 1.04 in political-actor states.[128] Professors Gelman and King found that bipartisan plans were more responsive than partisan plans by a margin of about 0.25 during the 1968–88 period.[129] Professor Jackman's list of the ten lowest responsiveness scores recorded in Australia from 1949 to 1993 is mostly comprised of plans from South Australia (pre-1975) and Western Australia (which used a commission but sharply limited its discretion prior to 2005).[130] Conversely, the ten highest scores come primarily from jurisdictions that employed commissions throughout this era, such as Victoria and the federal electoral system.[131] And responsiveness

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[124] See id at 344–45. See also Butler and Cain, 4 Electoral Stud at 205 (cited in note 20) (noting the minimal bias of the 1984 Australian reapportionment). Queensland and South Australia not only entrenched independent commissions when they reformed their electoral systems, but also abolished redistricting criteria that previously had resulted in significant malapportionment in favor of rural areas. See Jackman, 24 Brit J Polit Sci at 344–45 (cited in note 123); Graeme Orr and Ron Levy, *Electoral Malapportionment: Partisanship, Rhetoric and Reform in the Shadow of the Agrarian Strong-Man*, 18 Griffith L Rev 638, 639, 649, 659 (2009).

[125] See Alan Siaroff, *Electoral Bias in Quebec Since 1936*, 4 Can Polit Sci Rev 62, 66–67 (2010) (using slightly different method to calculate bias).

[126] Christensen, 5 Japanese J Polit Sci at 268 (cited in note 52).

[127] See Gary King, *Electoral Responsiveness and Partisan Bias in Multiparty Democracies*, 15 Legis Stud Q 159, 173 (1990).

[128] These calculations are on file with the author. See also Cain, Hanley, and McDonald, *Redistricting and Electoral Competitiveness* at *13 (cited in note 121).

[129] See Gelman and King, 88 Am Polit Sci at 543, 549 (cited in note 13). See also Kogan and McGhee, 4 Cal J Polit & Pol at 26 (cited in note 122) (showing increases in responsiveness for new commission-drawn plans in California).

[130] See Jackman, 24 Brit J Polit Sci at 350 (cited in note 123); Office of the Electoral Distribution Commissioners, *2011 Electoral Distribution for the State of Western Australia* 1–4 (2011) (describing 2005 changes to redistricting criteria in Western Australia).

[131] See Jackman, 24 Brit J Polit Sci at 350 (cited in note 123). In addition, Australia's and Britain's constituencies generally have exhibited normal party vote distributions, in contrast to the bimodal distributions that have been more common in the United States. Normal party vote distributions indicate higher responsiveness than bimodal

has roughly *doubled* in Japan in the wake of its 1994 reforms, from 1.56 in the 1958–86 period[132] to approximately three today.[133]

American political scientists have also studied the implications of commission-drawn plans for *competitiveness* (a concept related but not identical to responsiveness), with somewhat ambiguous results. Professors Jamie Carson and Michael Crespin found that commissions had a positive impact on the proportion of districts that were won by less than 20 points in the 1992 and 2002 congressional elections, even controlling for a host of other relevant variables.[134] Similarly, Professor James Cottrill determined that incumbent vote share in congressional races was lower between 1982 and 2008 in commission states, and that it declined markedly after these states adopted commissions.[135] However, these findings lost their statistical significance after Professor Cottrill controlled for other relevant variables.[136] And Professor Seth Masket and others examined state legislative election results in 2002, and concluded that bipartisan commissions did not make races more likely to have had a margin of victory of less than 10 points (though they did make them more likely to have been contested).[137]

In a nutshell, then, the case for the low-politicization, low-judicialization position is as follows: It is far more popular worldwide than any other approach (and still growing in popularity). It

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distributions. See G. Gudgin and P.J. Taylor, *Seats, Votes, and the Spatial Organisation of Elections* 132, 167 (Pion Limited 1979).

[132] See King, 15 Legis Stud Q at 173 (cited in note 127).

[133] See Christensen, 5 Japanese J Polit Sci at 269–70 (cited in note 52) (displaying seat-vote curves for 1996, 2000, and 2003 elections, with slopes close to three).

[134] Jamie L. Carson and Michael H. Crespin, *The Effect of State Redistricting Methods on Electoral Competition in United States House of Representatives Races*, 4 State Polit & Pol Q 455, 461–62 (2004).

[135] See James B. Cottrill, *The Effects of Non-legislative Approaches to Redistricting on Competition in Congressional Elections*, 44 Polity 32, 37–40 (2012). Professor Cottrill also reported that experienced challengers are more likely to run and incumbents are more likely to be defeated in commission states. Id.

[136] See id at 44–47.

[137] See Seth E. Masket, Jonathan Winburn, and Gerald C. Wright, *The Gerrymanderers Are Coming! Legislative Redistricting Won't Affect Competition or Polarization Much, No Matter Who Does It*, 45 Polit Sci & Pol 39, 41–42 (2012). See also Cain, Hanley, and McDonald, *Redistricting and Electoral Competitiveness* at *15 (cited in note 121) (finding that 2002 state legislative races in commission states were more competitive by some metrics and less competitive by others); Peter Miller and Bernard Grofman, *Redistricting Commissions in the Western United States*, *27–29 (working paper, Foxes, Henhouses, and Commissions Symposium at the University of California–Irvine Law School, Sept 2012) (on file with author) (finding that commission usage in western states had unclear implications for competitiveness in congressional races).

enables the courts to exit a domain in which their presence is often controversial. It prevents district plans from being devised with the intent to harm a particular party. And the plans that it generates are in fact less biased, more responsive, and perhaps more competitive than those fashioned by political actors. Next, I consider a number of the objections that scholars have posed to redistricting commissions, again relying where possible on evidence from around the world.

2. Objections.

The most common argument against independent commissions is that they cannot actually be made independent. Commission members may have partisan predilections, just like anybody else, and they must ultimately obtain their positions through the decisions of political actors. Politics simply cannot be removed from the redistricting process.[138] This argument is belied by the experiences of the foreign countries that have now used commissions to draw district lines for several decades. Despite having political cultures no less contentious than our own, and despite employing selection mechanisms that are not perfectly insulated from politics, these countries' commissions have developed impressive reputations for independence and impartiality. For example, a British court has lauded that country's commissions as "independent and non-political";[139] an Irish court has expressed its "confidence in the fact that constituency boundaries have been drawn [by commissions] in an even handed way,"[140] and Canada's foremost redistricting scholar has observed that "[s]ince they were first established in the 1960s, commissions have guarded their independence jealously."[141]

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[138] See, for example, Elmendorf, 80 NYU L Rev at 1378–79 (cited in note 12); Lowenstein and Steinberg, 33 UCLA L Rev at 73 (cited in note 114); Persily, 116 Harv L Rev at 674 (cited in note 114) ("[I]t is almost impossible to design institutions to be authentically nonpartisan and politically disinterested.").

[139] *Regina v Boundary Commission for England*, [1983] 1 QB at 615. See also Boundary Commission for England, *A Guide to the 2013 Review* 9 (2011) ("The BCE is an independent and impartial body."); Ron Johnston, et al, *From Votes to Seats: The Operation of the UK Electoral System Since 1945* 93 (Manchester 2001); Iain McLean, *Apportionment and the Boundary Commission for England*, 11 Electoral Stud 293, 306 (1992) (referring to the "jealously preserved independence of the Boundary Commissions").

[140] *Murphy*, IEHC 185 at ¶ 7.5. See also Coakley, *Electoral Redistricting in Ireland* at 164 (cited in note 54); Katz, *Malapportionment* at 255 (cited in note 48).

[141] John C. Courtney, *Parliament and Representation: The Unfinished Agenda of Electoral Redistributions*, 21 Can J Polit Sci 675, 677 (1988). See also Charles Paul Hoffman, *The Gerrymander and the Commission: Drawing Electoral Districts in the*

The argument about the inevitability of political infiltration also overlooks some of the procedural devices that can be used to safeguard the independence of commissions. As noted earlier, Australia and New Zealand do not allow political actors to appoint commission members, but rather staff the bodies primarily with nonpartisan technocrats who receive their positions ex officio.[142] Equally promisingly, Arizona and California create large pools of qualified potential members, from whose ranks the actual commissioners are selected either by legislative leaders (in Arizona's case) or by lottery (in California's).[143] Furthermore, it may not matter very much whether political influences are fully extirpated from the district-drawing process. As long as commissions in fact produce plans that are less biased and more responsive than those of the elected branches—as the evidence indicates is the case[144]—it is not too worrisome that partisan sentiments may still linger within the hearts of certain commission members.

The electoral outcomes of commission-drawn plans are actually the focus of another argument against commissions, associated primarily with Professors Daniel Lowenstein and Jonathan Steinberg. These two scholars claim that commissions in Australia, Britain, and New Zealand have systematically (albeit unintentionally) discriminated against the Labor parties by

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United States and Canada, 31 Manitoba L J 331, 348–49 (2005). As for the claim that there is something unique about the United States that makes it impossible for American commissions to be independent, see Lowenstein and Steinberg, 33 UCLA L Rev at 73 (cited in note 114), it is contradicted by the fact that several American states (including California) *do* have such commissions. It plainly is not impossible to find individuals in America (such as professors, retired judges, bureaucrats, and even ordinary citizens) who can be trusted to draw district boundaries without trying to help one party or another. In addition, one might expect commissions to be more independent of the political process where the stakes of their decisions are lower. The stakes *are* lower for American commissions, at both the state and federal levels, because their decisions only affect the composition of the legislative branch—and not, as in a parliamentary system, the makeup of the government as a whole.

142 See note 63 and accompanying text. See also Beth Bowden and Lloyd Falck, *Redistribution and Representation: New Zealand's New Electoral System and the Role of the Political Commissioners*, in Iain McLean and David Butler, eds, *Fixing the Boundaries: Defining and Redefining Single-Member Electoral Districts* 147, 164 (Dartmouth 1996); McRobie, *New Zealand's Electoral Redistribution Practices* at 27 (cited in note 65).

143 See Ariz Const Art IV, part 2, § 1; Cal Gov Code § 8252. See also Cain, 121 Yale L J at 1824 (cited in note 41) ("It is hard to imagine a more complete effort to squeeze every ounce of incumbent and legislative influence out of redistricting than the [new California commission].").

144 See notes 120–37 and accompanying text.

packing their supporters in urban districts.[145] However, Professors Lowenstein and Steinberg make their case entirely on the basis of data from the 1950s to the 1980s showing that the Australian, British, and New Zealand plans all had mild anti-Labor biases on the order of 1 to 3 percent.[146] They do not compare these plans' biases to those that existed *before* commissions were adopted in these countries,[147] nor do they compare them to biases in jurisdictions that do not use commissions—which are often much higher.[148] Commissions therefore cannot be blamed for the results that Professors Lowenstein and Steinberg bemoan. In addition, more recent plans in all three countries either have not been biased at all (in New Zealand's case),[149] or have been skewed *in favor* of the Labor parties (in the Australian and British cases).[150] There is thus nothing like a permanent right-wing gerrymander in any of these jurisdictions.

A final argument against commissions, made most eloquently by Professor Nathaniel Persily, is that redistricting is a matter of public policy just like any other. District boundaries "create service relationships between representatives and constituents" and "fit into larger public policy programs," and their demarcation should therefore remain within the legislative ambit.[151] It is true, of course, that district design cannot be wholly separated from issues that no one would want to remove from the control of political actors. But the implications of district design for these issues can be—and routinely are—taken into account by commissions. Around the world, commissions do not

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145 See Lowenstein and Steinberg, 33 UCLA L Rev at 71–73 (cited in note 114).

146 See id at 70–71.

147 See Jonathan Rodden, *The Geographic Distribution of Political Preferences*, 13 Ann Rev Polit Sci 321, 332 (2010) (noting that redistricting biases against leftist parties have existed in many countries "going back to the turn of the century").

148 See, for example, Gelman and King, 88 Am Polit Sci Rev at 556–57 (cited in note 13) (listing biases for US state legislative plans, many of which exceed 3 percent); Jackman, 24 Brit J Polit Sci at 350 (cited in note 123) (listing ten Australian plans with biases above 8 percent).

149 This is because New Zealand adopted a form of proportional representation in 1993 that effectively makes it impossible for substantial biases to arise. See Royal Commission on the Electoral System, *Report* at 43 (cited in note 46) (discussing changes to New Zealand's electoral system).

150 See Jackman, 24 Brit J Polit Sci at 346 (cited in note 123) (showing that more recent Australian plans have been biased in favor of Labor Party); Ron Johnston, David Rossiter, and Charles Pattie, *Disproportionality and Bias in the Results of the 2005 General Election in Great Britain: Evaluating the Electoral System's Impact*, 16 J Elections, Pub Op & Parties 37, 39 (2006) (same for Britain).

151 Persily, 116 Harv L Rev at 679 (cited in note 114).

blindly shape constituencies on the basis of abstract criteria, but rather receive information about all sorts of policy considerations (often from politicians) before finalizing their decisions. For instance, the Australian, British, Canadian, Indian, Irish, New Zealand, and Pakistani commissions all hold extensive hearings, allow interested parties to comment on draft maps, and respond explicitly to submitted statements, before issuing their final plans.[152] Relevant policy concerns by no means go unheard in this process.

The deeper problem with the redistricting-as-public-policy argument, though, is that it ignores the agency costs that are the reason why reformers want to withdraw the line-drawing power from the elected branches in the first place. In most issue domains, political actors' own electoral fortunes are not inherently in tension with optimal societal outcomes, and so the divergence between public policy and the public interest can be limited to manageable levels. In the redistricting arena, however, generations of experience indicate that politicians will create malapportioned districts, attempt to handicap their opponents, and dilute minority representation when they are left to their own devices. They may *also* consider matters of legitimate public policy, but this benefit is swamped by the large agency costs that are almost invariably incurred.

District design is thus analogous to monetary policy, another task that almost every liberal democracy assigns to an independent body instead of to the elected branches. Interest rates unquestionably implicate issues that are the bread and butter of ordinary politics. But through their links to inflation, unemployment, and economic growth, they also exert a sizeable influence on the likelihood that politicians will win reelection. The fear that politicians will manipulate interest rates for self-serving reasons is precisely why central banks are now responsible for monetary policy throughout the world, and the same

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[152] See note 69 and accompanying text. See also Orr, *The Law of Politics* at 34 (cited in note 46) (discussing extensive public consultation process in Australia); Rossiter, Johnston, and Pattie, *The Boundary Commissions* at 225–331 (cited in note 46) (same for Britain); Bowden and Falck, *Redistribution and Representation* at 159 (cited in note 142) (explaining how two partisan members of New Zealand commission "bring political information . . . to the senior public servants" and "provid[e] the necessary oil in the gears of the electoral machine"); John C. Courtney, *Redistricting: What the United States Can Learn from Canada*, 3 Election L J 488, 493 (2004) (noting that Canadian "commissioners are mindful of the need to construct districts using familiar administrative structures (health or education districts, rural municipalities, counties, and the like)").

logic applies squarely to redistricting. The case for independent commissions is essentially the same as the case for the Federal Reserve.[153]

II. REDISTRICTING CRITERIA

If the first crucial question confronted by every country with territorial districts is *who* should draw them, the second is *how* they should be drawn. In other words, of the many possible redistricting criteria—equal population, respect for political subdivisions, respect for communities of interest, compactness, and so forth—which ones should actually be used to shape constituencies? I begin this Part by summarizing the criteria that are currently employed in America and abroad. In America, equal population and various race-related provisions are the only universal requirements, though many states impose additional obligations. Abroad, the equal population mandate is not nearly as rigid, but it is supplemented by a host of requirements that relate to jurisdictions' underlying political geography.

Next, I divide redistricting criteria into two categories based on their implications for districts' internal composition. Most of the universal American requirements are diversifying because they tend to make districts more heterogeneous in terms of demography, socioeconomic status, and ideology. Conversely, almost all other common criteria are homogenizing because they typically give rise to districts whose residents resemble one another in key respects. Finally, I argue that homogenizing requirements are preferable in most cases. Both in theory and empirically, districts drawn pursuant to these criteria are linked to higher voter participation, more effective representation, and, in the aggregate, lower legislative polarization.

A. Global Models

1. America.

Nowhere in the world is the equal population requirement enforced more strictly than for congressional districts in the United States. Thanks to a series of Supreme Court decisions between the 1960s and 1980s, congressional districts within

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[153] Consider Scheppele, 89 BU L Rev at 819 (cited in note 99) (arguing that independent central banks are necessary because "parliaments are persistently tempted to inflate their way toward robust economic performance").

each state must have "as nearly as is practicable" the same population.[154] In the most recent cycle for which data is available, twenty-eight states reported interdistrict population deviations of fewer than *ten people*.[155] The doctrine is only slightly more relaxed for state legislative districts. They are typically permitted a total population range of up to 10 percent,[156] but even within this range they may be invalidated if their interdistrict deviations are not justified by legitimate state interests.[157]

The other universal American requirements all relate to race, and are discussed in more detail in Part III below. Under the Equal Protection Clause,[158] deliberate racial vote dilution is prohibited,[159] as is the construction of districts with race as the predominant motive (that is, racial gerrymandering).[160] The districts the Court has struck down as racial gerrymanders have mostly been odd-looking majority-minority constituencies that combined dissimilar communities of minority voters.[161] Under § 2 of the VRA, *unintentional* vote dilution is banned as well.[162] In practice, this means that large and geographically concentrated minority groups are usually entitled to districts in which they can elect the candidates of their choice.[163] The VRA also includes another provision, § 5, that requires certain jurisdictions (mostly in the South) to obtain preclearance from the Department of Justice or a federal court before their district plans can go into effect.[164] Plans are precleared when they neither are

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154 *Wesberry v Sanders*, 376 US 1, 7–8 (1964). See also *Karcher v Daggett*, 462 US 725, 730–31 (1983); *White v Weiser*, 412 US 783, 790 (1973).

155 See NCSL, *Redistricting* at 57–58 (cited in note 4).

156 See, for example, *Brown v Thomson*, 462 US 835, 842 (1983); *Connor v Finch*, 431 US 407, 418 (1977). Total population range refers to the percentage gap between the least and most populated districts in a plan, relative not to each other but rather to the ideal population size. For example, if the ideal population size is 100 people, the least populated district has 75 people, and the most populated district has 125 people, then the total population range is 50 percent (not 66.7 percent).

157 See, for example, *Cox v Larios*, 542 US 947, 949–50 (2004) (Stevens concurring) (affirming district court invalidation of Georgia plan that fell within 10 percent range but whose population deviations were politically motivated).

158 US Const Amend XIV, § 1.

159 See, for example, *Rogers v Lodge*, 458 US 613, 622–27 (1982); *White v Regester*, 412 US 755, 765–70 (1973).

160 See, for example, *Miller v Johnson*, 515 US 900, 916 (1995); *Shaw v Reno*, 509 US 630, 649 (1993).

161 See Stephanopoulos, 160 U Pa L Rev at 1419–21 (cited in note 15).

162 See VRA § 2, 79 Stat at 737, codified at 42 USC § 1973.

163 See *Thornburg v Gingles*, 478 US 30, 48–51 (1986) (Brennan).

164 See 42 USC § 1973c(a).

intended to discriminate against minority groups nor result in a reduction in minority representation.[165]

Beyond these universal (or, in § 5's case, regional) requirements, states also impose many of their own criteria on how districts are drawn. These criteria are found in constitutions, statutes, and even nonbinding guidelines, and they apply to state legislative districts about twice as often as to congressional districts.[166] In rough order of popularity, they include contiguity, respect for political subdivisions, compactness, respect for communities of interest, preservation of prior district cores, prohibitions on incumbent protection, prohibitions on partisan intent, and competitiveness.[167] State law may therefore add nothing at all to the generally applicable federal requirements (as, for example, with Texas's congressional districts).[168] Or state law may include elaborate regulations that markedly alter the redistricting process (as, for instance, with Florida's state legislative districts, which must be compact, must respect political subdivisions, must not favor or disfavor a political party or an incumbent, and must not reduce minority representation).[169]

2. Abroad.

Like the United States, all foreign jurisdictions that periodically redraw their districts abide by equal population requirements of one kind or another.[170] However, these foreign requirements are never as strict as the American mandate for congressional districts, and in only a handful of cases—most notably, Australia,[171] New Zealand,[172] and, since 2011, the United Kingdom[173]—are they even as rigorous as the American policy for state legislative districts. Permissible population ranges

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165 See 42 USC § 1973c(b).

166 See NCSL, *Redistricting* at 172–217 (cited in note 4) (listing all state law redistricting criteria as of 2009).

167 See id.

168 See id at 210 (showing that no state law requirements apply to design of Texas congressional districts).

169 See Fla Const Art III, § 21.

170 See Handley, *A Comparative Survey* at 273 (cited in note 10).

171 See Commonwealth Electoral Act 1918, §§ 63A, 73(4) (Australia) (permitting projected total population range of up to 7 percent at three years and six months after the plan's enactment).

172 See Electoral Act 1993, § 36 (New Zealand) (permitting total population range of up to 10 percent).

173 See Parliamentary Voting System and Constituencies Act 2011, part 2, § 11 (UK) (permitting total population range of up to 10 percent).

around the world are more commonly on the order of 20 percent (e.g., Belarus, the Ukraine), 30 percent (e.g., the Czech Republic, Germany), 40 percent (e.g., Papua New Guinea, Zimbabwe), or 50 percent (e.g., Canada, Lithuania)[174]—where they are specified at all, which they often are not.[175] Also notably, certain Australian states and Canadian provinces make exceptions to their regular rules for large and sparsely populated districts. For example, population ranges of up to 100 percent are allowed for northern districts in Alberta[176] and Saskatchewan,[177] while Queensland[178] and Western Australia[179] add "phantom" voters to the populations of districts in their vast and almost empty interiors.

Foreign jurisdictions' more relaxed approach to population equality is also evident in their judicial decisions on the subject. In the United States, legal challenges to malapportioned districts began succeeding in droves in the 1960s, thus triggering the reapportionment revolution. Abroad, in contrast, the majority of lawsuits complaining about unequal district population have failed—rejected by courts in no mood to emulate the American example.[180] In Australia, for instance, the High Court

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174 See *Equal Population in Redistricting* (ACE Electoral Knowledge Network), online at http://aceproject.org/ace-en/topics/bd/bdb/bdb05/bdb05a (visited May 11, 2013). See also David Samuels and Richard Snyder, *The Value of a Vote: Malapportionment in Comparative Perspective*, 31 Brit J Polit Sci 651, 660–61 (2001) (providing malapportionment figures for 78 countries). Canada allows districts outside the 50 percent range if "extraordinary" circumstances apply. See Electoral Boundaries Readjustment Act, RSC 1985, ch E-3, § 15(2) (Canada).

175 See Handley, *A Comparative Survey* at 273 (cited in note 10) ("Close to 75 percent of the countries surveyed report no specific limit regarding the extent to which constituencies are permitted to deviate from the population quota.").

176 See Electoral Boundaries Commission Act, RSA 2000, ch E-3, § 15(2) (Alberta 2000) (Canada). Alberta formerly specified the numbers of urban, rural, and "rurban" hybrid districts that had to be drawn. See *Reference re: Order in Council O.C. 91/91 in Respect of the Electoral Boundaries Commission Act (1991)*, 86 DLR 4th 447, ¶¶ 6–8 (Alberta App) (Canada) ("1991 Alberta Reference Case").

177 See *1991 Saskatchewan Reference Case*, 2 SCR 158, ¶ 44 (S Ct 1991) (Canada). Saskatchewan also formerly specified the numbers of urban and rural districts to be drawn.

178 See Electoral Act 1992, § 45 (Australia Queensland). See also Graeme Orr, Bryan Mercurio, and George Williams, *Australian Electoral Law: A Stocktake*, 2 Election L J 383, 391 (2003).

179 See Electoral Act 1907, § 16G (Western Australia). Western Australia formerly specified the numbers of metropolitan and nonmetropolitan districts to be drawn. See *McGinty v Western Australia*, 186 CLR 140, 165 (High Ct 1996) (Australia) (Brennan).

180 The main exceptions have been in jurisdictions where political actors formerly were responsible for district design, such as France, Ireland, Japan, and certain Canadian provinces. See notes 48–59 and accompanying text.

upheld the federal electoral system (which then permitted a 20 percent population range) in 1975,[181] as well as Western Australia's regime (whose largest district was then about three times the size of its smallest) in 1996.[182] The court observed that Australian states had never followed a policy of strict population equality,[183] and that nationwide referenda aimed at enacting the one-person, one-vote rule had twice been rebuffed.[184] The court concluded that "equality of numbers within electoral divisions" simply is not "an essential concomitant of a democratic system."[185]

In Britain, similarly, the Court of Appeal held in 1983 that, under the then-applicable statute, the equal population requirement was less important than several other criteria.[186] According to the court, "the guidelines designed to achieve the broad equality of electorates . . . have been deliberately expressed by the legislature in such manner as to render them subordinate to [other] guidelines."[187] And in Canada, the Supreme Court explicitly declined in 1991 to "adopt the American model" of perfect population equality.[188] Instead, the court declared that "parity of voting power . . . is not the only factor to be taken into account in ensuring effective representation," and then identified additional criteria that it hoped would "ensure that our legislative assemblies effectively represent the diversity of our social mosaic."[189]

What are these non-population factors that foreign jurisdictions value so highly? In an oft-cited passage, the Canadian Supreme Court named "geography, community history, community

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[181] See *McKinlay v Commonwealth*, 135 CLR 1, 33 (High Ct 1975) (Australia) (Barwick).

[182] See *McGinty*, 186 CLR at 165 (Brennan).

[183] See *McKinlay*, 135 CLR at 20 (Barwick).

[184] See *McGinty*, 186 CLR at 245–46 (McHugh).

[185] See *McKinlay*, 135 CLR at 45 (Gibbs). See also Nicholas Aroney, *Democracy, Community, and Federalism in Electoral Apportionment Cases: The United States, Canada, and Australia in Comparative Perspective*, 58 U Toronto L J 421, 465 (2008).

[186] See *Regina v Boundary Commission for England*, [1983] 1 QB 600, 635–37 (1983).

[187] Id at 629. Also interestingly, Britain's equal population requirement was amended almost as soon as it was enacted in order to eliminate its numerical restriction on the permissible population range—a restriction, 50 percent, that was itself quite lax. See *Baker v Carr*, 369 US 186, 305 (1962) (Frankfurter dissenting); Rossiter, Johnston, and Pattie, *The Boundary Commissions* at 83 (cited in note 46).

[188] See *1991 Saskatchewan Reference Case*, 2 SCR at ¶ 34. See also *Dixon v British Columbia (AG)*, 59 DLR 4th 247, ¶ 85 (BC S Ct 1989) (Canada) (holding that Charter does not "introduce the ideal of absolute voter parity embraced by the American courts").

[189] *1991 Saskatchewan Reference Case*, 2 SCR at ¶¶ 28, 31. See also Daly, 21 BC Intl & Comp L Rev at 261 (cited in note 85).

interests and minority representation," while adding that "the list is not closed."[190] More systematically, Professor Lisa Handley recently surveyed sixty countries that use territorial districts, finding that they employ the following non-population criteria (in rough order of popularity): respect for political subdivisions, attention to geographic features, attention to means of communication and travel, respect for communities of interest, attention to population density, compactness, minority representation, and contiguity.[191] These criteria are not overly different from the ones applied by certain American states.[192] The principal contrasts are that geographic features, means of communication and travel, and population density are largely absent from American law, while the American preoccupation with minority representation is not shared by most foreign jurisdictions.[193]

Of the foreign criteria, two in particular warrant further discussion. First, respect for political subdivisions is often a much more significant requirement abroad than in even the American states that abide by it.[194] In pre-2011 Britain, for example, county and borough boundaries were considered essentially inviolable.[195] District lines almost never traversed them,

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[190] *1991 Saskatchewan Reference Case*, 2 SCR at ¶ 31. See also *McGinty*, 186 CLR at 186–87 (Dawson) (quoting this passage).

[191] See Handley and Grofman, eds, *Redistricting* at appendix C (cited in note 10). In addition, a few countries designate (or used to designate) districts for members of particular social or economic groups. See Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* 233–34 (Hong Kong 1997) (discussing "functional" constituencies reserved for certain economic sectors in Hong Kong); Marian Sawer, *Representing Trees, Acres, Voters and Non-voters: Concepts of Parliamentary Representation in Australia*, in Marian Sawer and Gianni Zappalà, eds, *Speaking for the People: Representation in Australian Politics* 36, 41 (Melbourne 2001) (discussing former university seats in Australia and Britain).

[192] See note 166 and accompanying text.

[193] More trivially, contiguity is generally required in the United States but is rarely mandated abroad.

[194] Beyond Britain and Japan, France and Ireland have relatively strict subdivision preservation requirements as well. See Conseil Constitutionnel, Décision No 2008-573, *7 (Jan 8, 2009) (France) (discussing French rule that cantons with fewer than 40,000 inhabitants not be divided); Electoral Act, 1997, Act No 25/1997, § 6(2)(c) (Ireland) (stating that "breaching of county boundaries shall be avoided as far as practicable").

[195] See Butler and Cain, *Congressional Redistricting* at 119 (cited in note 48); R.J. Johnston, *Constituency Redistribution in Britain*, in Grofman and Lijphart, eds, *Electoral Laws and Their Political Consequences* 277, 279–80 (cited in note 11). In 2011, the Conservative-led coalition revised Britain's redistricting criteria so that population equality now takes precedence over respect for political subdivisions. See Parliamentary Voting System and Constituencies Act 2011, part 2, § 11 (UK); Ron Johnston and Charles Pattie, *From the Organic to the Arithmetic: New Redistricting/Redistribution Rules for the United Kingdom*, 11 Election L J 70, 70 (2012).

even if substantial improvements in population equality could have been achieved, and the Court of Appeal stated outright that "[t]he requirement of electoral equality is . . . subservient to the requirement that constituencies shall not cross county or London borough boundaries."[196] In Japan, likewise, each prefecture is entitled to at least one parliamentary member and no district can include portions of more than one prefecture. The rationale for this policy, in the words of the Japanese Supreme Court, is that prefectures are "unit[s] with historical, economic, social integrity and substance and with a political unity,"[197] which "have a significant place in the life of the people and their feeling."[198]

Second, respect for communities of interest is also taken more seriously abroad than in the United States. In Canada, for instance, not only does the federal electoral system and every province require community boundaries to be followed,[199] but their importance has been stressed by both the Supreme Court[200] and a special 1991 commission on electoral reform.[201] As the commission put it, "The efficacy of the vote is enhanced to the degree that constituencies represent the shared interests of local communities."[202] Community-oriented arguments also account for about 50 percent of all comments submitted to Canadian redistricting commissions—80 percent if claims about history and

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196 *Boundary Commission for England*, [1983] 1 QB at 622 (describing relationship between population equality and respecting government boundaries).

197 *Case to Seek Nullification of an Election*, 52 Minshu 1373 (Saikō Saibansho, Sept 2, 1998) (Japan).

198 *Claim for the Invalidity of an Election*, 53 Minshu 1704 (Saikō Saibansho, Nov 10, 1999) (Japan). See also id (noting that "when further dividing prefectures into constituencies . . . [smaller] administrative divisions such as cities, towns and villages . . . are to be considered"); Moriwaki, *Politics of Redistricting in Japan* at 111 (cited in note 52) ("The importance of local government boundaries has traditionally been asserted by both voters and politicians.").

199 See Courtney, 3 Election L J at 493 (cited in note 152); Alan Stewart, *Community of Interest in Redistricting*, in David Small, ed, *Drawing the Map* 117, 134 (Dundurn 1991) ("The federal legislation treats community of interest as the *basic* redistricting concept, with all the other factors cited above . . . subsumed within it as component factors.") (emphasis in original).

200 See note 190 and accompanying text.

201 See Royal Commission on Electoral Reform and Party Financing, 1 *Reforming Electoral Democracy* at 9, 136–37, 149, 157–58 (cited in note 45).

202 Id at 149. See also British Columbia Electoral Boundaries Commission, *Preliminary Report* 12 (2007) ("[E]ach community needs the opportunity to choose the people who speak for it in the legislature, and to hold them accountable in democratic elections.").

geography are counted too.[203] Similarly, in Australia, Britain, Germany, India, Ireland, New Zealand, and Pakistan, commissions focus heavily on communal considerations when they design districts, as do concerned parties when they comment on proposed plans.[204] As Professor Nicholas Aroney has observed, "A close examination of the electoral systems of most modern democracies shows that . . . representation of discrete communities . . . continues in varied forms."[205]

B. Diversifying Versus Homogenizing Criteria

1. The centrality of district composition.

A key goal of the above redistricting criteria (both in America and abroad) is to limit the ability of line drawers to engage in gerrymandering. If districts must be designed so that they are contiguous, compact, respectful of political subdivisions and communities of interest, and attentive to geographic features, population density, and means of communication and travel,[206] then the hope is that they will not be able concurrently to discriminate in favor of particular parties or candidates. In the

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[203] See Courtney, *Commissioned Ridings* at 135 (cited in note 66); Stewart, *Community of Interest in Redistricting* at 151–68 (cited in note 199). The popularity of communities of interest is also revealed by Alberta's effort in the 1990s to mandate the creation of "rurban" districts that merged rural and urban areas. See note 176. The province's commission was unable to agree on a plan that included such districts, and a court commented that "the people of Alberta simply would not accept the idea that agrarian and non-agrarian populations would both feel adequately represented in the same constituency." *1994 Alberta Reference Case*, 119 DLR 4th 1, 17 (Alberta App) (Canada). See also Keith Archer, *Conflict and Confusion in Drawing Constituency Boundaries: The Case of Alberta*, 19 Can Pub Pol 177, 189 (1993).

[204] See note 69 (providing examples of commission reports focused on communal considerations). See also Rod Medew, *Redistribution in Australia: The Importance of One Vote, One Value*, in Handley and Grofman, eds, *Redistricting* at 97, 103 (cited in note 10) ("[C]ommunities of interest attract a great deal of attention during the public objection process in Australia."); Butler and Cain, 4 Electoral Stud at 200 (cited in note 20) ("Britain has put respect for communities . . . on more of a pedestal."); Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 194 (Duke 1997) ("[E]very [German] district must be a balanced and coherent entity."); McRobie, *An Independent Commission* at 36 (cited in note 65) ("The community of interest criterion is one that the [New Zealand] public sees as highly important.").

[205] Aroney, 58 U Toronto L J at 422 (cited in note 185). See also Michael Maley, Trevor Morling, and Robin Bell, *Alternative Ways of Redistricting with Single-Member Seats: The Case of Australia*, in McLean and Butler, eds, *Fixing the Boundaries* 119, 138 (cited in note 142) ("Of all the criteria, community of interest is probably the one which is most reflected one way or another in the electoral laws of countries.").

[206] See note 191 and accompanying text (listing foreign redistricting criteria in rough order of popularity).

words of the Australian High Court, "The requirements are necessary in order . . . to avoid any unnatural divisions of the kind which are found in gerrymandering."[207]

Redistricting criteria, however, serve not only to deter gerrymandering but also to realize distinctive democratic visions.[208] The rules for how districts are drawn shape constituencies' internal complexions, which in turn shape the makeup of the legislature as a whole—and thus the very character of representative democracy. A crucial mechanism through which criteria exercise this influence is district *diversification* or *homogenization*. Certain criteria, that is, tend to produce districts whose residents differ markedly from one another along demographic, socioeconomic, and ideological dimensions. Conversely, other requirements typically give rise to districts whose residents are relatively similar along these axes.

Why does district diversity matter?[209] At the level of the constituency, composition is important because it helps determine whether local political life will be conflictual or consensual. Districts whose residents vary widely in terms of politically salient factors are usually marked by internal debate and disagreement. Constituents cannot easily concur on candidates or policies when their attitudes diverge in fundamental ways.[210] On the other hand, districts whose residents resemble one another in key respects are normally more harmonious places (at least politically). There is less reason for electoral discord when constituents agree on most policy questions.[211]

District diversity also matters because of its connection to the makeup of the legislature. When most districts are internally heterogeneous with regard to some factor of interest, the

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[207] *McKinlay*, 135 CLR at 37 (McTiernan and Jacobs). See also *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 S3d 597, 639 (Fla 2012); *Hickel v SE Conference*, 846 P2d 38, 45 (Alaska 1992) ("The requirements of contiguity, compactness and socio-economic integration were incorporated by the framers of the reapportionment provisions to prevent gerrymandering.").

[208] Another goal of certain redistricting criteria, especially those relating to race, is to increase the level of minority representation. I discuss this goal in Part III.

[209] I do not distinguish in this Article between "top-line diversity," that is, the overall or aggregate heterogeneity of an entity's population, and "spatial diversity," or the variability of an entity's geographic subunits. See Stephanopoulos, 125 Harv L Rev at 1910–17 (cited in note 14) (discussing the two concepts). Since the two forms of diversity are usually correlated, the distinctions between them are not relevant here. See id at 1915.

[210] See James A. Gardner, *How to Do Things with Boundaries: Redistricting and the Construction of Politics*, 11 Election L J 399, 407 (2012).

[211] See Gardner, 37 Rutgers L J at 960–61 (cited at note 39).

legislature as a whole tends to be more homogeneous along this dimension. More of the factor's variation is captured *within* districts, leaving less to be expressed *among* districts.[212] Conversely, when most districts are internally homogeneous, the legislature is typically more diverse—more reflective of "the ends as well as the middle, the spread as well as the median of the political distribution," as Professor Heather Gerken has put it.[213] Along with this diversity comes conflict; societal cleavages predictably manifest themselves at the legislative level, resulting in a more antagonistic form of elite politics.

2. Classifying the criteria.

Despite the importance of district composition, redistricting criteria have never been analyzed in terms of their implications for it. In fact, redistricting criteria have rarely been analyzed in the first place. Scholars have often argued that they are indeterminate and cannot in fact constrain gerrymandering,[214] but little academic attention has been paid to their intended functions or the theories that underlie them. In this Subsection, I therefore classify the line-drawing requirements that are used in America and abroad, based on whether they tend to make districts more internally heterogeneous or homogeneous. As Figure 3 below indicates, most of the universal American criteria are diversifying, while almost all of the requirements employed abroad (as well as in certain US states) are homogenizing.[215]

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[212] See Gardner, 11 Election L J at 408 (cited in note 210).

[213] See Heather K. Gerken, *Second-Order Diversity*, 118 Harv L Rev 1099, 1161 (2005).

[214] See, for example, Bruce E. Cain, *Simple vs. Complex Criteria for Partisan Gerrymandering: A Comment on Niemi and Grofman*, 33 UCLA L Rev 213, 214–16 (1985); Grofman, 33 UCLA L Rev at 79–93 (cited in note 44); Lowenstein and Steinberg, 33 UCLA L Rev at 12–35 (cited in note 114).

[215] Figure 3 flags the universal American criteria and lists other criteria in rough order of their popularity abroad. See note 191 and accompanying text.

FIGURE 3. REDISTRICTING CRITERIA

Diversifying Criteria	Homogenizing Criteria
Equal population (universal United States)	Ban on racial gerrymandering
Voting Rights Act (universal United States)	Respect for political subdivisions
Political advantage (near-universal United States)	Geographic features
	Means of communication and travel
	Respect for communities of interest
	Population density
	Compactness
	Contiguity

Beginning with the equal population mandate, the more strictly it is enforced, the more heterogeneous districts must be in order to comply with it. When constituencies need to have only roughly the same population, as in most foreign countries, they can be crafted pursuant to the many criteria that promote district homogeneity. But when equal population is made the paramount objective of redistricting, as for American congressional districts, most other criteria must be sacrificed in the pursuit of perfect population equality. Odd shapes must be created, subdivision and community boundaries must be crossed, and geographic features must be neglected.[216] Consistent with this logic, Micah Altman found that US congressional districts' breaches of county, town, and neighborhood borders skyrocketed in the wake of the reapportionment revolution.[217] Similarly, the number of British counties and boroughs that are divided

[216] See Johnston, et al, *Votes to Seats* at 61 (cited in note 139) (arguing that British commission "had been forced to recommend the complete dismemberment . . . of many unified communities" during brief period when it had to comply with stricter equal population requirement); Bruce E. Cain, Karin Mac Donald, and Michael McDonald, *From Equality to Fairness: The Path of Political Reform since* Baker *v.* Carr, in Thomas E. Mann and Bruce E. Cain, eds, *Party Lines: Competition, Partisanship, and Congressional Redistricting* 6, 8 (Brookings 2005); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv J L & Pub Pol 103, 112 (2000).

[217] See Micah Altman, *Traditional Districting Principles: Judicial Myths vs. Reality*, 22 Soc Sci Hist 159, 187 (1998).

between different districts increased dramatically after a permissible population range of 10 percent was imposed in 2011.[218]

Next, the key provisions of the Voting Rights Act, § 2 and § 5, are diversifying because the majority-minority districts that they require are usually heterogeneous with respect to both race and other politically salient factors.[219] That majority-minority districts are diverse with respect to race is obvious as long as the minority group's share of the population is not much higher than 50 percent—which it rarely is in American congressional districts. For example, America's twenty-six majority-black districts in the 2000 cycle had an average black population of 59 percent, and the most heavily black district in the country (Illinois's Second) was only 69 percent black.[220]

The reason why majority-minority districts are also typically diverse with respect to *non*-racial factors is that dissimilar minority communities often need to be combined in order to muster a district-wide majority;[221] and then these groups often

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[218] See Boundary Commission, *A Guide to the 2012 Review* at 11 (cited in note 139) ("The mandatory nature of [the new equal population requirement] . . . means that it will be necessary for constituencies to cross a number of external local authority boundaries."); David Rossiter, Ron Johnston, and Charles Pattie, *Representing People and Representing Places: Community, Continuity and the Current Redistribution of Parliamentary Constituencies*, 66 Parliamentary Affairs *19 (forthcoming 2013), online at http://pa.oxfordjournals.org/content/early/2012/07/03/pa.gss037.full.pdf (visited May 11, 2013) (noting that thirty-seven out of sixty-eight proposed districts in London cross borough lines, compared to ten out of seventy-three current districts).

[219] See 42 USC §§ 1973(a)–(b), 1973c(b). The same is true for the constitutional prohibition on intentional racial vote dilution, which operates in relatively similar fashion as § 2 of the VRA. See note 35 and accompanying text. It is also important to note that the formation of a racially heterogeneous majority-minority district often results in the formation of adjacent districts that are more racially homogeneous. The adjacent districts often must be "bleached" in order to assemble enough minority members in the majority-minority district. See Gerken, 118 Harv L Rev at 1132 n 86 (cited in note 213).

[220] This data is on file with the author, covers the five-year period from 2005 to 2009, and is from the 2009 release of the American Community Survey (ACS). See *American Community Survey: 2009 Data Release* (US Census Bureau Dec 14, 2010), online at http://www.census.gov/acs/www/data_documentation/2009_release (visited May 11, 2013). Interestingly, before the VRA was amended in 1982 to make it easier to bring vote dilution claims, districts were often "packed" with very high concentrations of minority voters. See Bernard Grofman and Lisa Handley, *Preconditions for Black and Hispanic Congressional Success*, in Wilma Rule and Joseph F. Zimmerman, eds, *United States Electoral Systems: Their Impact on Women and Minorities* 31, 35 (Praeger 1992) (showing that *seven* districts in 1980 cycle were more than 70 percent African American).

[221] However, the VRA may not require majority-minority districts to be created if the minority communities that must be joined are *too* dissimilar. See *League of United Latin American Citizens v Perry*, 548 US 399, 432–34 (2006) (rejecting district that combined urban Hispanics in Austin with rural Hispanics along Mexican border).

need to be joined with miscellaneous "filler people"[222] in order to hit the district population target. A common kind of majority-minority district, especially in the South, is one that merges underprivileged urban and rural blacks with more affluent suburban whites. It should therefore come as no surprise that America's twenty-six majority-black districts in the 2000s were substantially more diverse than their peers with respect to crucial factors *other* than African American background, such as socioeconomic status, urban versus suburban location, and Hispanic ethnicity.[223]

While the VRA generally has a diversifying effect on district composition, the other universal American race-related requirement, the prohibition on racial gerrymandering, operates in the opposite direction. As it has been construed by the Supreme Court, the ban renders unconstitutional odd-looking majority-minority districts that combine highly disparate minority communities. For instance, a North Carolina district that joined blacks in "tobacco country, financial centers, and manufacturing areas,"[224] and a Georgia district that "connect[ed] the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County,"[225] were both invalidated by the Court.[226] The ban thus removes from the table some of the highly diverse majority-minority districts that states might otherwise create in order to comply with the VRA. It sets an upper limit on

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[222] T. Alexander Aleinikoff and Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 Mich L Rev 588, 601 (1993).

[223] In an earlier work, I used ACS data as well as factor analysis to determine the factors that best account for residential patterns in the United States. Socioeconomic status, urban versus suburban location, and Hispanic ethnicity are the three most important such factors, followed by African American background. See Stephanopoulos, 125 Harv L Rev at 1939 (cited in note 14). The 26 majority-black districts in the 2000s had an average spatial diversity score of 0.80 for socioeconomic status, compared with 0.75 for all other districts; an average score of 0.92 for urban versus suburban location, compared with 0.85 for all other districts; and an average score of 0.69 for Hispanic ethnicity, compared to 0.57 for all other districts. See id at 1988 table 4. See also Scott Clifford, *Reassessing the Unequal Representation of Latinos and African Americans*, 74 J Polit 903, 906–08 (2012) (finding that as districts become more heavily African American or Hispanic they also become more ideologically heterogeneous).

[224] *Shaw*, 509 US at 635–36.

[225] *Miller*, 515 US at 908.

[226] Conversely, districts with more homogeneous minority populations have generally been upheld by the Court. See *Easley v Cromartie*, 532 US 234, 250 (2001); *Lawyer v Department of Justice*, 521 US 567, 581 (1997).

the amount of heterogeneity that will be tolerated within districts' minority populations.[227]

The final criterion that generally guides redistricting in America is not a legal requirement but rather a time-honored (though democratically troublesome) practice: the pursuit of political advantage. In a recent article, Professors Adam Cox and Richard Holden explain that the optimal partisan gerrymandering strategy is inherently diversifying.[228] Line-drawers maximize the number of seats won by their party when they construct districts that "match slices" of very different voters—51 percent diehard Republicans, say, combined with 49 percent hardcore Democrats.[229] Such districts are highly diverse by definition with respect to ideology. Given the many demographic and socioeconomic differences between the parties, they are inevitably diverse along other dimensions as well.

Consistent with Professors Cox and Holden's analysis, the partisan bias of congressional plans in the 2000s tended to rise in tandem with the plans' average level of district diversity (at least for higher diversity levels).[230] Likewise, notorious French gerrymanders prior to the country's 2010 reforms "avoid[ed] overly sociologically homogeneous districts" and included many "mixtures of rural and urban zones."[231] Highly diverse US plans in the 2000s were also linked to low electoral responsiveness—the hallmark of a *bipartisan* (or incumbent-protecting) gerrymander.[232]

So much, then, for the universal American criteria, all of which are diversifying other than the ban on racial gerrymandering. What about the requirements that are in place in foreign jurisdictions (as well as in certain American states)? First, the most common of these requirements, respect for political subdivisions, is homogenizing for the simple reason that subdivisions themselves tend to be homogeneous. One body of scholarship finds that suburbs usually consist of residents who are strikingly

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[227] Notably, in both its racial gerrymandering and racial vote dilution cases, the Court has only been concerned about heterogeneity *within* districts' minority populations. The Court has shown no interest in differences *between* districts' minority and nonminority populations. See Stephanopoulos, 125 Harv L Rev at 1929–30 (cited in note 14).

[228] Adam B. Cox and Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U Chi L Rev 553, 567–72 (2011).

[229] Id at 567.

[230] See Stephanopoulos, 125 Harv L Rev at 1964–67 (cited in note 14) (referring to spatial diversity).

[231] Balinski, *Redistricting in France* at 178 (cited in note 48) (describing Gaston Defferre's guiding principles for redistricting).

[232] See Stephanopoulos, 125 Harv L Rev at 1964–67 (cited in note 14).

similar in their race, income, age, education, and profession.[233] As Professor Gregory Weiher has written, suburban boundaries facilitate the "sorting of the population into geographically defined groups by salient characteristics such as race and socioeconomic status."[234] Another body of scholarship relies on the similarities of subdivision residents to assign towns and neighborhoods to different categories based on their key attributes.[235] Such categorization would not be feasible if subdivisions were not so internally consistent. The upshot of this work is that the more congruent districts are with subdivisions (especially smaller ones), the more homogeneous the districts will tend to be.

The homogenizing logic is even more straightforward for the requirement that districts correspond to communities of interest. Communities are typically *defined* as populations that possess similar social, cultural, and economic interests. As the redistricting commission for Victoria has stated, "Communities of interest are groups of people who share a range of common concerns," which arise "where people are linked with each other geographically . . . or economically. . . . [or] because of similar circumstances."[236] Alternatively, in the words of Prince Edward Island's commission, communities are "areas where people have similar living standards, have access to the same work opportunities, [and] have similar needs in the social areas of education and health care."[237] Obviously, if communities are characterized

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[233] See, for example, Gregory R. Weiher, *The Fractured Metropolis: Political Fragmentation and Metropolitan Segregation* 100–01 (SUNY 1991); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 Colum L Rev 346, 353–54 (1990); Jerry Frug, *The Geography of Community*, 48 Stan L Rev 1047, 1047 (1996); Douglas S. Massey and Nancy A. Denton, *Suburbanization and Segregation in U.S. Metropolitan Areas*, 94 Am J Soc 592, 593–94 (1988).

[234] Weiher, *The Fractured Metropolis* at 190 (cited in note 233).

[235] See, for example, Bernadette Hanlon, *A Typology of Inner-ring Suburbs: Class, Race, and Ethnicity in U.S. Suburbia*, 8 City & Community 221, 231–42 (2009); Brian A. Mikelbank, *A Typology of U.S. Suburban Places*, 15 Housing Pol Debate 935, 949–57 (2004); Thomas J. Vicino, Bernadette Hanlon, and John Rennie Short, *Megalopolis 50 Years On: The Transformation of a City Region*, 31 Intl J Urb & Regional Rsrch 344, 357–61 (2007).

[236] Victoria Electoral Boundaries Commission, *Legislative Council Redivision Report* iii ¶ 17 (2005) (Australia).

[237] Prince Edward Island Electoral Boundaries Commission, *Report of the P.E.I. Electoral Boundaries Commission* 18 (2004). See also Cal Const Art XXI, § 2(d)(4) (defining community of interest as "a contiguous population which shares common social and economic interests"); *Zachman v Kiffmeyer*, No C0-01-160, *3 (Minn Special Redistricting Panel Dec 11, 2001), online at http://www.mncourts.gov/documents/0/Public/Court_Information_Office/redistrictingpanel/Final_Legislative_Order.pdf (visited May 11, 2013) (defining communities

above all by their homogeneous interests, then districts that coincide with them will be homogeneous as well.[238]

Several other common foreign requirements (the ones providing that geographic features, means of communication and travel, and population density be taken into account) are best understood as guidelines to help line-drawers identify communities of interest. According to the Canadian Supreme Court, "geographic boundaries" such as rivers and mountain ranges "form natural community dividing lines and hence natural electoral boundaries."[239] Similarly, communities often develop around transport links, including highways, railroads, and waterways, that enable people to engage in social and economic intercourse.[240] And the reason why population density is a common criterion is the widespread view that urban and rural areas are distinct communities that should not be merged within the same districts. As New Brunswick's commission has noted, "Historically in Canada, the tendency has been to avoid the creation of electoral districts with an urban and rural mix."[241] All of these subsidiary standards therefore promote district-community congruence—and, like the community-of-interest requirement from which they stem, exert a homogenizing influence on district composition.

The last two criteria, contiguity and compactness, also exert a homogenizing influence, albeit only mildly so. Contiguity is not

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of interest as "groups of . . . citizens with clearly recognizable similarities of social, geographic, political, cultural, ethnic, economic, or other interests").

238 See Maley, Morling, and Bell, *Alternative Ways of Redistricting* at 138 (cited in note 205) ("In Australia, 'community of interest' . . . . has been viewed as a prescription that divisions should ideally be internally homogeneous.").

239 *1991 Saskatchewan Reference Case*, 2 SCR at ¶ 55. See also *1991 Alberta Reference Case*, 86 DLR 4th at ¶ 40; Delimitation Commission of India, 1 *Changing Face of Electoral India* at II (cited in note 69) (noting that communities can be "defined geographically or by physical features like mountains, forests, [and] rivers").

240 See Courtney, *Commissioned Ridings* at 215 (cited in note 66) (describing proposed Canadian legislation that defined communities of interest partially in terms of "access to means of communication and transport"); Victoria Electoral Boundaries Commission, *Legislative Council* at iii ¶ 16 (cited in note 236) ("Means of travel, traffic arteries and communications can tie a community together.").

241 Federal Election Boundaries Commission for New Brunswick, *Report* 12 (2003), online at http://www.elections.ca/scripts/fedrep/newbruns/report/13000report_e.pdf (visited May 11, 2013). See also *1994 Alberta Reference Case*, 119 DLR 4th at 17 ("[T]he people of Alberta simply would not accept the idea that agrarian and non-agrarian populations would both feel adequately represented in the same constituency."); Victoria Electoral Boundaries Commission, *Legislative Council* at iv ¶ 20 (cited in note 236) ("As regards community of interest, one of the most fundamental divisions is that between metropolitan and rural areas.").

an especially restrictive requirement, but it does at least prevent districts from joining people with absolutely no geographic connection to one another. It renders unavailable, that is, some of the most heterogeneous possible districts. Likewise, it is certainly possible for compact districts to contain diverse populations—if, for instance, a circular district combines a center city with outlying suburbs.[242] But the compactness criterion at least bars the creation of bizarre-looking districts that are likely to be particularly heterogeneous. As one might expect, there was a modest negative correlation in the 2000 cycle between the compactness and the diversity of American congressional districts. The higher a district's compactness score, in other words, the less diverse it was, and vice versa.[243]

C. Rethinking the American Approach

Choosing between the diversifying criteria favored by the United States and the homogenizing ones used by most foreign jurisdictions may seem impossible. Who is to say whether society's conflicts should be resolved at the district level or at the legislative level? How can any decision be made between diverse districts and a homogeneous legislature, on the one hand, and homogeneous districts and a diverse legislature, on the other? In the words of Professor James Gardner, "there is no clear reason to prefer one mode of democratic organization over another, and therefore none can be ruled out a priori as a legitimate choice."[244]

Professor Gardner may well be right as a matter of formal logic, but, as I discuss in this Section, there are actually several compelling reasons to prefer homogenizing criteria—and the

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[242] See Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistrictring Plans*, 73 Geo Wash L Rev 1131, 1158 (2005) ("One could draw compact districts that group unrelated communities on different sides of a mountain or river.").

[243] This data is on file with the author. I found correlations of around −0.2 using two different measures of district diversity (top-line and spatial) as well as two different measures of compactness (Reock and Polsby-Popper). See Ernest C. Reock Jr, *Measuring Compactness as a Requirement of Legislative Apportionment*, 5 Midwest J of Polit Sci 70–74 (1961); Daniel D. Polsby and Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L & Pol Rev 301, 336 (1991). In all four cases, I could clearly reject the null hypothesis that the correlation between district diversity and compactness was zero. See also Ron Levy, *Drawing Boundaries: Election Law Fairness and Its Democratic Consequences*, in Joo-Cheong Tham, Brian Costar, and Graeme Orr, eds, *Electoral Democracy: Australian Prospects* 57, 61–62 (Melbourne 2011) (noting in Australian context that "rules of contiguity and compactness . . . provide that electorates should not connect distant and dissimilar communities").

[244] Gardner, 11 Election L J at 417 (cited in note 210).

more homogeneous districts they generate—once the level of abstraction is lowered somewhat. As in the Article's previous normative section, these compelling reasons stem from, and are compatible with, a range of theories of representative democracy.[245] The implication is that American states that lack them should adopt (and then enforce) requirements such as respect for political subdivisions, respect for communities of interest, and attention to geographic features, means of communication and travel, and population density. Even better, these criteria should be enacted at the federal level, and the equal population mandate should be relaxed.[246]

1. The benefits of homogenizing criteria.

One important benefit of homogenizing criteria has already been alluded to: they make gerrymanders of both the partisan and bipartisan varieties more difficult to execute.[247] Partisan gerrymandering is limited because the optimal "matching slices" strategy can be carried out only if highly politically heterogeneous districts, combining almost equal numbers of both parties' most fervent supporters, are permitted.[248] Bipartisan gerrymandering is curbed because, somewhat counterintuitively, districts that are congruent with communities of interest (and thus more

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[245] See notes 107–10 and accompanying text.

[246] Another potential implication is that some of the VRA's provisions may need to be rethought. I express my views on minority representation in Part III. I should also note that I assess redistricting criteria using some of the same criteria with which I assessed redistricting institutions in Part I (for example, bias, responsiveness, and competitiveness), but also using certain new criteria (for example, participation, representation, and polarization). These new criteria are closely related to districts' internal composition—the focus of this Part—but have a more attenuated link to the institutional choice between political actors and independent commissions.

[247] See notes 228–32 and accompanying text. This is not to say that homogenizing criteria result in *zero* bias or in *optimal* responsiveness—just that they score better on these metrics than diversifying criteria. The only way to ensure that district plans will be *neutral* in their electoral consequences is to draw district lines with neutrality as the paramount goal, which is an approach that no jurisdiction has attempted.

[248] See Cox and Holden, 78 U Chi L Rev at 567–72 (cited at note 228). In line with Professors Cox and Holden's analysis, several studies have found that partisan fairness increases when districts are required to respect the boundaries of political subdivisions or communities of interest (both classic homogenizing criteria). See Jonathan Winburn, *The Realities of Redistricting* 9, 200–01 (Lexington 2008); Todd Makse, *Defining Communities of Interest in Redistricting through Initiative Voting*, 11 Election L J 503, 508–10 (2012); Stephanopoulos, 160 U Pa L Rev at 1460–62 (cited at note 15) (states that respect communities of interest have lower levels of partisan bias); Stephanopoulos, 125 Harv L Rev at 1964–67 (cited in note 14) (spatial diversity is positively correlated with partisan bias, at least at higher levels of spatial diversity).

demographically and socioeconomically homogeneous) are relatively competitive.[249] It is easier for challengers to craft their messages and to convey their views to the electorate in these districts, making them less hospitable places for incumbents. And both forms of gerrymandering are inhibited by the sheer number of homogenizing criteria that are typically in place in jurisdictions that employ them. It is hard to gerrymander when one must comply with a host of other requirements, some of them quite rigorous.

Another benefit of homogenizing criteria is participatory: people are better informed about candidates,[250] more likely to vote,[251] and more trusting of government,[252] when they live in more demographically and socioeconomically homogeneous districts. To highlight a Canadian study, after Ontario's provincial districts were redrawn in the 1980s, turnout rose in the districts that corresponded best to communities of interest and fell in the districts that corresponded worst.[253] One possible explanation is that, as Professor Robert Putnam has found, levels of social

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[249] See Richard Forgette, Andrew Garner, and John Winkle, *Do Redistricting Principles and Practices Affect U.S. State Legislative Electoral Competition?*, 9 State Polit & Pol Q 151, 162, 164 (2009) (use of homogenizing criteria reduced margin of victory and likelihood of uncontested race in 2000 state legislative elections); Kogan and McGhee, 4 Cal J Polit & Pol at 22–24 (cited in note 122) (new California districts drawn pursuant to community-of-interest requirement are more competitive than their predecessors); Stephanopoulos, 160 U Pa L Rev at 1460–62 (cited at note 15) (states that respect communities of interest have higher levels of electoral responsiveness); Stephanopoulos, 125 Harv L Rev at 1964–67 (cited in note 14) (spatial diversity is correlated negatively with competitiveness and responsiveness).

[250] See Richard G. Niemi, Lynda W. Powell, and Patricia L. Bicknell, *The Effects of Congruity between Community and District on Salience of U.S. House Candidates*, 11 Legis Stud Q 187, 193 (1986) (voters are more likely to recognize and recall candidate names in districts that are congruent with political subdivisions); Jonathan Winburn and Michael W. Wagner, *Carving Voters Out: Redistricting's Influence on Political Information, Turnout, and Voting Behavior*, 63 Polit Rsrch Q 373, 379 (2010) (same).

[251] See David E. Campbell, *Why We Vote: How Schools and Communities Shape Our Civic Life* 23–24 (Princeton 2006) (voter turnout is higher in less demographically, socioeconomically, and ideologically diverse areas); Stephanopoulos, 160 U Pa L Rev at 1464–67 (cited at note 15) (voter turnout is higher in states that respect communities of interest); Stephanopoulos, 125 Harv L Rev at 1941–45 (cited in note 14) (spatial diversity is linked positively to voter roll-off rate).

[252] See Stephanopoulos, 160 U Pa L Rev at 1464–67 (cited in note 15) (trust in government is higher in states that respect communities of interest).

[253] See Courtney, *Commissioned Ridings* at 210–11 (cited in note 66); Stewart, *Community of Interest in Redistricting* at 145–46 (cited in note 199). See also Royal Commission on Electoral Reform and Party Financing, 1 *Reforming Electoral Democracy* at 149 (cited in note 45) (noting in Canadian context that "[w]hen a community of interest is dispersed across two or more constituencies . . . [voters'] incentive to participate is likewise reduced").

capital are higher in areas that are less diverse.[254] That is, people are better connected via social networks and more engaged in civic affairs when they are similar to their neighbors along important dimensions.[255] Another potential cause is that the channels of political communication are clearer when districts coincide with political subdivisions or communities of interest.[256] Candidates are able to communicate more effectively with voters in these districts, resulting in an electorate that is more politically knowledgeable, and, for this reason, more inclined to participate in the political process.

Homogenizing criteria are also linked to better legislative representation (at least if one is receptive to the notion of representatives as delegates).[257] Elected officials from homogeneous districts have voting records that more accurately reflect key constituency characteristics[258] as well as the views of the median voter.[259] In contrast, politicians from heterogeneous districts have voting records that are less tethered to their constituents' attributes and positions.[260] These findings are the result of the more straightforward signals that representatives receive from

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[254] See Robert D. Putnam, E Pluribus Unum*: Diversity and Community in the Twenty-First Century*, 30 Scandinavian Polit Stud 137, 147–51 (2007).

[255] See id. See also Campbell, *Why We Vote* at 48 (cited in note 251); Alberto Alesina and Eliana La Ferrara, *Participation in Heterogeneous Communities*, 115 Q J Econ 847, 848 (2000).

[256] See Niemi, Powell, and Bicknell, 11 Legis Stud Q at 198 (cited in note 250); Winburn and Wagner, 63 Polit Res Q at 375 (cited in note 250).

[257] According to the traditional delegate-trustee dichotomy, representatives who are delegates abide by the expressed preferences of their constituents, while representatives who are trustees make their own autonomous policy decisions. See generally Hanna Fenichel Pitkin, *The Concept of Representation* (California 1967). See also Alan Frizzell, *In the Public Service*, in Small, ed, *Drawing the Map* 251, 258 (cited in note 199) (reporting that plurality of Canadian survey respondents want their representatives to be delegates).

[258] See Michael Bailey and David W. Brady, *Heterogeneity and Representation: The Senate and Free Trade*, 42 Am J Polit Sci 524, 537 (1998) (studying senators' votes on free trade issues and using top-line diversity); Stephanopoulos, 125 Harv L Rev at 1945–47 (cited at note 14) (studying House members' votes on all issues and using spatial diversity).

[259] See Benjamin G. Bishin, Jay K. Dow, and James Adams, *Does Democracy "Suffer" from Diversity? Issue Representation and Diversity in Senate Elections*, 129 Pub Choice 201, 206–10 (2006) (studying Senate candidates' positions and using top-line diversity); Elisabeth R. Gerber and Jeffrey B. Lewis, *Beyond the Median: Voter Preferences, District Heterogeneity, and Political Representation*, 112 J Polit Econ 1364, 1376–78 (2004) (studying legislators' votes in Los Angeles County and using top-line diversity).

[260] See Bailey and Brady, 42 Am J Polit Sci at 537 (cited in note 258); Bishin, Dow, and Adams, 129 Pub Choice at 206–10 (cited in note 259); Gerber and Lewis, 112 J Polit Econ at 1376–78 (cited in note 259); Stephanopoulos, 125 Harv L Rev at 1945–47 (cited in note 14).

residents in homogeneous districts. When the variance of residents' attributes and positions is low, it is relatively easy for elected officials to determine what they are and to vote in a manner consistent with them.[261] But, as Professors Vince Buck and Bruce Cain conclude in a study of British members of Parliament, "Where there are different interests within a constituency, [a member of Parliament] may have to focus his activities on one group or part of the constituency more than another," causing "part of the district [to] feel slighted."[262]

A further advantage of homogenizing criteria—lower legislative polarization—stems from the kind of representation that they foster. Precisely because elected officials from homogeneous districts are more responsive to their constituents' interests, they are less responsive to the views of their political party.[263] Conversely, the voting records of politicians from heterogeneous districts are driven more heavily by partisanship; if one knows these officials' partisan affiliation, one can predict their policy stances with a good deal of certainty.[264] As a consequence, when heterogeneous districts are considered in the aggregate, their representatives' positions are substantially more polarized than those of representatives from homogeneous districts. Over the 2005–10 period, for example, the gap in voting record between the average House Democrat and the average House Republican was about 25 percent larger in the one hundred most heterogeneous districts than in the one hundred most homogeneous.[265]

Beyond their implications for these measures of democratic health, homogenizing criteria appear to be more popular with

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[261] See Thomas L. Brunell, *Redistricting and Representation: Why Competitive Elections are Bad for America* 26–28 (Routledge 2008); Stewart, *Community of Interest in Redistricting* at 121 (cited in note 199).

[262] J. Vincent Buck and Bruce E. Cain, *British MPs in Their Constituencies*, 15 Legis Stud Q 127, 138 (1990). See also Richard F. Fenno Jr, *Home Style: House Members in Their Districts* 2–6 (Little, Brown 1978) (reporting similar findings for US House members); Malcolm E. Jewell, *Representation in State Legislatures* 55–59, 115–17 (Kentucky 1982) (noting similar findings for US state legislators).

[263] See Bailey and Brady, 42 Am J Polit Sci at 525–26 (cited in note 258) (referring to top-line diversity); Gerber and Lewis, 112 J Polit Econ at 1376–78 (cited in note 259) (same); Stephanopoulos, 125 Harv L Rev at 1945–47 (cited in note 14) (referring to spatial diversity).

[264] See Stephanopoulos, 125 Harv L Rev at 1945–47 (cited in note 14).

[265] See id at 1947–49 (cited in note 14) (referring to spatial diversity and measuring voting record using DW-Nominate scores). See also James M. Snyder Jr and David Strömberg, *Press Coverage and Political Accountability*, 118 J Polit Econ 355, 395–99 (2010) (finding that representatives from districts that are more congruent with media markets are less loyal to their parties and hence less polarized).

the public (and with politicians). As mentioned earlier, the vast majority of comments that are submitted to Canadian redistricting commissions argue that districts should be made more congruent with communities of interest and more mindful of historical and geographic considerations.[266] Similarly, about three-quarters of the oral statements made in Ontario hearings in the 1980s called for boundary changes that would have increased interdistrict population deviations, while only about 2 percent explicitly endorsed greater population equality.[267] And 44 percent of British parliamentary members named respect for political subdivisions or respect for local ties as the most important redistricting criterion, compared to 37 percent who favored equal population.[268] Quantitative evidence is unavailable for other jurisdictions, but scholars familiar with their redistricting practices believe that requirements that promote district homogeneity, particularly respect for communities of interest, are highly valued there as well.[269]

The final point in favor of homogenizing criteria is that they are more consistent with territorial districting—the basic premise of all modern electoral systems that use single-member or small multimember districts. The hallmark of homogenizing criteria is that they pay heed to jurisdictions' underlying political geography. They require that political subdivisions and communities of interest be respected, and they mandate that geographic features, means of communication and travel, and population density be taken into account. In contrast, the distinguishing feature of diversifying criteria is that they ignore political geography and could be satisfied more easily if districts were not

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[266] See note 203 and accompanying text. See also *Arizona Minority Coalition for Fair Redistricting v Arizona Independent Redistricting Commission*, 2004 WL 5330049, *8 (Ariz Super Ct) (noting that in comments submitted to Arizona commission "citizens ranked 'communities of interest' as the most important redistricting criteria, and 'city, town, and county boundaries' as the second most important redistricting criteria"); Karin Mac Donald and Bruce E. Cain, *Community of Interest Methodology and Public Testimony* *23 (unpublished manuscript) (on file with author) (finding that 7,138 out of 12,425 comments submitted to California commission explicitly addressed communities of interest).

[267] See Courtney, *Commissioned Ridings* at 214 (cited in note 66); Stewart, *Community of Interest in Redistricting* at 141 (cited in note 199). See also note 203 (describing opposition to "rurban" districts in Alberta).

[268] Rossiter, Johnston, and Pattie, *The Boundary Commissions* at 393–95 (cited in note 46). See also Ron Johnston, David Rossiter, and Charles Pattie, *'Far Too Elaborate about So Little': New Parliamentary Constituencies for England*, 61 Parliamentary Affairs 4, 16 (2007) (noting that comments on proposed English districts "are more concerned with the 'organic' aspects of constituency definition . . . than the purely 'arithmetic'").

[269] See note 204 and accompanying text.

drawn territorially in the first place. Equal population, for instance, would be a trivial requirement if noncontiguous voters could be placed in the same districts. Similarly, it would be much simpler to create majority-minority districts—or to manipulate districts' partisan composition for the sake of political advantage—if the constraints of geography could be set aside entirely. Diversifying criteria are therefore in tension with the American system's foundational assumption of territorial districting, while homogenizing criteria dovetail nicely with it.[270]

In sum, then, the case for homogenizing criteria is that they curb both partisan and bipartisan gerrymandering while generating democratic goods such as higher voter participation, more effective representation, and lower legislative polarization. What is more, the public seems to prefer them, and they are more in harmony with the commitment to territorial districting that underpins the American system. Below I consider several of the claims that are commonly advanced in favor of diversifying requirements (and the more diverse districts they produce).

2. Objections.

The most intuitive argument for diversifying criteria is that they encourage dialogue, debate, and competition within districts. If dissimilar people are placed in the same constituency, they should have more to talk (and argue) about, and more to compete about come election time. As Professor Michael Kang has written, "It is cultural *heterogeneity*, not homogeneity, that provides opportunities for democratic contestation."[271] The trouble with this claim is that, while plausible in theory, it is belied by a large body of empirical evidence. As noted above, districts are more competitive when they are drawn pursuant to homogenizing requirements such as respect for communities of interest.[272] Even focusing on district diversity itself (rather than on redistricting criteria), competitiveness in both general[273] and

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[270] See Stephanopoulos, 160 U Pa L Rev at 1395–97, 1399–1404 (cited in note 15).

[271] Michael S. Kang, *Race and Democratic Contestation*, 117 Yale L J 734, 791–92 (2008).

[272] See note 249 and accompanying text.

[273] See Jonathan S. Krasno, *Challengers, Competition, and Reelection* 62, 69 (1994); Jon R. Bond, *The Influence of Constituency Diversity on Electoral Competition in Voting for Congress, 1974–1978*, 8 Legis Stud Q 201, 206 (1983); William Koetzle, *The Impact of Constituency Diversity upon the Competitiveness of U.S. House Elections, 1962–96*, 23 Legis Stud Q 561, 564 (1998).

primary[274] elections is unrelated to districts' demographic and socioeconomic heterogeneity. Quality challengers also are no more likely to materialize in heterogeneous districts than in homogeneous districts.[275]

Why is politics not more vigorous in heterogeneous districts? Part of the answer is Professor Putnam's finding that "inhabitants of diverse communities tend to withdraw from collective life, to distrust their neighbors . . . [and] to expect the worst from their community and its leaders."[276] The rest of the story is that district heterogeneity usually advantages incumbents, not challengers. When voters differ from one another in fundamental ways, challengers find it difficult to come up with compelling messages and to assemble political coalitions.[277] In contrast, incumbents necessarily have managed to thread the electoral needle at least once before. Even once they have determined their positions, challengers face obstacles conveying their views to the public in heterogeneous districts. These districts are often diverse in the first place because they do not coincide with political subdivisions or communities of interest, meaning that their channels of political communication are less efficient.[278] Challengers bear the brunt of this inefficiency since they are the candidates who have the greater need to reach voters and to persuade them to support someone new.[279]

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[274] See Robert E. Hogan, *Sources of Competition in State Legislative Primary Elections*, 28 Legis Stud Q 103, 115 (2003); Tom W. Rice, *Gubernatorial and Senatorial Primary Elections: Determinants of Competition*, 13 Am Polit Rsrch 427, 438 (1985).

[275] See Paul Gronke, *The Electorate, the Campaign, and the Office: A Unified Approach to Senate and House Elections* 97 (Michigan 2000); Jon R. Bond, Cary Covington, and Richard Fleisher, *Explaining Challenger Quality in Congressional Elections*, 47 J Polit 510, 525 (1985); Michael J. Ensley, Michael W. Tofias, and Scott de Marchi, *District Complexity as an Advantage in Congressional Elections*, 53 Am J Polit Sci 990, 998 (2009).

[276] Putnam, 30 Scan Polit Stud at 150–51 (cited in note 254). This cannot be the whole answer because there is no necessary connection between the diversity of a political subdivision (the unit studied by Professor Putnam and other social scientists) and the diversity of the district(s) in which it is placed. For example, a homogeneous subdivision could be split between two districts, and then each half could be combined with a very different group of people, in which case both districts would be quite diverse.

[277] See Bond, Covington, and Fleisher, 47 J Polit at 527 (cited in note 275); Ensley, Tofias, and de Marchi, 53 Am J Polit Sci at 1000 (cited in note 275).

[278] See Niemi, Powell, and Bicknell, 11 Legis Stud Q at 198 (cited in note 250); Winburn and Wagner, 63 Polit Rsrch Q at 381–83 (cited in note 250).

[279] See Niemi, Powell, and Bicknell, 11 Legis Stud Q at 193 (cited in note 250). See also James E. Campbell, John R. Alford, and Keith Henry, *Television Markets and Congressional Elections*, 9 Legis Stud Q 665, 673–74 (1984) (finding that incumbents perform better in districts that are less congruent with media markets); Dena Levy and

Another important argument for diversifying criteria stems from the Burkean claim that representatives should be trustees, not delegates.[280] If districts are made up of multiple interest groups, none of them numerically dominant, then it should be easier for elected officials to exercise their own independent judgment. They should be more able to resist the tide of public opinion and to "fashion a synthetic position to advance in the legislature . . . . [that may] correspond to a position that is held by very few voters in the district."[281] I take no side here in the longstanding debate between the delegate and trustee models of representation. My objection to this reasoning, rather, is that elected officials from heterogeneous districts actually behave not as trustees but rather as partisan loyalists. As discussed above, these officials' voting records cannot be predicted very well using constituent attributes and positions—but they *can* be forecast accurately using partisan affiliation.[282] In electoral systems that feature strong parties, then, the trustee model is essentially defunct. The choice to be made is not between delegates and trustees, but rather between delegates and disciplined partisan soldiers.

The heavy influence of partisanship on politicians from heterogeneous districts also explains why the (entirely legitimate) preference for a more homogeneous legislature cannot be realized, at least with respect to voting record. With respect to *other* variables, such as race, the relationship between district heterogeneity and legislative homogeneity may well hold. Districts that have racial distributions similar to society as a whole (and that are thus quite diverse) may well elect representatives who are, in the aggregate, very racially homogeneous.[283] But districts that are heterogeneous in terms of politically salient factors simply do *not* elect representatives who are collectively homogeneous in terms of voting record. Rather, depending on which party prevails in each race, some of these districts elect devoted Democrats, while others send reliable Republicans to the legislature.

Peverill Squire, *Television Markets and the Competitiveness of U.S. House Elections*, 25 Legis Stud Q 313, 321 (2000) (same).

[280] See Edmund Burke, *Speech to the Electors of Bristol (Nov 3, 1774)*, in Philip B. Kurland and Ralph Lerner, eds, 1 *The Founders' Constitution* 361 (Chicago 1987).

[281] Gardner, 37 Rutgers L J at 957 (cited in note 39).

[282] See notes 263–64 and accompanying text.

[283] For example, if voting is racially polarized and every district has the same racial composition as America as a whole, then every representative would be white. See Gerken, 118 Harv L Rev at 1125 (cited in note 213).

The predictable outcome is legislative polarization—the exact opposite of legislative homogeneity.[284]

A final argument for diversifying criteria is that they prevent the formation of districts that may seem segregated when examined en masse. The worry that racially homogeneous districts "bear[] an uncomfortable resemblance to political apartheid" prompted the Supreme Court to create a new cause of action for racial gerrymandering in the 1990s.[285] Similar concerns about the "ghettoization" of Aboriginals explain why Canadian provinces only rarely have tried to construct majority-Aboriginal districts.[286] However, the minority-heavy districts that trigger these fears are usually very *heterogeneous* with respect to nonracial factors. For instance, it was only because the challenged majority-black districts in the 1990s combined highly dissimilar African American communities that the Court struck them down.[287] Likewise, the Canadian reluctance to design majority-Aboriginal districts is attributable in part to the enormous diversity of the Aboriginal population, which often overshadows the group's shared interests.[288] When minority members with more in common than their race have been placed in the same districts, the courts universally have upheld them, and the rhetoric of segregation has been nowhere to be found.[289]

Moreover, to the extent that districts appear segregated when they are drawn pursuant to homogenizing criteria—not just racially but also socioeconomically and ideologically—they do so because society itself remains segregated along these axes. As noted earlier, political subdivisions and communities of interest tend to be quite homogeneous,[290] meaning that they, as well as districts that correspond to them, differ considerably

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284 Ironically, it is actually *homogeneous* districts that result in a more homogeneous legislature with respect to voting record. Representatives from such districts are still quite diverse in the aggregate, but they at least are not divided into two entirely separate camps. See Stephanopoulos, 125 Harv L Rev at 1947–49 (cited in note 14).

285 *Shaw*, 509 US at 647.

286 See Royal Commission on Electoral Reform and Party Financing, 1 *Reforming Electoral Democracy* at 11, 184 (cited in note 45).

287 See Stephanopoulos, 160 U Pa L Rev at 1419–21 (cited in note 15).

288 See Courtney, *Commissioned Ridings* at 221 (cited in note 66).

289 See Stephanopoulos, 160 U Pa L Rev at 1419–21 (cited in note 15). See also *Shaw*, 509 US at 646 ("[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district . . . may reflect wholly legitimate purposes.").

290 See notes 233–38 and accompanying text.

from one another when considered in the aggregate.[291] If subdivisions and communities become more internally diverse, as they have in recent years with respect to race,[292] then so too will districts that coincide with them. Lastly, it is important to remember that districts, unlike other geographic entities, are part of a system of representation that has two levels. Homogeneity at the district level (what some refer to as segregation) therefore is not the end of the story. Instead, it is precisely what makes heterogeneity at the legislative level (what some call integration) possible.

III. MINORITY REPRESENTATION

While all countries with territorial districts must decide which institutions will be involved in redistricting and which criteria will be employed, jurisdictions with substantial minority populations face another difficult question: how to ensure an adequate minority presence in the legislature. As the British political theorist John Stuart Mill once wrote, "It is an essential part of democracy that minorities should be [ ] represented. No real democracy, nothing but a false show of democracy, is possible without it."[293] I begin this Part by summarizing the mechanisms that are used around the world to provide representation to racial, ethnic, and religious minority groups. In America, the Voting Rights Act typically requires majority-minority districts to be drawn wherever there exist large and geographically concentrated minority populations. Abroad, minority representation is achieved through a variety of means, including parallel electoral systems, reserved seats within unitary systems, party slating requirements, and multimember districts using limited, cumulative, or preferential voting rules.

Next, I identify two dimensions along which policies for minority representation can be classified: the geographic concentration of the minority groups that benefit from the policies, and

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[291] See Gerken, 118 Harv L Rev at 1102 (cited in note 213) (noting inverse relationship between first- and second-order diversity).

[292] See Edward Glaeser and Jacob Vigdor, *The End of the Segregated Century: Racial Separation in America's Neighborhoods, 1890–2010* 4 (Manhattan Institute 2012).

[293] John Stuart Mill, *Representative Government*, in Millicent Garret Fawcett, ed, *Three Essays by John Stuart Mill* 143, 252 (Oxford 1960). I focus on descriptive representation in this Part, or the presence of minority members in the legislature, as opposed to substantive representation, or the passage of policies that advance minority interests. While both forms of representation are important, substantive representation is more difficult to measure and harder as well to connect to particular institutional choices.

the explicitness of the processes that allocate legislative seats to the groups. These dimensions both illuminate the many options that are available to policymakers and underscore the distinctiveness of the American approach. Finally, I argue that multimember districts with alternative voting rules are preferable to the VRA's usual model of single-member majority-minority districts created through litigation. The former produce higher levels of minority representation, via more dynamic elections, at a fraction of the social and legal cost.

A. Global Models

1. America.

Under § 2 of the VRA, a minority group (most commonly African American or Hispanic) is entitled to a district in which it can elect the candidate of its choice (most commonly a majority-minority district[294]) if it satisfies a series of criteria. The group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," the group must be politically cohesive, racial polarization in voting must exist, and the totality of the circumstances must support the group's claim.[295] Since most American minority groups vote cohesively and for different candidates than the white majority—and were subjected to pervasive discrimination for many years—the requirement of sufficient size and compactness tends to be dispositive. It usually means that any large and geographically concentrated minority population has the right to its own majority-minority district.[296]

Notably, § 2 does not affirmatively specify any level of minority representation that must be achieved. Rather, the number of majority-minority districts is a function of the lawsuits that are brought by minority groups as well as the choices that line-drawers make in the shadow of potential VRA litigation. Section 2 is complemented, however, by another provision, § 5, that does set a floor for minority representation in certain (mostly

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294 See *Bartlett v Strickland*, 556 US 1, 14–20 (2009).

295 *Thornburg v Gingles*, 478 US 30, 48–51 (1986) (Brennan). See also 42 USC § 1973.

296 See Adam B. Cox and Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U Chi L Rev 1493, 1504 (2008) ("The preconditions suggest that a minority-controlled district may be required wherever a sufficiently large and compact group of minority voters exists.").

southern) jurisdictions.[297] These jurisdictions are barred from reducing minority representation (that is, "retrogressing"),[298] though they may *raise* its level if they wish or alter which particular districts are controlled or influenced by minority groups. Both § 2 and § 5 coexist uneasily with the constitutional ban on racial gerrymandering, which prohibits overly odd-looking or community-disruptive minority-heavy districts from being drawn.[299]

Though the VRA has resulted in dramatic electoral gains for minority groups over the last few decades, African Americans and Hispanics remain underrepresented relative to their population shares. For example, African Americans currently make up 13.2 percent of the population, but only 9.7 percent of congressional districts have black representatives, and only 6.0 percent of districts have black majorities.[300] More starkly, Hispanics make up 15.1 percent of the population, but only 7.0 percent of congressional districts have Hispanic representatives, and only 5.8 percent of districts have Hispanic majorities.[301] The VRA's implementation also necessitates very large volumes of litigation. Between 1982 and 2005, in jurisdictions covered by § 5 alone, there were 653 successful § 2 lawsuits, 626 Department of Justice objections that blocked changes to electoral laws, and 105 successful § 5 enforcement actions.[302]

While the formation of single-member majority-minority districts is the most important way in which minority representation is achieved in America, a growing number of jurisdictions

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297 See 42 USC § 1973c.

298 See, for example, *Georgia v Ashcroft*, 539 US 461, 477 (2003).

299 See 160–61, 224–27 and accompanying text.

300 Data about the racial composition of congressional districts and the country as a whole is from the American Community Survey and is on file with the author. For data on minority members of Congress, see *African, Hispanic (Latino), and Asian American Members of Congress* (Ethnic Majority 2012), online at http://www.ethnicmajority.com/congress.htm (visited May 11, 2013).

301 See id. At the state legislative level, the median gap between a state's proportion of majority-minority districts and its minority population percentage is 10.6 percent. See Stephanopoulos, 160 U Pa L Rev at 1463–64 (cited in note 15). See also David T. Canon, *Electoral Systems and the Representation of Minority Interests in Legislatures*, 24 Legis Stud Q 331, 339 (1999) (noting that 5.5 percent of state house members and 4.1 percent of state senators were black in 1985, while 11.5 percent of population was black).

302 *Shelby County, Alabama v Holder*, 679 F3d 848, 866, 868, 870 (DC Cir 2012), cert granted, 133 S Ct 594 (2012). See also Ellen Katz, et al, *Documenting Discrimination in Voting: Judicial Findings under Section 2 of the Voting Rights Act Since 1982: Final Report of the Voting Rights Initiative*, 39 U Mich J L Ref 643, 654 (2006) (describing study that identified 331 § 2 lawsuits since 1982 that resulted in published opinions).

use (or have used) alternative approaches.[303] Limited voting, a system in which districts have multiple representatives and voters cast fewer ballots than there are seats to be filled, is employed by dozens of towns and counties in Alabama, Connecticut, North Carolina, and Pennsylvania.[304] Cumulative voting, which also features multimember districts but which allows voters to distribute their ballots as they see fit (including casting multiple votes for individual candidates), was used for the Illinois state house for more than a century, and is now the regime of choice for many jurisdictions in Alabama, Illinois, New Mexico, New York, South Dakota, Texas, and West Virginia.[305] And preferential voting, which again relies on multimember districts but which permits voters to rank candidates in order of preference, was formerly used by major cities such as Cincinnati and New York, and is now employed by a handful of jurisdictions in Massachusetts and Minnesota.[306]

A key rationale for all of these approaches is that they enable minority groups (both racial and political) to win representation without having to muster a plurality of the district-wide vote. In the parlance of political scientists, they lower the threshold of exclusion, especially as the number of members per district increases.[307] As predicted, minority groups indeed have been able to secure a legislative presence in jurisdictions that have adopted limited, cumulative, or preferential voting. For instance, in the scores of jurisdictions that instituted one of these systems in the 1980s and 1990s due to settlements of VRA

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[303] For a clear summary of these approaches, see Richard L. Engstrom, *Modified Multi-seat Election Systems as Remedies for Minority Vote Dilution*, 21 Stetson L Rev 743, 749–51, 757–58, 762–68 (1992).

[304] See Grofman, 33 UCLA L Rev at 163–64 (cited in note 44); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv CR–CL L Rev 173, 223–31 (1989); *Communities in America Currently Using Proportional Voting* (Fair Vote), online at http://archive.fairvote.org/index.php?page=2101 (visited May 11, 2013).

[305] See Grofman, 33 UCLA L Rev at 164 (cited in note 44); Karlan, 24 Harv CR–CL L Rev at 233–36 (cited in note 304); *Communities in America Currently Using Proportional Voting* (cited in note 304).

[306] See Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 Houston L Rev 1119, 1160 (1998); *Communities in America Currently Using Proportional Voting* (cited in note 304).

[307] See Kenneth Benoit and Kenneth A. Shepsle, *Electoral Systems and Minority Representation*, in Paul E. Peterson, ed, *Classifying by Race* 50, 62–63 (Princeton 1995) (explaining how threshold of exclusion is calculated for limited and cumulative voting rules).

lawsuits, African American or Hispanic candidates won seats (usually for the first time) in almost every case.[308]

2. Abroad.

While foreign countries have converged on similar policies with respect to redistricting institutions and criteria,[309] their approaches to minority representation are highly varied—and usually quite different from the American model. To begin with, several nations take no steps whatsoever to guarantee a legislative presence for minority groups. In Australia, Britain, and France, for example, single-member districts are drawn pursuant to criteria that do not include minority representation.[310] Minority groups may form communities of interest that redistricting commissions may choose to respect, but the groups are not otherwise entitled to any special consideration. Not surprisingly, levels of minority representation are very low in all of these countries. In Australia, only one Aboriginal has ever been elected to the House of Representatives;[311] while in Britain and France, minority groups comprise 9.5 percent and 12.6 percent of the population, respectively, but only 2.3 percent and 0.4 percent of parliamentary members.[312]

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[308] See Shaun Bowler, Todd Donovan, and David Brockington, *Electoral Reform and Minority Representation: Local Experiments with Alternative Elections* 96 (Ohio State 2003); Engstrom, 21 Stetson L Rev at 752–62 (cited in note 303); Steven J. Mulroy, *The Way out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 Harv CR–CL L Rev 333, 349 (1998).

[309] See Parts I.A.2 and II.A.2.

[310] See Commonwealth Electoral Act 1918 § 66 (Australia); Parliamentary Voting System and Constituencies Act, 2011, part 2, § 11 (UK); Conseil Constitutionnel, Décision No 2008-573, §§ 22–25 (Jan 8, 2009) (France). However, there have been several proposals in Australia (none yet successful) to adopt policies that would increase levels of Aboriginal representation. See, for example, Parliament of New South Wales, *Enhancing Aboriginal Political Representation: Inquiry into Dedicated Seats in the New South Wales Parliament* (1998) (Australia).

[311] See *First Australian Aboriginal in House of Representatives*, BBC News Asia-Pacific (BBC Aug 29, 2010), online at http://www.bbc.co.uk/news/world-asia-pacific-11125497 (visited May 11, 2013). See also Gianni Zappalà, *The Political Representation of Ethnic Minorities: Moving beyond the Mirror*, in Sawar and Zappalà, eds, *Speaking for the People* 134, 144 (cited in note 191) (noting under-representation of ethnic minority groups in Australia).

[312] See *Must the Rainbow Turn Monochrome in Parliament?*, Economist 54 (Oct 27, 2007). See also Karen Bird, *The Political Representation of Women and Ethnic Minorities in Established Democracies: A Framework for Comparative Research* *25 (Academy of Migration Studies in Denmark Working Paper, 2003), online at http://www.outcome-eng.com/wp-content/uploads/2011/12/Karen-Bird-amidpaper.pdf (visited May 11, 2013) (reporting similar figures).

Next, a few jurisdictions—including Panama, the Ukraine, and about half of Canada's provinces—follow something like the American model, deliberately drawing minority-heavy, single-member districts in areas where minority populations are concentrated. Panama requires "concentrations of indigenous populations" to be taken into account,[313] Ukrainian law refers to the "density of national minority populations,"[314] and commissions in Alberta, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, and Saskatchewan intentionally create districts in which Aboriginals, Acadians, or African Canadians constitute majorities (or large minorities).[315] Nova Scotia's efforts are the most prominent in this vein, as four of its provincial districts are "protected constituencies" designed to be won by Acadians or African Canadians.[316] Also of note, New Brunswick's breakup of an Acadian-majority district prompted the only foreign decision analogous to America's § 2 case law, in which the Federal Court held that the district should not have been split for the sake of greater population equality.[317] Nevertheless, as in America, Canadian minorities of all stripes remain substantially underrepresented.[318]

At the other end of the policy spectrum, many countries provide for minority representation through more explicit mechanisms, such as reserved seats for particular groups. These

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313 See *Communities of Interest: Delimiting Boundaries* (ACE Electoral Knowledge Network), online at http://aceproject.org/ace-en/topics/bd/bdb/bdb05/bdb05c (visited May 11, 2013).

314 See id.

315 See Courtney, *Commissioned Ridings* at 103, 175–77, 182–83, 190–91, 225–32 (cited in note 66). See also *1991 Saskatchewan Reference Case*, 2 SCR 158, ¶ 31 (S Ct 1991) (Canada) (referring to "minority representation" as factor that can justify deviations from perfect population equality).

316 See Courtney, *Commissioned Ridings* at 103, 225–26 (cited in note 66); Nova Scotia Select Committee on Establishing an Electoral Boundaries Commission, *Report* 8, 12 (Nova Scotia House of Assembly 2011).

317 See *Raiche v Attorney General of Canada*, 2004 FC 679, ¶ 82 (Fed Ct 2005) (Canada). See also *Charlottetown (City) v Prince Edward Island*, 142 DLR 4th 343, ¶ 39 (PEI S Ct 1996) (Canada) (upholding under-populated district because of its Acadian-majority status)

318 See Trevor Knight, *Electoral Justice for Aboriginal People in Canada*, 46 McGill L J 1063, 1065–67 (2001) (noting that in 2000 there were only five Aboriginal members in Canadian House of Commons); *Must the Rainbow*, Economist at 54 (cited in note 312) (showing that ethnic minorities make up 15.9 percent of Canadian population but only 7.8 percent of parliamentary members). See also Royal Commission on Electoral Reform and Party Financing, 1 *Reforming Electoral Democracy* at 169–93 (cited in note 45) (recommending that dedicated Aboriginal districts be created along lines of New Zealand model).

reserved seats often are separate from the rest of the electoral system, as in New Zealand, Fiji, and Pakistan. In New Zealand, there is one nationwide district map for the sixty-three regular constituencies, and another map for the seven Māori constituencies, in which only voters who have registered for the Māori roll may cast ballots.[319] Not unexpectedly, the Māori make up about the same proportion (15 percent) of both the general population and the membership of the legislature.[320] In Fiji, likewise, there are *five* nationwide maps, four for ethnic groups such as ethnic Fijians and Fijian Indians, and one for all voters of all ethnicities.[321] Each voter belongs to, and casts ballots in, both a reserved and an open district.[322] And in Pakistan, there are 272 conventional single-member districts as well as 10 seats reserved for non-Muslims and elected via proportional representation—a number that slightly *overrepresents* this group.[323]

Reserved seats can also be part of a unitary electoral system, as in India, Jordan, and the Palestinian Territories. In India, both scheduled castes and scheduled tribes are allocated particular single-member districts in each state, in shares equal to the groups' proportions of the state's population. Only candidates from the specified caste or tribe may compete in these constituencies, which are assigned by ordering each state's districts by their minority population and then reserving the requisite number that are most minority-heavy.[324] Similarly, in Jordan

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319 See *Report of the Representation Commission 2007* 7–13 (Representation Commission 2007), online at http://www.elections.org.nz/sites/default/files/2007%20Representation%20Commission%20Report.pdf (visited May 11, 2013).

320 See Catherine J. Iorns Magallanes, *Dedicated Parliamentary Seats for Indigenous Peoples: Political Representation as an Element of Indigenous Self-Determination*, 10 Murdoch U Electronic J L ¶ 31 (Dec 2003), online at http://www3.austlii.edu.au/au/journals/MurUEJL/2003/39.html (visited May 11, 2013); Michael A. Murphy, *Representing Indigenous Self-Determination*, 58 U Toronto L J 185, 193 (2008). Interestingly, more Māori are elected to parliament through the general roll than through the reserved districts.

321 See Jon Fraenkel, *The Design of Ethnically Mixed Constituencies in Fiji, 1970–2006*, in Handley and Grofman, eds, *Redistricting* 123, 124–28 (cited in note 10).

322 See id at 125.

323 See Pakistan Const Art 51. See also Andrew Reynolds, *Reserved Seats in National Legislatures: A Research Note*, 30 Legis Stud Q 301, 304 (2005) (listing nations with reserved seats, in both parallel systems and unitary systems); *Special Provisions for Minority Groups When Delimiting Electoral Districts* (ACE Electoral Knowledge Network), online at http://aceproject.org/ace-en/topics/bd/bdb/bdb05/bdb05d (visited May 11, 2013).

324 See India Const Art 330; Delimitation Commission of India, *Changing Face of Electoral India* at 5–6, 33 (cited in note 69); Wendy Singer, *A Seat at the Table: Reservations and Representation in India's Electoral System*, 11 Election L J 202, 206–09 (2012).

and the Palestinian Territories, specific seats in specific multimember districts are reserved for Christian and Circassian candidates (in Jordan) and for Christian and Samaritan candidates (in the Palestinian Territories).[325] All of these groups receive proportional representation (or better) as a result.[326]

Yet another device that is sometimes used to ensure minority representation is the party-slating requirement—that is, a mandate that each party nominate a certain number of minority candidates, either in each district or in the country as a whole. In Singapore, parties are only permitted to contest multimember constituencies if their candidate slates for the districts include at least one minority member.[327] In Lebanon, likewise, parties must put forward candidate slates whose sectarian composition has been specified in advance (and varies markedly from one constituency to another).[328] And in Britain and Canada, major parties have voluntarily decided to adopt internal procedures that encourage the nomination of minority candidates, such as the British Labour Party's policy of including at least one minority candidate in its shortlist for each district.[329]

There is somewhat more leeway in the assignment of scheduled caste constituencies, which the commission tries to avoid placing adjacent to one another. See id.

[325] See International Institute for Democracy and Electoral Assistance (IDEA), *Building Democracy in Jordan: Women's Political Participation, Political Party Life and Democratic Elections* 135 appendix 3.1 (2005); *Special Provisions for Minority Groups* (cited in note 323).

[326] In India, for example, scheduled castes and scheduled tribes comprised 16.4 and 7.9 percent of the population, respectively, and occupy on average 14.4 and 7.3 percent of government positions. See Rohini Pande, *Can Mandated Political Representation Increase Policy Influence for Disadvantaged Minorities? Theory and Evidence from India*, 93 Am Econ Rev 1132, 1138, 1140 (2003). Similarly, Christians make up about 6 percent of Jordan's population and receive about 8 percent of the seats in the legislature. See IDEA, *Building Democracy in Jordan* at 135 appendix 3.1 (cited in note 325) (providing table with figures of minority representation in Jordan); *The World Factbook: Middle East; Jordan* (CIA 2012), online at https://www.cia.gov/library/publications/the-world-factbook/geos/jo.html (visited May 11, 2013).

[327] See Yash Ghai, *Public Participation and Minorities* 15 (Minority Rights Group International 2003); Singapore Const Art 39A(2)(a)(ii); N. Ganesan, *Entrenching a City-State's Dominant Party System*, 1998 SE Asian Affairs 229, 230.

[328] See Bassel F. Salloukh, *The Limits of Electoral Engineering in Divided Societies: Elections in Postwar Lebanon*, 39 Can J Polit Sci 635, 639, 643 (2006).

[329] See Royal Commission on Electoral Reform and Party Financing, 1 *Reforming Electoral Democracy* at 102, 112, 171 (cited in note 45); Judith Squires, *Gender and Minority Representation in Parliament*, 1 Polit Insight 82, 84 (Dec 2010). Similar approaches (in both voluntary and mandatory forms) are used in many more countries to promote the representation of women in the legislature. See Mala Htun, *Is Gender Like Ethnicity? The Political Representation of Identity Groups*, 2 Persp on Polit 439, 452 (2004).

Finally, several jurisdictions employ small multimember districts in combination with limited, cumulative, or preferential voting rules. (Many more rely on large multimember districts with party-list proportional representation, but, as noted at the outset, such regimes are beyond this Article's scope.)[330] Limited voting is used in Afghanistan, Indonesia (for the upper house), Jordan, Kuwait, and Spain (for the Senate), and was formerly used in Britain (in the 1800s), Japan, South Korea, and Taiwan.[331] Cumulative voting was used in Britain and South Africa for certain elections in the 1800s.[332] And preferential voting is used in Australia (for the Senate and in certain states), Ireland, Malta, New Zealand (for local elections), Northern Ireland (for local and European Union elections), and Scotland (for local elections).[333] Not all of these jurisdictions have significant minority populations, but their voting rules facilitate the representation of *all* groups that cannot muster a plurality of the district-wide vote—be they racial or political. For example, Aboriginal candidates have won more seats in the Australian Senate than in the House,[334] and smaller parties also perform better in Senate than in House elections.[335]

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[330] See note 18 and accompanying text.

[331] See Benoit and Shepsle, *Electoral Systems and Minority Representation* at 73 (cited in note 307); Arend Lijphart, Raphael Lopez Pintor, and Yasunori Sone, *The Limited Vote and the Single Nontransferable Vote: Lessons from the Japanese and Spanish Examples*, in Grofman and Lijphart, eds, *Electoral Laws and Their Political Consequences* 154, 155 (cited in note 11); Steven R. Reed and Michael F. Thies, *The Consequences of Electoral Reform in Japan*, in Shugart and Wattenberg, eds, *Mixed-Member Electoral Systems* 380, 381 (cited in note 11); John M. Carey, *Legislative Voting and Accountability* 11 (Cambridge 2009); Andrew Ellis, *One Year after the Elections: Is Democracy in Indonesia on Course?* *4 (Institute for Democracy and Electoral Assistance Sept 20, 2005).

[332] See Bowler, Donovan, and Brockington, *Electoral Reform and Minority Representation* at 19 (cited in note 308); George S. Blair, *Cumulative Voting: An Effective Electoral Device for Fair and Minority Representation*, 219 Annals NY Acad Sci 20, 20 (2006); Shaun Bowler, Todd Donovan, and David M. Farrell, *Party Strategy and Voter Organization under Cumulative Voting in Victorian England*, 47 Polit Stud 906, 906–07 (1999).

[333] See McKaskle, 35 Houston L Rev at 1160 (cited in note 306); Mulroy, 33 Harv CR–CL L Rev at 341 (cited in note 308); *Single Transferable Vote* (Electoral Reform Society 2012), online at http://www.electoral-reform.org.uk/single-transferable-vote (visited May 11, 2013).

[334] See Keith Archer, *Representing Aboriginal Interests: Experiences of New Zealand and Australia* (Electoral Insight Nov 2003), online at http://www.elections.ca/res/eim/article_search/article.asp?id=%2027&lang=e&frmPageSize=%5B (visited May 11, 2013); Murphy, 58 U Toronto L J at 188–89 (cited in note 320).

[335] See Campbell Sharman, *The Representation of Small Parties and Independents, Papers on Parliament No. 34—Representation and Institutional Change: Fifty Years of Proportional Representation in the Senate* (Parliament of Australia Dec 1990), online at

B. Geographic Concentration and Power Allocation

1. Beneficiaries and techniques.

The American election law literature has barely noticed the many policies enacted by foreign countries to promote the legislative representation of minority groups.[336] Even when scholars have engaged with foreign approaches, they have tended merely to describe them[337]—not to think deeply about the value choices they reflect or the ways in which they resemble or differ from one another. In this Section, I therefore introduce a conceptual framework that can be used to classify models of minority representation. The first key dimension is the geographic concentration of the minority groups that benefit, and the second is the explicitness of the processes that allocate legislative seats to them.

The identities of the minority groups that are assisted in gaining representation vary, of course, from country to country. Some nations focus their efforts on indigenous populations (e.g., Canada, New Zealand),[338] others emphasize historically disadvantaged minorities (e.g., India, the United States),[339] and still others are most concerned about ethnic or sectarian cleavages (e.g., Fiji, Lebanon).[340] A crucial question that all of these jurisdictions must answer, however, is whether only *concentrated* minority groups should be represented or also *diffuse* groups. Concentrated groups, such as America's blacks and India's scheduled tribes, are heavily clustered—that is, segregated—in particular areas.[341] As a consequence, they are often capable of

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http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/pops/pop34/c13 (visited May 11, 2013).

336 See Richard H. Pildes and Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U Chi Legal F 241, 258 (noting that literature "has only recently begun to explore the different voting practices democracies might choose").

337 See, for example, Benoit and Shepsle, *Electoral Systems and Minority Representation* at 51 (cited in note 307); Arend Lijphart, *Proportionality by Non-PR Methods: Ethnic Representation in Belgium, Cyprus, Lebanon, New Zealand, West Germany, and Zimbabwe*, in Grofman and Lijphart, eds, *Electoral Laws and Their Political Consequences* 113 (cited in note 11); Reynolds, 30 Legis Stud Q at 301 (cited at note 323). See also Bird, *The Political Representation of Women and Ethnic Minorities* at *7 (cited in note 312) ("Comparative studies that do exist are largely descriptive and theoretically underdeveloped.").

338 See notes 313, 315–16 and accompanying text.

339 See notes 318 and 350, and accompanying text.

340 See notes 321 and 328, and accompanying text.

341 See Ghai, *Public Participation and Minorities* at 16 (cited in note 327) (discussing India's scheduled tribes); *The Black Population: 2010* *8 (US Census Bureau Sept

winning representation in districts (even single-member ones) that are drawn geographically. In contrast, diffuse groups, such as Canada's Aboriginals and New Zealand's Māori, are dispersed more evenly throughout the country.[342] They are invariably underrepresented by single-member districts and require other mechanisms to achieve anything close to proportional representation.[343]

In addition to choosing what kinds of minority populations should be represented, nations need to decide how to allocate legislative seats to them. In particular, they need to decide whether to allocate seats *explicitly* or *implicitly*. Explicit methods of allocation, such as reserved seats and party slating requirements (and, arguably, § 5 of the VRA), are marked by their efficacy. There is no doubt in which districts and in what numbers minority candidates will win election. However, such techniques are often controversial because they openly take race into account and deviate from the ideal of the color-blind state.[344] Implicit methods of allocation, such as redistricting rules that pay heed to minorities' geographic distributions and multimember districts with low thresholds of exclusion, are notable for their subtlety. They do not racialize the electoral system (at least not to the same extent) while still making possible substantial levels of minority representation. But they are usually more complicated than explicit mechanisms, and thus less certain to produce a proportional minority presence in the legislature.[345]

2011), online at http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf (visited May 11, 2013).

342 See Royal Commission on Electoral Reform and Party Financing, 1 *Reforming Electoral Democracy* at 10, 170 (cited in note 45) (discussing Canada's Aboriginals); Andrew Geddis, *A Dual Track Democracy? The Symbolic Role of the Māori Seats in New Zealand's Electoral System*, 5 Election L J 347, 347 (2006) (discussing New Zealand's Māori).

343 See Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 Colum L Rev 418, 430 (1995) ("Districting will be effective only in areas where minority voters are residentially concentrated in homogeneous territories."); Kent Roach, *Chartering the Electoral Map into the Future*, in John C. Courtney, Peter MacKinnon, and David E. Smith, eds, *Drawing Boundaries: Legislatures, Courts, and Electoral Values* 200, 213 (Fifth House 1992) (noting in Canadian context that "[a]ffirmative districting will not benefit more diffuse disadvantaged groups").

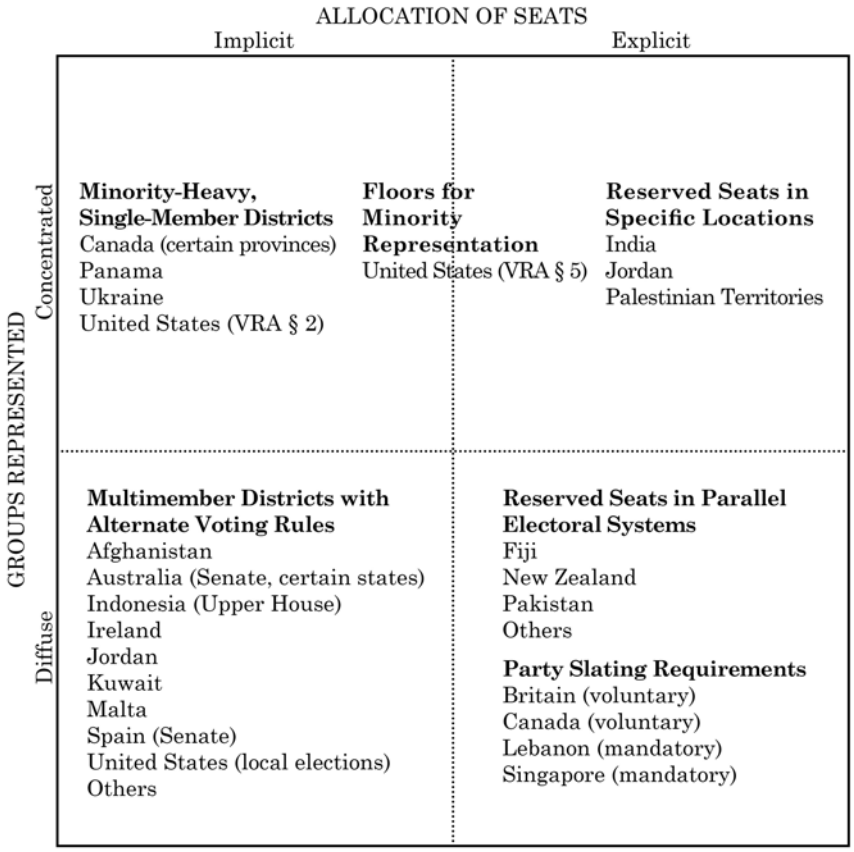
344 See, for example, Ghai, *Public Participation and Minorities* at 16–17 (cited in note 327) (noting that reserved seats remain controversial in India); Alistair McMillan, *Delimitation in India*, in Handley and Grofman, eds, *Redistricting* 75, 76 (cited in note 10) (same); Geddis, 5 Election L J at 360–66 (cited in note 342) (same in New Zealand).

345 See Bowler, Donovan, and Brockington, *Electoral Reform and Minority Representation* at 32–50 (cited in note 308) (discussing voter and party coordination required by systems of limited and cumulative voting).

2. Processing the policies.

While interesting individually, the dimensions of minority group concentration and allocative explicitness are more analytically useful when considered in tandem. Figure 4 below, then, is a matrix in which the vertical axis indicates whether only concentrated minority groups are represented or also diffuse groups, and the horizontal axis denotes whether legislative seats are allocated explicitly or implicitly. Only the policies currently in place in different jurisdictions are displayed; unlike earlier in the Article,[346] I do not present a second figure showing policy changes over time because approaches to minority representation have not exhibited much temporal variation.

FIGURE 4. MODELS OF MINORITY REPRESENTATION



346 See Part I.B.2.

To begin with, the deliberate creation of minority-heavy, single-member districts (as often required in America by § 2 of the VRA) occupies the concentrated-implicit quadrant of the matrix. These sorts of districts can benefit only minority groups that are large and geographically dense enough to comprise the majority, or at least a substantial minority, in specific constituencies. Indeed, the Supreme Court has made sufficient size and geographic compactness a prerequisite for the grant of relief in § 2 litigation.[347] These districts are also relatively circumspect in their allocation of legislative influence. True, their construction requires line-drawers to take into account the spatial distribution of minority populations; but they then function in precisely the same fashion, under precisely the same electoral rules, as all other districts. They are not formally designated as "minority constituencies," and they may be (and sometimes are) won by candidates of any race.

Section 5 of the VRA, in contrast, straddles the line between the concentrated-implicit and concentrated-explicit quadrants. Like § 2, it usually applies to minority-heavy, single-member districts,[348] which are beneficial only to geographically concentrated minority groups. But unlike § 2, it sets a floor for minority representation below which covered jurisdictions may not fall. Section 5 is thus notably more overt in its allocation of seats—not as blatant as policies that specify *levels* of minority representation, but also not as discreet as approaches that merely require that minority-heavy districts be drawn in certain circumstances. As Justice Anthony Kennedy has observed, "considerations of race that would doom a redistricting plan under . . . § 2 seem to be what save it under § 5."[349]

The first of the policies that do specify levels of minority representation, occupying the concentrated-explicit quadrant, is the reservation of particular districts in particular locations. These constituencies are typically situated in areas where the relevant minority groups are concentrated. In India, for example, the districts reserved for scheduled tribes are by law the districts in each state in which the tribes make up the largest shares of the population.[350] However, these constituencies are

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[347] See *Gingles*, 478 US at 50 (Brennan).

[348] See notes 295–96 and accompanying text.

[349] *Georgia*, 539 US at 491 (Kennedy concurring).

[350] See India Const Art 330; Delimitation Commission of India, *Changing Face of Electoral India* at 5–6, 33 (cited in note 69).

also capable of representing more diffuse minority groups. Because only candidates of the designated race, ethnicity, or religion are permitted to run for office, minority groups are guaranteed victory even if they make up less than 50 percent of the district population (as is often the case, for instance, with India's scheduled castes).[351] It is this feature that accounts for this model's lower position on the concentration-diffusion axis (relative to the VRA)—as well as its position further to the right on the implicit-explicit axis.

The other two policies that explicitly set levels of minority representation are reserved seats in parallel electoral systems and party slating requirements. Like reserved seats in unitary systems, these approaches determine in advance how much legislative influence minority groups should have, and then use overt mechanisms to provide it to them. As Professor Andrew Geddis has remarked about New Zealand, "The Māori seats provide a guaranteed presence in Parliament for MPs directly elected by those Māori who wish to enroll and vote as Māori."[352] Unlike reserved seats in unitary systems, however, reserved seats in parallel systems and party slating requirements are not linked at all to minority groups' geographic distributions. No matter how dispersed New Zealand's Māori or Pakistan's non-Muslims are, they still receive exactly the same representation through their separate electoral structures. Similarly, Singapore's ethnic minorities and Lebanon's religious sects are assured the same legislative presences, regardless of their spatial patterns, since their positions in party slates are protected by law.[353]

Finally, multimember districts with alternative voting rules occupy the diffuse-implicit quadrant of the matrix. Relative to single-member districts, they enable smaller and more scattered

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[351] See, for example, Ghai, *Public Participation and Minorities* at 16 (cited in note 327) (noting that scheduled castes in India usually make up less than 30 percent of population in districts reserved for them).

[352] Geddis, 5 Election L J at 357 (cited in note 342).

[353] Singapore's system, which requires every party slate for every multimember district to include at least one minority candidate, is entirely unmoored from minority groups' geographic distributions. See note 327 and accompanying text. However, Lebanon's system, in which the required sectarian composition of party slates varies from district to district, does partly take into account the areas in which different religious groups are concentrated. See Salloukh, 39 Can J Polit Sci at 639–40 (cited in note 328). It is thus closer on the concentration-diffusion axis to the Indian, Jordanian, and Palestinian approaches of reserved seats in specific locations. See notes 324–25 and accompanying text.

minority groups to gain representation, especially as the number of members per district rises and the threshold of exclusion falls. However, since some minority groups cannot meet even a relatively low threshold, these constituencies do still require a greater degree of geographic concentration than do reserved seats in parallel systems or party slating requirements. Multimember districts with alternative voting rules are also the least allocatively explicit of all the models of minority representation. They are obviously far less blatant than policies that set outright the numbers of seats for different minority groups, but they are also substantially subtler than § 2 of the VRA. Every element of the § 2 inquiry involves racial considerations,[354] while limited, cumulative, and preferential voting all operate without race ever entering into the equation. Indeed, perhaps the most notable feature of these systems is that they promote the representation of *all* minority groups, not just racial ones.[355]

C. Rethinking the American Approach

Unlike with redistricting institutions and criteria, there are many global models of minority representation to choose from, not just two. However, all of the foreign approaches that allocate seats explicitly—reserved districts in unitary systems, reserved districts in parallel systems, and party slating requirements—can essentially be rejected out of hand as options for the United States. If § 5 of the VRA is on constitutional thin ice,[356] and if minority-heavy, single-member districts violate the Equal Protection Clause when they disrupt communities or are shaped too oddly,[357] then there is no question that policies that overtly set levels of representation for minority groups would be unconstitutional. (Party slating requirements would also likely run afoul of the First Amendment associational freedoms that American parties enjoy.)[358]

The only plausible models of minority representation for the United States are therefore the status quo, characterized by the

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354 See *Gingles*, 478 US at 48–51 (Brennan).

355 See Karlan, 24 Harv CR–CL L Rev at 236 (cited in note 304); Pildes and Donoghue, 1995 U Chi Legal F at 255 (cited in note 336).

356 See *Shelby County*, 679 F3d at 873; *Northwest Austin Municipal Utility District Number One v Holder*, 557 US 193, 203–05 (2009).

357 See 160–61, 224–27 and accompanying text.

358 See, for example, *California Democratic Party v Jones*, 530 US 567, 585–86 (2000) (invalidating California law that required parties to participate in "blanket" primary).

creation of minority-heavy, single-member districts in areas where there exist large and geographically concentrated minority groups, and the use of multimember districts with alternative voting rules.[359] In this section, I first make the case for the latter approach and then consider a number of potential objections. Because I am not the first to argue for systems of limited, cumulative, or preferential voting,[360] I emphasize the lessons that can be gleaned from comparative and empirical analysis—modes of inquiry that have not yet been brought to bear on these issues.[361] Once again, the arguments that I present are consistent with a range of democratic theories.[362]

1. Better representation via better means.

Two of the benefits of multimember districts with alternative voting rules stem directly from their positions on the taxonomic axes that I introduced above. First, their ability to provide representation to more diffuse minority groups is not a neutral attribute but rather one that is quite normatively attractive. The underlying rationale for trying to secure a legislative presence for American minorities is that they are socioeconomically disadvantaged and have been subjected to pervasive discrimination for many years.[363] Crucially, this justification in no way rests on the groups' geographic concentration. Spatially dispersed groups are just as deserving of representation—and can earn it via limited, cumulative, or preferential voting in many areas where they would be denied it by single-member districts. I noted earlier that Australia's widely scattered Aboriginals have won more seats in the Senate, which is elected from

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[359] Scrapping the VRA altogether is also an option, but such a step would signify the *absence* of any actual model of minority representation. Consider *Bush v Vera*, 517 US 952, 1072 (1996) (Souter dissenting) (noting that if VRA were eliminated "the result . . . would almost inevitably be a so-called 'representative' Congress with something like 17 black members").

[360] Other scholars who have made similar arguments include Professors Richard Briffault, Lani Guinier, and Pamela Karlan. See generally Briffault, 95 Colum L Rev 418 (cited in note 343); Guinier, 71 Tex L Rev 1589 (cited in note 18); Karlan, 24 Harv CR–CL L Rev 173 (cited in note 304).

[361] See Bird, *The Political Representation of Women* at *7 (cited in note 312) (noting "underdevelopment of comparative research on ethnic minority representation").

[362] See text accompanying notes 107–10.

[363] See *Gingles*, 478 US at 36–37 (listing factors that govern totality-of-circumstances inquiry under § 2 of VRA, which include "any history of official discrimination in the state" and "the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health").

six-member districts using preferential voting, than in the House.[364] America's diffuse Hispanic population has also experienced greater electoral success in jurisdictions that employ limited or cumulative voting.[365]

Second, it is normatively appealing as well that multimember districts with alternative voting rules allocate seats implicitly to minority groups. Explicit methods of allocation are troublesome because they raise the salience of racial identity and conflict with the principle that governments should treat all of their citizens equally. Concerns of this sort are precisely why India and New Zealand's reserved-seat systems remain controversial generations after they were adopted,[366] and why Australia and Canada have decided not to form dedicated Aboriginal districts analogous to New Zealand's.[367] Of course, the construction of minority-heavy, single-member districts is not as brazen as these mechanisms, but it does still require race to be taken into account when districts are drawn. As Justice Clarence Thomas has written (somewhat hyperbolically), § 2 of the VRA can be seen as an "enterprise of systematically dividing the country into electoral districts along racial lines [and] segregating the races into political homelands."[368] In contrast, multimember districts with alternative voting rules do not compel

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[364] See note 334 and accompanying text. Each district (or each Australian state) actually elects twelve senators, but their terms are staggered so that only six positions are filled in each election. *Parliament of Australia, about the Senate* (Australia 2012), online at http://www.aph.gov.au/About_Parliament/Senate/About_the_Senate (visited May 11, 2013).

[365] See Bowler, Donovan, and Brockington, *Electoral Reform and Minority Representation* at 95–96 (cited in note 308); Richard L. Engstrom, Delbert A. Taebel, and Richard L. Cole, *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico*, 5 J L & Polit 469, 482 (1989) (noting success of Hispanics in Alamogordo, despite their "relative dispersion . . . across the city," under cumulative voting). Consider Robert G. Moser, *Electoral Systems and the Representation of Ethnic Minorities: Evidence from Russia*, 40 Comp Polit 273, 289 (2008) (finding that minority groups in Russia perform well under single-member districts only if they are geographically concentrated); Jessica Trounstine and Melody E. Valdini, *The Context Matters: The Effects of Single-Member versus At-Large Districts on City Council Diversity*, 52 Am J Polit Sci 554, 563 (2008) (same for minority groups in American municipal elections).

[366] See note 344.

[367] See Parliament of New South Wales, *Enhancing Aboriginal Political Representation* at 53 (cited in note 310) (describing view that "dedicated seats would be perceived as 'special treatment' for Aboriginal people"); Melissa S. Williams, *Sharing the River: Aboriginal Representation in Canadian Political Institutions*, in David Laycock, ed, *Representation and Democratic Theory* 93, 96–98 (British Columbia 2004).

[368] *Holder v Hall*, 512 US 874, 905 (1994) (Thomas concurring in the judgment). See also id at 906 (arguing that § 2 is "indistinguishable in principle" from foreign reserved-seat systems).

any consideration of race in their design or operation. They promise levels of minority representation comparable to those produced by § 2, but without any of the "dividing" and "segregating" that are sometimes linked to the provision.[369]

But do limited, cumulative, and preferential voting rules actually deliver on this promise? In fact, they perform even better in terms of minority representation than do single-member districts. In a recent study, Professor Shaun Bowler and others compared African American vote and seat shares in US jurisdictions that use limited or cumulative voting to the equivalent proportions in jurisdictions employing single-member districts or at-large elections.[370] Limited and cumulative voting resulted in higher African American seat shares for all potential vote shares. An African American group that won 40 percent of a jurisdiction's vote, for example, could expect to win 10 percent of its seats in an at-large election, 30 percent with single-member districts, and almost 40 percent under limited or cumulative voting.[371]

Similarly, African Americans, Hispanics, and Asian Americans made up 37 percent to 46 percent of New York City's population during the three decades in which it used preferential voting for its school board elections.[372] The minority groups won 35 percent to 57 percent of these positions, compared to only 5 percent to 25 percent of seats on the city council, which were elected using single-member districts.[373] In the Spanish Senate as well,

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[369] See Briffault, 95 Colum L Rev at 434 (cited in note 343); Karlan, 24 Harv CR–CL L Rev at 236 (cited in note 304) (noting that these approaches avoid "permanently embedding racial polarization in the political landscape by drawing district lines in an expressly race-conscious manner"); Pildes and Donoghue, 1995 U Chi Legal F at 255 (cited in note 336).

[370] See Bowler, Donovan, and Brockington, *Electoral Reform and Minority Representation* at 98–103 (cited in note 308).

[371] See id at 101. See also id at 98 (finding seat-vote slope of 0.95 for these jurisdictions, where 1.0 indicates perfect proportionality); Edward Still, *Cumulative Voting and Limited Voting in Alabama*, in Rule and Zimmerman, eds, *United States Electoral Systems* 183, 184 (cited in note 220) ("Empirical studies of existing LV and CV systems show they usually result in the election of racial minorities at a level close to the minority percentage in the population.").

[372] See Robert Richie, *Improving New York City's Community School Board Elections: Testimony to the Citywide Community School Board Elections Committee* (Center for Voting and Democracy Dec 2, 1997), online at http://archive.fairvote.org/library/geog/cities/ny_school_board.htm (visited May 11, 2013).

[373] See id. See also Douglas J. Amy, *Real Choices/New Voices: The Case for Proportional Representation in the United States* 138 (Columbia 1993); Benoit and Shepsle, *Electoral Systems and Minority Representation* at 73 (cited in note 307); Leon Weaver and Judith Baum, *Proportional Representation on New York City Community School*

controlling for malapportionment, the two main ethnic parties in the 1980s both received slightly *higher* seat shares than vote shares in a system of four-member districts with limited voting.[374] And in Ireland, the Protestant minority has secured approximately proportional representation for decades in a regime of three- to five-member districts with preferential voting.[375] In contrast, racial, ethnic, and religious minorities are dramatically under-represented in all countries that employ single-member districts.[376]

A further advantage of multimember districts with alternative voting rules is that they ensure minority representation without giving rise to extensive litigation. As mentioned above, there have been hundreds of VRA lawsuits since the statute was amended in 1982, many requiring the plaintiffs to prove contestable elements such as racial polarization and subjection to discrimination.[377] Voting rights suits are actually among the most time- and labor-intensive of all actions brought before the federal courts.[378] Abroad as well, the most prominent court dispute over minority representation involved the dissolution of a single-member Acadian-majority district in New Brunswick.[379]

But very little of this legal activity is necessary with limited, cumulative, or preferential voting. With respect to local jurisdictions that employ one of these schemes, their compliance with the VRA is almost assured (thanks to their high resultant levels of minority representation), and they typically no longer even need to draw district lines.[380] Counties and states must still

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Boards, in Rule and Zimmerman, eds, *United States Electoral Systems* 197, 202–03 (cited in note 220).

374 See Lijphart, Pintor, and Sone, *The Limited Vote* at 167 (cited in note 331) (showing that Catalan party won 4.9 percent of seats with 4.2 percent of votes and Basque party won 4.1 percent of seats with 2.0 percent of votes).

375 See Enid Lakeman, *Comparing Political Opportunities in Great Britain and Ireland*, in Wilma Rule and Joseph F. Zimmerman, eds, *Electoral Systems in Comparative Perspective: Their Impact on Women and Minorities* 45, 52–53 (Greenwood 1994); Rein Taagepera, *Beating the Law of Minority Attrition*, in Rule and Zimmerman, eds, *Electoral Systems in Comparative Perspective* 235, 240 (cited in note 375). See also Blair, 219 Annals NY Acad Sci at 23 (cited in note 332) (stating that African Americans were better represented under cumulative voting in Illinois than in most other states).

376 See notes 311–12, 318 and accompanying text.

377 See note 302 and accompanying text.

378 See *Shelby County*, 679 F3d at 872 (discussing study finding that voting rights suits are fifth most work-intensive out of sixty-three categories).

379 See note 317 and accompanying text.

380 See Bowler, Donovan, and Brockington, *Electoral Reform and Minority Representation* at 22 (cited in note 308) (observing that jurisdictions often adopt limited or cumulative voting "to save the time and cost of drawing districts"); Steven Mulroy, *Alternative,*

design districts even if they assign them multiple members—but in smaller numbers and for lower stakes. Since minority groups are able to win seats over wider vote share ranges, the precise locations of district boundaries become less important. Not surprisingly, there has not been *any* successful VRA litigation against jurisdictions that have embraced one of the alternatives to the usual American model.[381] Nor have any foreign countries that employ these approaches ever been sued over their use (successfully or otherwise) on the ground of inadequate minority representation.

Finally, there is reason to think that multimember districts with alternative voting rules foster more vigorous elections than the status quo. The Bowler study of all US jurisdictions using limited or cumulative voting found that their elections feature higher turnout, more active campaigning by candidates, greater mobilization by outside groups, and more contested races than either single-member districts or at-large regimes.[382] Similarly, Professors David Farrell and Ian McAllister determined that voters worldwide in preferential voting systems exhibit greater satisfaction with democracy and are more likely to believe that elections are conducted fairly.[383] The likely explanation is that voters are more inclined to participate, and candidates to compete, when elections are decided by rules other than winner-take-all. Under the usual electoral arrangements, many districts have lopsided racial and partisan compositions, many races are uncompetitive, and many voters and candidates do not engage as energetically as possible in the political process.[384] But under limited, cumulative, or preferential voting, groups that do not

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Nondistrict Vote Dilution Remedies under the Voting Rights Act *15 (University of Memphis School of Law Research Paper No 111, Sept 2011), online at http://ssrn.com/abstract=1923777 (visited May 11, 2013).

[381] To the contrary, these alternatives have most commonly been adopted in the first place as *remedies* in VRA litigation. See, for example, Karlan, *Maps and Misreadings* at 227, 234 (cited in note 304) (discussing Alabama litigation that resulted in dozens of municipalities instituting either limited or cumulative voting).

[382] See Bowler, Donovan, and Brockington, *Electoral Reform and Minority Representation* at 51–64, 75–91 (cited in note 308). See also Shaun Bowler, David Brockington, and Todd Donovan, *Election Systems and Voter Turnout: Experiments in the United States*, 63 J Polit 902, 912–13 (2001).

[383] See David M. Farrell and Ian McAllister, *Voter Satisfaction and Electoral Systems: Does Preferential Voting in Candidate-Centered Systems Make a Difference?*, 45 Eur J Polit Rsrch 723, 732, 739 (2006).

[384] See Amy, *Real Choices/New Voices* at 146–47 (cited in note 373).

command plurality support can still win seats—and thus have a greater incentive to leap wholeheartedly into the fray.

In sum, then, the case for multimember districts with alternative voting rules is that they result in higher levels of minority representation, through more dynamic elections, for both diffuse and concentrated groups. They do so, moreover, without recognizing race explicitly or triggering endless rounds of acrimonious litigation. Below I consider several of the objections that scholars and judges have posed to these approaches.

2. Objections.

One relatively crude argument against multimember districts with alternative voting rules is that they are too unfamiliar or exotic for American jurisdictions. Justice Thomas, for example, has referred to them as "bizarre concoctions of Voting Rights Act plaintiffs" and "radical departures from the electoral systems with which we are most familiar."[385] But, as noted earlier, dozens of American towns and counties in at least twelve different states currently use limited, cumulative, or preferential voting.[386] A sovereign state, Illinois, also employed cumulative voting for more than a century for its state house races.[387] Party-list proportional representation, having never been adopted by any American jurisdiction, may indeed be an alien system, but the same simply cannot be said for the approaches under examination here.

A more sophisticated version of the unfamiliarity argument is that voters will be confused (and their voting intentions confounded) by rules that require them to rank candidates or to cast more or fewer ballots than they are accustomed to.[388] Limited, cumulative, and preferential voting *are* somewhat more complicated than plurality voting in single-member districts,[389] but there is abundant evidence that voters can manage this additional complexity. In a survey in Alamogordo, New Mexico, which uses cumulative voting for its city council elections,

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385 *Hall*, 512 US at 910 & n 17 (Thomas concurring in the judgment).

386 See notes 304–06 and accompanying text.

387 See Blair, 219 Annals NY Acad Sci at 21–26 (cited in note 332).

388 See, for example, Douglas W. Rae, *The Political Consequences of Electoral Laws* 128 (Yale 1971) (arguing that voters lack "rather complex cognitive arrangements" necessary for preferential voting).

389 Though they are only slightly more complicated than voting in at-large elections, which also requires voters to cast ballots for multiple candidates.

Professor Richard Cole and others found that 95 percent of voters understood the procedure and 87 percent deemed it no more difficult to comprehend than the regime it replaced.[390] Exit polls in fifteen Texas jurisdictions using cumulative voting revealed similar levels of understanding,[391] as did a survey in a South Dakota school district.[392] And it is clear from actual election results, both in America and abroad, that minority voters not only understand these systems but also deploy them effectively to elect the candidates of their choice.[393]

Another related worry is that voters and candidates in multimember districts with alternative voting rules will have difficulty coordinating their electoral strategies.[394] For instance, multiple minority candidates might run in a district whose minority population is only slightly above the threshold of exclusion; and then minority voters might split their ballots among these candidates with the result than none of them wins a seat. This fear of nonoptimal behavior also is belied by the favorable election results in jurisdictions that use these approaches.[395] Moreover, the fear is relevant in the first place only to limited or cumulative voting, since the systematic reallocation of votes under preferential voting largely allays any concerns about coordination.[396] And even under limited or cumulative voting, it is actually *larger* political groups, not minorities, that face the greatest strategic challenges. The optimal tactic is often obvious for minorities—nominate one candidate and then cast all ballots for her—

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[390] See Richard L. Cole, Delbert A. Taebel, and Richard L. Engstrom, *Cumulative Voting in a Municipal Election: A Note on Voter Reactions and Electoral Consequences*, 43 W Polit Q 191, 194 (1990).

[391] See Robert R. Brischetto and Richard L. Engstrom, *Cumulative Voting and Latino Representation: Exit Surveys in Fifteen Texas Communities*, 78 Soc Sci Q 973, 978–79 (1997).

[392] See Richard L. Engstrom and Charles J. Barrilleaux, *Native Americans and Cumulative Voting: The Sisseton-Wahpeton Sioux*, 72 Soc Sci Q 388, 391 (1991).

[393] See notes 370–74 and accompanying text. See also Brischetto and Engstrom, 78 Soc Sci Q at 980 (cited in note 391) (finding that Hispanics in Texas jurisdictions successfully "plumped" votes for their preferred candidates); Engstrom and Barrilleaux, 72 Soc Sci Q at 391 (cited in note 392) (same for Native Americans in South Dakota school district); Pildes and Donoghue, 1995 U Chi Legal F at 273–74 (cited in note 336) (same for African Americans in Alabama county).

[394] See David Brockington, et al, *Minority Representation under Cumulative and Limited Voting*, 60 J Polit 1108, 1112 (1998); Karlan, 24 Harv CR–CL L Rev at 230 (cited in note 304).

[395] See notes 370–74 and accompanying text. See also Brischetto and Engstrom, 78 Soc Sci Q at 984 (cited in note 391) (finding that Hispanic candidates' defeats under cumulative voting were not attributable to strategic errors).

[396] See Engstrom, 21 Stetson L Rev at 767 (cited in note 303); Pildes and Donoghue, 1995 U Chi Legal F at 299 (cited in note 336).

but much less clear for larger groups that need to decide how many candidates to run and how to distribute votes among them. For precisely this reason, it is majority parties in Britain, Japan, and Spain that typically have lost the most winnable seats under limited or cumulative voting.[397]

The final common argument against multimember districts with alternative voting rules is that they encourage legislative fragmentation. Because they lower the threshold of exclusion, they allow groups that cannot win district-wide pluralities into the legislature, thus threatening the two-party system that many Americans hold dear.[398] It is certainly true that *large* multimember districts (say with ten or more members) would enable additional parties to gain a legislative foothold—but these are not the kinds of districts that have generally been used in, or proposed for, the United States. To the contrary, most American jurisdictions that employ limited, cumulative, or preferential voting elect between three and five members in this fashion.[399] Illinois, notably, relied on three-member districts during its century-long experience with cumulative voting.[400] At these magnitudes, there is no evidence that multimember districts foster the development of third parties. None emerged in Illinois,[401] none routinely wins seats in the US jurisdictions that now use these approaches,[402] and even foreign non-ethnic third parties tend to

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397 See Bowler, Donovan, and Farrell, 47 Polit Stud at 911–12 (cited in note 332) (discussing losses of "locally-dominant" Liberal Party in Birmingham election under cumulative voting after it nominated too many candidates); Lijphart, Pintor, and Sone, *The Limited Vote* at 159–63 (cited in note 331) (same for Liberal Democratic Party in Japan and Socialist Party in Spain under limited voting).

398 See Karlan, 24 Harv CR–CL L Rev at 230 (cited in note 304); Pildes and Donoghue, 1995 U Chi Legal F at 256–57 (cited in note 336). See also *Davis v Bandemer*, 478 US 109, 144–45 (1986) (O'Connor concurring in the judgment) (praising American two-party system and worrying that it would be undermined by use of proportional representation to curb partisan gerrymandering).

399 See Brockington, et al, 60 J Polit at 1111 (cited in note 394) (showing that US cumulative voting jurisdictions average 3.22 seats per election and US limited voting jurisdictions average 4.00 seats per election); Engstrom, 21 Stetson L Rev at 752–62 (cited in note 303).

400 See Blair, 219 Annals NY Acad Sci at 21–26 (cited in note 332).

401 See id at 21.

402 See Pildes and Donoghue, 1995 U Chi Legal F at 291–94 (cited in note 336). See also Lani Guinier, *The Representation of Minority Interests*, in Peterson, ed, *Classifying by Race* 21, 21 (cited in note 307) (noting that jurisdictions can "juggl[e] the number of legislative positions within each multimember district" so as to "set a community-specific threshold of exclusion"); Bowler, Donovan, and Brockington, *Electoral Reform* at 41 (cited in note 308).

have seat shares that are substantially lower than their vote shares.[403]

Indeed, multimember districts with alternative voting rules might actually *improve* the functionality of the American two-party system. According to a study by Professor Greg Adams, one of the main effects of Illinois's cumulative voting regime was to increase the variance of the policy views held by both Democratic and Republican members of the state house.[404] Freed from the need to win over the median voter in single-member districts, politicians from both parties were able to adopt wider ranges of policy positions. These wider ranges unsurprisingly overlapped to a substantial degree, leading to a lower level of legislative polarization. Since high and rising polarization is one of the most worrisome features of the current American political scene,[405] the appeal of limited, cumulative, and preferential voting is particularly pronounced at present. As Professor Adams writes, "If one's greatest concern in a . . . legislature is partisan gridlock, multi-member districts could potentially ease the partisan feuding by making each party more ideologically diverse."[406]

CONCLUSION

This Article began with a description of Texas's most recent redistricting experience—an experience that exemplifies each aspect of the exceptional (and exceptionally flawed) American model of district design. Can this model actually be reformed? Is there any hope that independent commissions might soon take the place of political actors, that homogenizing criteria might supplant diversifying requirements, or that alternative voting systems might displace plurality-rule elections? In fact, there is reason for optimism on all three fronts.

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403 See Lijphart, Pintor, and Sone, *The Limited Vote* at 164, 167 (cited in note 331) (presenting results under limited voting for Japan and Spain).

404 Greg D. Adams, *Legislative Effects of Single-Member vs. Multi-member Districts*, 40 Am J Polit Sci 129, 140 (1996). See also Gary W. Cox, *Centripetal and Centrifugal Incentives in Electoral Systems*, 34 Am J Polit Sci 903, 927 (1990) ("In multimember districts, cumulation promotes a dispersion of competitors across the ideological spectrum.").

405 For an excellent recent discussion of polarization and its consequences, see Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 Calif L Rev 273, 276–81 (2011).

406 Adams, 40 Am J Polit Sci at 141–42 (cited in note 404).

Start with redistricting institutions. After several decades in which popular initiatives to establish commissions almost always failed,[407] such measures have recently succeeded in Arizona and (twice) in California. Reformers have developed several tactics that seem to resonate with voters, for instance, recruiting bipartisan support for initiatives and proposing to staff commissions with citizens rather than former judges.[408] Of course, direct democracy is unavailable in many states, but even in these jurisdictions, the political process may be growing more amenable to institutional change. At the urging of the state's reformist governor, the New York legislature recently embraced a commission for the next redistricting cycle,[409] as did the Texas State Senate after becoming frustrated by endless rounds of litigation.[410]

The courts can also prod the elected branches into relinquishing their line-drawing authority by subjecting their district plans to heightened scrutiny. Indeed, some scholars believe this is already the courts' implicit practice, especially in racial gerrymandering cases.[411] Lastly, at least in theory, Congress could exercise its Elections Clause power and compel states to craft congressional districts using commissions.[412] Federal law already requires congressional districts to have a single member[413] and used to require contiguity and compactness;[414] there is no reason why it could not be extended to issues of institutional design as well.

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[407] See generally Stephanopoulos, 23 J L & Polit 331 (cited in note 29) (discussing redistricting initiatives and reasons for their success or failure).

[408] See id at 381–85. See also Vladimir Kogan and Thad Kousser, *Great Expectations and the California Citizens Redistricting Commission*, in Moncrief, ed, *Reapportionment and Redistricting* 219, 227 (cited in note 44); Nicholas O. Stephanopoulos, *A Fighting Chance for Redistricting*, LA Times A21 (Sept 27, 2008).

[409] See note 22.

[410] See note 24. In addition, almost every foreign jurisdiction that has adopted a redistricting commission has done so through ordinary legislation. Political actors plainly are not *incapable* of enacting policies that result in a reduction of their own power. See, for example, Courtney, *Commissioned Ridings* at 36–56 (cited in note 66) (discussing history of Canadian provinces' adoption of redistricting commissions).

[411] See Issacharoff, 116 Harv L Rev at 646–47 (cited in note 12); Issacharoff, 71 Tex L Rev at 1690 (cited in note 44). See also *1994 Alberta Reference Case*, 119 DLR 4th 1, 19 (Alberta App 1993) (Canada) (noting that lower "level of deference is appropriate when the author of the boundary is some [entity] . . . who is not insulated from partisan influence").

[412] See US Const Art I, § 4, cl 1. See also *Vieth v Jubelirer*, 541 US 267, 275 (2004) (describing Elections Clause as including "power to check partisan manipulation of the election process").

[413] See 2 USC § 2c.

[414] See *Vieth*, 541 US at 276.

Next consider redistricting criteria. All of the initiatives that created commissions put into place homogenizing requirements such as compactness, respect for political subdivisions, and respect for communities of interest.[415] One recent Florida measure actually aimed to curb gerrymandering *solely* by imposing rules that tend to make districts more homogeneous.[416] Homogenizing criteria also are much more realistic products of the political process than are independent commissions. Dozens of states already employ such criteria, particularly at the state legislative level,[417] and they easily could be adopted by more states or applied to congressional districts as well. Furthermore, as I have argued elsewhere, the Supreme Court has evinced a preference for districts that are congruent with geographic communities in several lines of its redistricting case law.[418] Judicial doctrine thus already exerts a homogenizing influence on district composition. And again, as it has in the past, Congress could once more enact homogenizing requirements for the design of all congressional districts.

Finally, with respect to minority representation, the VRA has been the vehicle through which most jurisdictions have implemented alternative voting systems. While VRA litigation usually has resulted in the formation of single-member–majority-minority districts, plaintiffs increasingly have sought—and defendants and courts increasingly have agreed to—multimember districts with limited or cumulative voting rules.[419] This is a very promising development that should be emphatically encouraged, not only at the municipal level but also for statewide elections. Even without the spur of potential VRA liability, the dozen or so states that currently use multimember districts with plurality voting rules could switch to alternative schemes almost effortlessly.[420] All they would have to do is change the type of ballot that each voter within a multimember district is entitled to cast. And yet again, Congress could improve matters for the whole country by either mandating

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415 See Stephanopoulos, 23 J L & Polit at 345–77 (cited in note 29).

416 See note 25.

417 See notes 166–67.

418 See Stephanopoulos, 160 U Pa L Rev at 1413–24 (cited at note 15).

419 See note 308 and accompanying text. See also *United States v Village of Port Chester*, 704 F Supp 2d 411, 448–49 (SDNY 2010) (summarizing favorable VRA case law on alternative voting systems).

420 See NCSL, *Redistricting* at 160 (cited in note 4) (listing states using multimember districts for their state legislatures).

multimember congressional districts with alternative voting rules (an unlikely prospect) or at least granting states the discretion to adopt them if they so desire. Precisely because of these approaches' advantages, House members have repeatedly introduced bills that would eliminate the single-member requirement, though so far to no avail.[421]

Several mechanisms thus exist for making the American model of redistricting less unique—and better. Popular initiatives, state legislation, judicial intervention, and congressional action have all made valuable contributions in the past and can all be expected to bear further fruit in the future. Accordingly, reformers need not despair when they contemplate the many jurisdictions in which political actors still draw heterogeneous single-member districts that underrepresent minorities. The status quo in these places is indeed lamentable, but the situation was worse not long ago, and most recent policy shifts have been in a favorable direction. If these trends continue, the days of American electoral exceptionalism may well be numbered.

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[421] See Voter Choice Act of 2005, HR 2690, 109th Cong, 1st Sess, in 151 Cong Rec 11463 (May 26, 2005); Voters' Choice Act, HR 1189, 107th Cong, 1st Sess, in 147 Cong Rec 4299 (Mar 22, 2001); States' Choice of Voting Systems Act, HR 1173, 106th Cong, 1st Sess, in 145 Cong Rec 4727 (Mar 17, 1999); Voters' Choice Act, HR 2545, 104th Cong, 1st Sess, in 141 Cong Rec 30009 (Oct 26, 1995).