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Reorienting Home Rule: Part 1–The Urban Disadvantage in National and State Lawmaking

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Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking

Paul A. Diller^{*†}

“Legislators represent people, not trees or acres.”
Chief Justice Earl Warren, *Reynolds v. Sims* (1964)

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† Note on citations: All election results come from the secretaries’ of states (or equivalent) offices, sometimes obtained through a gathering website like Ballotpedia. Population figures come from the U.S. Census and, unless stated otherwise, are either 2013 or 2014 estimates, depending on the year in question.

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INTRODUCTION

The federal government is dysfunctional, largely because of Congress’s inability to pass laws that solve the problems facing the country. Numerous opinion polls rate Congress at the lowest levels in recent history.¹ A president re-elected by a solid majority in 2012 found himself immediately hobbled by Congress’s obstructionism. American voters, frustrated by federal inaction, seemingly rewarded the same obstructionists in the 2014 midterm elections. The federal government seems stuck in a cycle of despair. Although less dysfunctional than the federal government, in recent years states have swung wildly in ideological directions that sometimes diverge sharply from the median views of the state’s voters. Some states innovate and solve problems of concern to voters, to be sure, but there is also evidence that state governments do not accurately reflect the views of many states’ voters on a consistent basis.

By contrast, numerous commentators praise cities, counties, and urban metropolises for taking the lead in tackling problems that the federal

1. *E.g.*, Rebecca Riffkin, *2014 U.S. Approval of Congress Remains Near All-Time Low*, GALLUP (Dec. 15, 2014), <http://www.gallup.com/poll/180113/2014-approval-congress-remains-near-time-low.aspx> [<https://perma.cc/9S2R-7SYT>].

government and many states have fumbled: climate change, income inequality, paid sick leave, immigration reform, gay rights, public health, gun control, and others.² Those lauding local governments have offered many reasons for their leadership in these areas. Some commentators have cited the smaller scale of local government and its knack for “practical” problem-solving.³ Others have highlighted the relative lack of veto points in the legislative processes of local government, which enables cities to overcome the inertia prevalent at the federal level.⁴ The concentrated, left-leaning political preferences of urban voters, which can facilitate policy consensus on issues that might cause gridlock at other levels of government, undoubtedly play an important role.⁵

Big cities as progressive islands in the statewide and national sea is thus a common theme in the local government literature. Inevitably, cities’ views on issues—as translated into policy—collide with the authority of state and federal actors representing a different electorate. How to resolve these disputes normatively and doctrinally receives much attention from local government scholars.⁶ Most scholars accept the status quo that

2. See generally BENJAMIN R. BARBER, *IF MAYORS RULED THE WORLD: DYSFUNCTIONAL NATIONS AND RISING CITIES* (2013); BRUCE KATZ & JENNIFER BRADLEY, *THE METROPOLITAN REVOLUTION: HOW CITIES AND METROS ARE FIXING OUR BROKEN POLITICS AND FRAGILE ECONOMY* (2013); see also Thomas L. Friedman, *I Want to Be a Mayor*, N.Y. TIMES (July 27, 2013), <http://www.nytimes.com/2013/07/28/opinion/sunday/friedman-i-want-to-be-a-mayor.html> [<https://perma.cc/3LTT-4PA8>].

3. E.g., BARBER, *supra* note 2, at 11 (discussing the “pragmatic, problem-solving character” of cities).

4. See, e.g., Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1265–69 (2014) (arguing that cities’ streamlined legislative structures makes them better able to advance regulation of certain industries); CLAYTON P. GILLETTE, *LOCAL REDISTRIBUTION AND LOCAL DEMOCRACY: INTEREST GROUPS AND THE COURTS* 181 (2011) (observing that cities, with unicameral legislatures, are less likely to “privilege the status quo” than governments with bicameral legislatures).

5. Diller, *supra* note 4, at 1262–65 (discussing big cities’ left-leaning political preferences); see also Jonathan A. Rodden, *The Long Shadow of the Industrial Revolution: Political Geography and the Representation of the Left* 60 (Mar. 25, 2011) (unpublished manuscript) (on file with the *Louisiana Law Review*), <http://web.stanford.edu/~jrodde/wp/shadow.pdf> [<https://perma.cc/9FX-Y-P6RT>] (“[A] relatively tight correlation between population density and left voting is quite ubiquitous in industrialized societies.”).

6. See, e.g., Kenneth Stahl, *Preemption Federalism, and Local Democracy*, FORDHAM URB. L.J. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837905 [<https://perma.cc/M7CS-WSDD>]; Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113 (2007).

preemption by higher-level authorities, whether state or federal, is ultimately constitutional and, impliedly, democratically legitimate.⁷ Even those who argue that local ordinances should trump state law do so only in limited contexts, largely accepting the legitimacy of state and federal action.⁸

This Article takes a different tack: it impugns the democratic legitimacy of the federal and state lawmaking processes from the perspective of large and densely populated urban areas. More specifically, this Article explains why the federal and state governments fail to represent the median voter, and how this failure systematically disadvantages the views of big-city residents. At the federal level, the anti-urban dynamic is most pronounced in Congress. Hence, the urban-centered majority that succeeded in electing a president in 2008 and 2012 has been stymied by a Congress that underweights urban votes. For example, despite more than 90% of the U.S. population supporting increased gun regulation after the Newtown school shooting—with support at its highest in urban areas—Congress failed to produce any meaningful legislative response. Although less obvious, many state legislatures shortchange the views of urban residents in favor of more rural and exurban voters. Thus, although a majority of a state's voters might prefer to expand Medicaid under the Affordable Care Act, for instance, a state legislature's anti-urban skew helps block any such expansion if the pro-expansion majority is concentrated in urban areas.

As this Article will demonstrate in detail, the urban disadvantage at the national and state levels is the result of a combination of spatial, demographic, and legal forces. A significant ideological cleavage in partisan views exists between residents of large, dense, urban areas and those of outlying exurban and rural areas. This cleavage holds on a number of issues—gun control versus firearm “rights,” mass transit versus private automobiles, and fighting climate change versus promoting extractive industries. The cleavage does not conform perfectly to geography, of course. There are right-leaning pockets in dense urban areas and smatterings of left-leaning rural areas. But, generally speaking, left-leaning voters are intensely concentrated in densely populated urban areas; less densely populated suburban areas are more politically heterogeneous; and exurban and rural areas are strongly right-leaning, but not as intensely or uniformly as urban areas that lean left.

7. See, e.g., Diller, *supra* note 6, at 1138 (“In most states . . . the legislature is free to expressly preempt any local ordinance.”).

8. E.g., Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 181 (2005).

Given this division of political views, the Constitution's apportionment of two senators to each state irrespective of population contributes substantially to a national anti-urban skew. The other force at both the national and state levels is the use of winner-take-all, single-representative, contiguous districts. Under a system of national proportional representation, the spatial distribution of political preferences would not affect the translation of votes to seats—that is, left-leaning votes would have the same value in urban areas as they do in rural areas. Under a winner-take-all, district-based system, by contrast, left-leaning parties and candidates waste comparatively more votes in urban areas than their right-leaning counterparts do in exurban and rural areas. In other words, Republicans win more seats by 55% to 40%, while Democrats win more by 75% to 20%. Writ large, this dynamic explains, for instance, why Democratic House candidates won 1.4 million more votes than Republican candidates in 2012, yet Republicans comfortably retained their majority.⁹

In the last two decades, Republican state legislatures have exacerbated the urban disadvantage by intentionally gerrymandering U.S. House and state legislative districts to favor the political preferences of exurban and rural areas. But, as this Article explains, the political effects of the spatial distribution of ideological and partisan preferences in a first-past-the-post system persist to some extent even without such gerrymandering. The phenomenon of “unintentional gerrymandering,” whereby urban-favored Democratic legislative candidates waste comparatively more votes in their districts than do Republicans in suburban-to-rural districts, puts urban voters' political preferences at a structural disadvantage that is almost impossible to “correct” even with intentional, pro-Democratic gerrymandering.

Part I of the Article explains the spatial distribution of political and ideological preferences in the United States. Part II offers the Article's normative premises. The first, overarching premise is that a legislative system ought to represent the views of the median voter as expressed in periodic elections. To reach this goal, two subsidiary principles apply: the governmental system must comply with one-person, one-vote, and that system must not be systematically biased toward a particular political party. If a political party wins a clear majority of the popular vote over time, such votes must translate into legislative majorities with regularity. Part II then surveys the degree to which constitutional law and popular political culture have embraced these normative commitments and demonstrates that majoritarianism, in particular, enjoys strong support.

9. Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES (Feb. 3, 2013), <http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html?pagewanted=all> [<https://perma.cc/7SN4-7FUD>].

Using the normative framework articulated in Part II, Part III explains how the Senate's egregious violation of one-person, one-vote is partly responsible for the urban disadvantage in the national lawmaking process. Part IV then details how the U.S. House of Representatives, while roughly compliant with one-person, one-vote, suffers from substantial partisan bias in a manner that shortchanges the political and ideological views of urban residents. Part IV explains how this bias results from not only pro-Republican intentional gerrymandering, but also unintentional gerrymandering and the presumed federal constitutional prohibition on House districts crossing state lines. Proceeding from Part IV's explanation of unintentional gerrymandering, Part V examines state governments and explains how many state legislatures experience the same phenomenon as the U.S. House.

Part VI looks at other structural biases against urban voters in the federal and state systems. Using Herbert Wechsler's "Political Safeguards of Federalism" as a foil, this Part explains how urban metropolises lack similar structural safeguards in either the federal or state systems.¹⁰ For example, although state boundaries are honored in the selection of officials for the national government—senators represent entire states; members of the House represent part of only one state—local governments' are not. The districts of House members and state legislators may slice through numerous cities and counties. This lack of structural protection for local government units compounds, or at least fails to remedy, the disadvantage that big-city residents suffer in the state and national lawmaking processes.

This Article is the first of a two-part series. The second article in this series, to be published in a later issue of this law review, will assess the degree to which state constitutional home rule doctrine might correct the urban disadvantage explained herein.

I. EMPIRICAL PREMISE: A SPATIALLY DIVIDED ELECTORATE

Recent presidential elections have revealed a United States that is divided politically along geographic lines. This division transcends the well-known "red"—"blue" state dichotomy. At the presidential level, Democratic candidates rack up huge majorities of votes in densely populated cities and inner-ring suburbs, while Republicans excel to a lesser but still substantial extent in exurban and rural areas.¹¹ The density

10. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

11. Dante J. Scala et al., *Red Rural, Blue Rural? Presidential Voting Patterns in a Changing Rural America*, 48 POL. GEOGRAPHY 108, 108 (2015) (documenting Democrats' reliance on "strong performance in cities to offset a poor performance

of an area's population is an extraordinary predictor of which way it will vote in a presidential election.¹² Although this dynamic does not hold in every single state, it is remarkably common throughout the nation. Even in "red" states, Republicans trounce Democrats overall, but Democrats win big cities, college towns, and other urbanized pockets. In "blue" states, the Democrats win big overall, but Republican candidates prevail by large margins in many—if not most—rural, sparsely populated counties.¹³

Some have questioned the usefulness of presidential election data in establishing a spatial political divide given the unwieldiness of presidential platforms.¹⁴ Regardless, it seems reasonable to assume that while not perfect, presidential elections can convey some helpful information about the kinds of policies the electorate prefers.¹⁵ Whatever the limits of presidential returns, down-ballot elections for Congress, governors, and state legislatures also reveal a spatially divided electorate. To be sure, voters generally know less about lower-profile office holders and candidates and often vote on the basis of party affiliation or as a referendum on the president's—or, in the case of state legislatures, the governor's—performance.¹⁶ Many voters, however, are aware that their particular legislator will help determine the overall partisan composition and leadership of the body.¹⁷ Moreover, if voters choose down-ballot

outside urban areas"); Josh Kron, *Red State, Blue City: How the Urban-Rural Divide Is Splitting America*, ATLANTIC (Nov. 30, 2012), <http://www.theatlantic.com/politics/archive/2012/11/red-state-blue-city-how-the-urban-rural-divide-is-splitting-america/265686/> [<https://perma.cc/J6S3-FE78>].

12. See Richard Florida & Sara Johnson, *What Republicans Are Really Up Against: Population Density*, ATLANTIC: CITYLAB (Nov. 26, 2012), <http://www.citylab.com/politics/2012/11/what-republicans-are-really-against-population-density/3953/> [<https://perma.cc/52PL-LWU3>] (charting county population density versus 2012 presidential election vote share).

13. See Kron, *supra* note 11.

14. See, e.g., Samuel J. Abrams & Morris P. Fiorina, "The Big Sort" That Wasn't: A Skeptical Reexamination, 45 POL. SCI. & POL. 203, 204 (2012).

15. *Id.* ("[P]residential voting returns obviously are an important indicator of political preferences.").

16. ROBERT P. STEED ET AL., SOUTHERN PARTIES AND ELECTIONS: STUDIES IN REGIONAL POLITICAL CHANGE 55 (2012) (stating that voters for lower-level offices often vote based on party affiliation because candidates are less well-known).

17. *Id.* The degree to which American voters understand the basic functioning of the political system and accurately register their preferences when voting is the subject of much debate in the political science literature. For a commendable recent summary concluding that while "[v]oters make mistakes," they are "nonetheless capable of providing useful feedback when armed with clear party labels . . . that

candidates more on the basis of party affiliation than on the individual candidates' positions, then any geographic trends in preference are even more indicative of an ideological divide.

That left-leaning parties and candidates perform better in densely populated urban areas is not a new phenomenon. In his exhaustive study, political scientist Jonathan Rodden traces the dynamic back to employment and residential patterns formed during the Industrial Revolution, in the United States and beyond.¹⁸ Urban residents, clustered in “tight, uncomfortable living quarters and often-inhumane working conditions,” were “ripe for mobilization by socialist political entrepreneurs.”¹⁹ In some nations, far-left socialist parties succeeded in establishing proportional representation, which further strengthened their clout in the national legislature.²⁰ In nations that retained single-member, geographic-district-based legislatures, such as the United Kingdom and the United States, far-left movements joined with other elements under the umbrella of a moderate-left political party, like the post-World-War-II Democrats, to exercise any clout. Thus, until fairly recently, urban areas strongly preferred Democratic candidates, and many rural areas did so as well.²¹ In the United States, therefore, according to Rodden, party identification or candidate preference was not always a great indication of an area's true policy preferences and ideological leanings.²²

are consistent over time and available at the moment of decision,” see Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 370–84 (2013).

18. Rodden, *supra* note 5, at 60 (“[A] relatively tight correlation between population density and left voting is quite ubiquitous in industrialized societies.”).

19. *Id.* at 9.

20. *Id.* at 30–51 (discussing examples from Continental Europe).

21. For instance, Democrats dominated the South in Congressional elections, even in rural areas, until as late as the 1980s. DAVID LUBLIN, *THE REPUBLICAN SOUTH: DEMOCRATIZATION AND PARTISAN CHANGE* 1, 37 (2004) (noting Democratic dominance of Southern congressional delegations into the 1980s); Nicol C. Rae, *The Democrats' “Southern Problem” in Presidential Politics*, 22 *PRESIDENTIAL STUDIES Q.* 135, 135 (1992) (noting that Democrats held approximately two-thirds of U.S. House seats in the South as late as the early 1990s).

22. Rodden, *supra* note 5, at 138, 167 (discussing left-wing Democrats' alliance with Blue Dog or Boll Weevil Democrats). Rodden, however, may underestimate common ground shared by left-leaning urban areas and the rural, impoverished South, particularly in the pre-1960s social order, when racial and cultural issues were largely off the table. See Rae, *supra* note 21, at 136 (noting that the “economically-backward South” benefited disproportionately from FDR's New Deal programs, which strengthened the Democratic party in the region); see also LUBLIN, *supra* note 21, at 29; MICHAEL J. WEBBER, *NEW DEAL*

However ideologically disparate the Democratic party of old may have been, it has clearly become more uniformly “liberal” today, and more preferred than ever by residents of densely populated urban areas.²³ Similarly, the Republican party at the national level has largely lost its liberal, Northeastern wing and represents almost no inner-city House districts.²⁴ To some extent, the urban dominance of the Democratic party is because of race: blacks overwhelmingly vote for Democratic candidates, while whites either split their votes or lean heavily toward the Republican party, depending on the region.²⁵ Cities with large African-American populations, such as Detroit and Washington, D.C., therefore, overwhelmingly support Democratic candidates. But the urban preference for Democratic presidential candidates largely transcends race.²⁶ By contrast, rural whites,

FAT CATS: BUSINESS, LABOR, AND CAMPAIGN FINANCE IN THE 1936 PRESIDENTIAL ELECTION 101–02 (2000) (discussing enthusiasm for FDR among “ordinary Southerners” due to the region’s “pressing need for economic relief”).

23. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1086–87 (2014) (citing numerous sources) (arguing that today’s state and national parties are more partisan and ideologically cohesive than they were decades earlier); KEITH T. POOLE & HOWARD ROSENTHAL, *IDEOLOGY & CONGRESS* 318 (2007) (“The collapse of the old southern Democratic Party has produced . . . two sharply distinct political parties,” reflecting a “degree of polarization in Congress . . . approaching levels not seen since the 1890s.”).

24. Bulman-Pozen, *supra* note 23, at 1086–87; POOLE & ROSENTHAL, *supra* note 23, at 318; Cliff Schechter, *Extremely Motivated: The Republican Party’s March to the Right*, 29 FORDHAM URB. L.J. 1663 (2001).

25. See Peyton M. Craighill & Sean Sullivan, *The Wide Racial Gap in Obama’s Presidential Elections*, in 2 *Charts*, WASH. POST: THE FIX (Aug. 28, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/08/28/the-wide-racial-gap-in-obamas-presidential-elections-in-2-charts/> [<https://perma.cc/UQK7-U3BD>] (noting that 93% of black voters supported President Obama in his 2012 re-election, as opposed to just 39% of white voters); *Obama Polled Low with Southern Whites*, USA TODAY: THE OVAL (Nov. 19, 2012), <http://www.usatoday.com/story/theoval/2012/11/19/obama-southern-white-vote/1714291/> [<http://perma.cc/BZB2-Z9DH>] (citing exit polls showing that Obama won 10% of the white vote in Mississippi and 15% of the white vote in Alabama, as opposed to 51% of the white vote in Iowa). Hispanic Americans and Asian Americans have also preferred Democratic presidential candidates in recent years, although by a less robust margin than African Americans. See, e.g., Alexander Kuo et al., *Why Do Asian Americans Identify as Democrats? Testing Theories of Social Exclusion and Intergroup Solidarity 1* (Feb. 20, 2014) (unpublished manuscript), https://www.princeton.edu/csdp/events/Mo02272014/KMM_AsianAmericans_20Feb2014.pdf [<https://perma.cc/98VB-QK5C>].

26. See, e.g., Rodden, *supra* note 5, at 80 (discussing the 2004 presidential election); Richard Florida, *What Is It Exactly That Makes Big Cities Vote Democratic?*, ATLANTIC: CITYLAB (Feb. 19, 2013), <http://www.citylab.com/politics>

particularly in the South and West, strongly prefer Republicans, whereas minority voters in rural areas often remain loyal Democratic voters.²⁷

Moving beyond party labels, scholars have attempted to discern the ideological preferences of city residents through opinion polls on specific issues. Ranking responses on a “liberal” to “conservative” scale, Chris Tausanovitch and Christopher Warsaw show that 38 of the 51 cities with populations greater than 250,000 are more liberal than the national mean.²⁸ Generally speaking, the larger the city, the older the city—which sometimes corresponds to population density—and if it is in the Northeast, Midwest, or along the Northern Pacific coast, the more liberal it ranks.²⁹ The smaller the city, the newer, and if it is in the South, lower Midwest, or Mountain West, the more conservative it ranks.³⁰

Another imperfect metric of the views of urban residents is the product of the local governments that represent them. The policies enacted by big cities undoubtedly reveal something about what urban residents want, even if there are many other factors at play.³¹ A quick look at the

/2013/02/what-makes-some-cities-vote-democratic/4598/ [https://perma.cc/5XUD-64UE] (reporting “no statistically significant association between a metro’s share of black residents and the share of Obama votes” in 2012).

27. See Andrew Gelman, *The Twentieth-Century Reversal: How Did the Republican States Switch to the Democrats and Vice Versa?*, 1 *STATS. & PUB. POL’Y* 1 (2014) (explaining the movement of rural whites to the Republican party in the last three decades); Richard Morrill et al., *Anomalies in Red and Blue: Exceptionalism in American Electoral Geography*, 26 *POL. GEOGRAPHY* 525, 537 (2007) (“The major . . . nonmetropolitan Democratic counties [include] ‘Black Belt’ counties in the south” and “several American Indian-dominated counties in the west and plains, and some areas with large Latino majorities, mainly along the border with Mexico.”). In Hawaii, which has the most diverse population of any state, including a very large percentage of Asian Americans, native Hawaiians, and mixed-race persons, William W. Welch, *More Hawaii Residents Identify as Mixed Race*, *USA TODAY* (Feb. 25, 2011), http://usatoday30.usatoday.com/news/nation/census/2011-02-24-hawaii-census_N.htm [https://perma.cc/9NKD-LSF3], there is no discernible urban–rural split in political preferences. See Rodden, *supra* note 5, at 82.

28. Chris Tausanovitch & Christopher Warsaw, *Representation in Municipal Government*, 108 *AM. POL. SCI. REV.* 605, 609 fig.1 (2014).

29. *Id.* (The most liberal cities include San Francisco, Washington, D.C., Seattle, Oakland, Boston, Minneapolis, Detroit, New York, Buffalo, Baltimore, and Chicago.)

30. *Id.* (The most conservative cities include Mesa, Ariz; Oklahoma City, Okla.; Virginia Beach, Va.; Colorado Springs, Colo.; Jacksonville, Fla.; Arlington, Tex.; Anaheim, Cal.; Omaha, Neb.; Tulsa, Okla.; Aurora, Colo.; and Anchorage, Alaska.)

31. *Id.* at 625 (“[M]unicipal policy actions are related to citizen policy preferences.”).

accomplishments or goals of major cities across the nation indicates a strong concern with economic inequality, climate change, immigration reform, gay rights, public health, and gun control.³² The distinctly urban nature of some of these issues, such as restricting guns, is obvious.³³ In other instances, there is a connection between seemingly “local” issues, such as parking and transportation, and more global issues like climate change. In still other instances, such as gay rights or immigration reform, the urban agenda might reflect the influence of constituencies whose presence is proportionally larger in urban areas than in the general population. Finally, on issues like public health, there is no obvious reason why urban residents ought to care more about the issue than the rest of the nation.³⁴

Why urban residents prefer certain policies and candidates is a complicated question. Rodden points to the urban form as well as the propensity of urban residents to abandon traditional, “religious” values to which rural residents remain more steadfast.³⁵ Others postulate that living in closer proximity to the poor leads to a greater willingness among the urban rich to be taxed for social welfare programs.³⁶ Resolving the question of whether urban residence shapes political preferences or vice versa is beyond the scope of this Article.³⁷ The goal here, by contrast, is to take urban ideological and political views as given and then show how the state and federal lawmaking processes systematically discriminate against them.

32. See, e.g., Claire Cain Miller, *Liberals Turn to Cities to Pass Laws and Spread Ideas*, N.Y. TIMES: THE UPSHOT (Jan. 26, 2016), http://www.nytimes.com/2016/01/26/upshot/liberals-turn-to-cities-to-pass-laws-and-spread-ideas.html?_r=0 [<https://perma.cc/YA4F-YZ8J>]; BARBER, *supra* note 2, at 7 (noting that cities are “address[ing] . . . issues of weapons, trade, climate change, cultural exchange, crime, drugs, transportation, public health, immigration and technology”); Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371, 375 (2008) (noting local leadership in “policy areas such as climate change, gay rights and gay marriage, domestic partner benefits, affordable housing, campaign finance and other electoral reforms, health care, . . . term limits,” immigration, and living wage); Diller, *supra* note 4 (discussing cities’ public health regulation).

33. See Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 98–103 (2013) (discussing urban views on gun control). Blocher explains that “gun crime is clearly an urban problem,” and that “[c]ity-dwellers are roughly half as likely as rural residents to own guns, and are far more likely to support gun control.” *Id.* at 98–99.

34. See Diller, *supra* note 4, at 1247–48.

35. Rodden, *supra* note 5, at 10–11, 96–99.

36. See Mark V. Pauly, *Income Redistribution as a Local Public Good*, 2 J. PUB. ECON. 35, 38 (1973).

37. Rodden, *supra* note 5, at 97–99.

II. NORMATIVE PREMISES: ONE-PERSON, ONE-VOTE AND PARTISAN FAIRNESS

In any legitimate democracy, the elected representatives must fairly represent the views of the people. Essential to a democracy, therefore, is an effective means of turning the people's sentiments into policy. In a representative democracy, this means is usually a periodic election of government officials who then wield the power to make policy. This Article embraces the normative view that any such government should roughly represent the median voter of the jurisdiction that elects it. A government thus composed should be able to put the majority's broad policy preferences into law, subject to the normal rough and tumble of political dealmaking. This normative premise admittedly assumes that elected representatives are to some extent responsive to the policy preferences of their constituents—that is, legislators are not pure “trustees” but rather agents or delegates of the electorate at least in part.³⁸

The median-voter or majoritarian premise from which this Article proceeds is not without its prominent critics, distilled into two strains. The first, largely identified with the public-choice school, questions the knowableness of “the majority will.” According to this school of thought, voters' collective preferences do not exist in the abstract, but are rather the inevitable product of the manner in which such preferences are solicited.³⁹ As such, measuring a political system's worth by its success at representing the will of the majority is a fool's errand. This Article, by contrast, assumes that voter positions on at least some issues are knowable. Public polling, despite its flaws, can reveal voter sentiment on key issues,⁴⁰ and election results constitute credible evidence of voters' views on issues.⁴¹

38. Whether legislators are more properly viewed as delegates or trustees is a longstanding, classic debate in the political science literature. See Rudy B. Andeweg, *Roles in Legislatures*, in THE OXFORD HANDBOOK OF LEGISLATIVE STUDIES 267–68 (Shane Martin et al. eds., 2014) (recounting debate).

39. E.g., JON ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES 155 (1989) (“[T]he notion of a popular will is incoherent, or . . . the popular will is itself incoherent, whichever you prefer.”); see also WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM (1982); KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963).

40. Justin H. Phillips, *Public Opinion and Morality*, in POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS 437 (Virginia Gray et al. eds., 10th ed. 2012) (“The beauty of a well-constructed and properly administered poll is that it will usually provide a reasonably accurate snapshot of opinion.”); but see Adam J. Berinsky, *The Two Faces of Public Opinion*, 43 AM. J. POL. SCI. 1209, 1209 (1999) (arguing that opinion polls, under certain circumstances, may be a “poor reflection of collective public sentiment”).

41. See *supra* Part I.

The other prominent objection to the median voter or majoritarian premise, associated most recently with Randy Barnett, objects to majoritarian government outright, at least when it interferes with pre-existing natural rights.⁴² According to Barnett, the Constitution is designed not to allow the majority to effectuate its will, but rather to preserve fundamental rights.⁴³ Whether Barnett is correct as a matter of constitutional interpretation is not germane to this Article, for the majoritarian premise embraced herein trumps even fealty to the Constitution. Regardless, as Section A explains, a strong strain of constitutional reasoning supports majoritarian governance. Moreover, Barnett's objection largely collapses into the public-choice criticism, for it fails to provide an affirmative normative account for any means of electing public officials. If preservation of natural rights precedes a commitment to democracy, then it matters little who votes and whether they vote on equal terms.

To be sure, insofar as Barnett and others are concerned with protecting minorities from majoritarian tyranny, this Article does not dispute the importance of that concern. Figuring out which issues should be "off the table" of majoritarian control through the mechanism of judicial review is the great project of constitutional law.⁴⁴ This Article remains agnostic as to what rights the judiciary ought to protect through its interpretation and enforcement of the Constitution, and simply assumes that under any theory of judicial review, much will remain "on the table" for the elected branches to tackle. It is in this realm of the supposedly "democratic" branches—particularly, the legislatures—that urban areas suffer a significant disadvantage.

A. *One-Person, One-Vote*

Compliance with one-person, one-vote is generally considered necessary for democratic governance; it is a short leap from this proposition to expect that one-person, one-vote is highly correlated with, if not

42. Randy E. Barnett, *We the People: Each and Every One*, 123 YALE L.J. 2576, 2602 (2014) [hereinafter *We the People*] (“[S]overeignty rests . . . in the people themselves considered as individuals.”); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 11 (rev. ed. 2014) [hereinafter *RESTORING THE LOST CONSTITUTION*].

43. *We the People*, *supra* note 42, at 2602 (“[I]n the absence of express consent by each person . . . the only consent that can be attributed to *everyone* is consent only to such powers that do not violate their retained fundamental rights.”).

44. *E.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

necessary for, a government's ability to represent the median voter.⁴⁵ If one segment of the voting populace exercises a franchise that has greater effect than another's, the former will undoubtedly enjoy more influence on the lawmaking process. The Supreme Court recognized the normative imperative of majoritarian lawmaking in its twin landmark "one-man, one-vote" decisions of 1964.⁴⁶ In *Reynolds v. Sims*, the Court held that the Equal Protection Clause of the Fourteenth Amendment required state legislatures to adhere to the equipopulation principle in districting.⁴⁷ In *Wesberry v. Sanders*, the Court held that Article I, Section 2 of the Constitution required that U.S. House districts within states be equipopulous.⁴⁸

The movement toward one-person, one-vote as a fundamental constitutional value stretches back to the beginning of the Republic. The Framers haltingly embraced the principle by apportioning seats in the House of Representatives on a roughly equipopulous basis, an apportionment that the Electoral College reflects to a limited extent.⁴⁹ In doing so, the Constitution reflected the colonists' partial break with the British notion of "virtual representation," whereby a member of Parliament was said to "represent" the whole of the realm, even if elected by a constituency in a particular borough.⁵⁰ By using census figures to allocate House seats, the Framers staunchly rejected this view for at least one-half of the legislative branch of the federal government.⁵¹ Of course, the infamous three-fifth's

45. ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION 2* (1971) (weighing citizens' votes equally is a necessary condition for a democracy); see also Nicola Maaser & Stefan Napel, *Equal Representation in Two-Tier Voting Systems*, 28 *SOC. CHOICE WELFARE* 401, 401 (2007) ("The principle of 'one person, one vote' is generally taken to be a cornerstone of democracy.").

46. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

47. *Reynolds*, 377 U.S. 533.

48. *Wesberry*, 376 U.S. 1.

49. See *infra* Part IV.D (discussing the Electoral College).

50. Edmund Burke famously declared that "Parliament is not a *congress* of ambassadors from different and hostile interests . . . but . . . a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole." Edmund Burke, Speech to the Electors of Bristol, (Nov. 3, 1774), <http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html> [<https://perma.cc/GY32-HYDU>]. For more on the former colonists' break from the British notion of virtual representation, see GORDON S. WOOD, *REPRESENTATION IN THE AMERICAN REVOLUTION* 26–28, 38–39 (A.E. Dick Howard ed., 1969).

51. THE FEDERALIST No. 57, at 390 (James Madison) (M. Walter Dunne ed., 1901) ("Who are to be the electors of the Federal Representatives? . . . The electors are to be the great body of the people of the United States.").

compromise on counting slaves in the allocation of House seats,⁵² combined with the exclusion of women, Native Americans, and white males without property, demonstrated that the Founders had a narrow and compromised conception of which persons should select the representatives of the “people.”⁵³ In other words, just as virtual representation is still generally seen as unproblematic vis-à-vis minors and noncitizens, the Framers viewed it as unproblematic vis-à-vis the other groups then excluded from the franchise. But for the “people” they considered worthy of exercising the franchise, the Framers took a significant step toward a representational model premised on one-person, one-vote.

As the class of eligible voters broadened greatly over the next two centuries, the link between “the people” and their elected representatives grew less tenuous. Still, there remain large numbers of persons included in the census yet excluded from voting, such as noncitizens and millions of convicted criminals.⁵⁴ Yet the notion that legislators represent the interests of all of the people in their districts is now far more credible than it was at the Founding, even if there remain major questions at the margins. One such question that the Supreme Court may soon decide is whether noncitizens and those not yet of voting age qualify as “people” for the purposes of allocating seats on the basis of one-person, one-vote.⁵⁵

It is at least hypothetically possible that a system not in compliance with one-person, one-vote might nonetheless represent the median voter.

52. U.S. CONST. art. 1, § 2, cl. 3; *see also* THE FEDERALIST No. 54, at 253 (James Madison) (George W. Carey & James McClellan eds., 2001) (discussing three-fifth’s compromise and slaves’ “mixt [sic] character of persons and of property”).

53. Mark S. Stein, *Originalism and Original Exclusions*, 98 KY. L.J. 397, 398 (2009) (“Among those excluded from the franchise [when the Constitution was ratified] were women, African-American slaves, almost all Native Americans, and many poor white males, who were excluded by property qualifications and poll taxes.”).

54. *See* CHRISTOPHER UGGEN, SARAH SHANNON & JEFF MANZA THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010, at 5 (2012), http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf [<https://perma.cc/M4F5-9YQB>] (estimating that 5.85 million Americans are disenfranchised due to felony convictions). It is not just felons who are prohibited from voting; in many states, certain misdemeanants are also barred. *See also* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1325 n.68 (2012) (noting effects on voting rights from misdemeanor convictions).

55. *See* *Evenwel v. Perry*, No. A–14–CV–335–LY–CH–MHS, 2014 WL 5780507 (W.D. Tex. Nov. 5, 2014), *aff’d sub nom.* *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

Voters with a magnified franchise may hold the same political views as those whose franchise is diluted. In such a situation, the fact that the former set of voters receives more representation than the latter set should not affect the policies pursued by elected officials—the principle of one-person, one-vote would be necessary to preserve individual dignity and abstract equality, but would not be necessary for representative fairness.⁵⁶ In *Reynolds*, however, the Supreme Court laid this fiction bare.⁵⁷ Different sets of voters never hold the exact same mix of views on political issues, and augmenting the power of a geographic constituency's clout is nearly certain to result in increased government spending on its behalf. The Court thus corrected disparities in the apportionment of legislative seats that were as egregious as 41 to 1.⁵⁸ Similarly, in *Wesberry*, although relying on a different constitutional provision, the Supreme Court again strongly embraced a majoritarian ethos of representation in requiring that U.S. House districts within states be of equal population.⁵⁹ Despite *Reynolds*'s and *Wesberry*'s strong embrace of majoritarianism, the ambiguity and occasional tension between the majoritarian and dignitary goals of one-person, one-vote persist within the doctrine.⁶⁰

56. *Reynolds v. Sims*, 377 U.S. 533, 567 (“To the extent that a citizen’s right to vote is debased, he is that much less a citizen.”).

57. *Id.* at 565–66 (“[I]n a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators.”).

58. *Id.* at 545.

59. *Wesberry v. Sanders*, 376 U.S. 1, 14–15 (1964) (discussing the Framers’ contempt for Great Britain’s “rotten boroughs” in Parliament whereby “one man could send two members to Parliament to represent [a rotten borough] while London’s million people sent but four”).

60. See, e.g., *Evenwel v. Abbott*, 136 S. Ct. 1120, 1133 (2016) (Thomas, J., concurring) (“[T]his Court has never provided a sound basis for the one-person, one-vote principle. For 50 years, the Court has struggled to define what right that principle protects.”); Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1418 (2002) (criticizing the Supreme Court’s one-person, one-vote jurisprudence as “doctrinally incoherent, plagued with inconsistencies, and marked by a rigid preference for mechanical proxies”); *id.* at 1441 (criticizing one-person, one-vote doctrine for “rigidity” that “deprive[s] the Court of the discretion to make nuanced judgments regarding application of the equality norm”); see also Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1274 (2002) (criticizing the doctrine for “provid[ing] no guidance at all to deciding which persons in the first place will be admitted to the franchise”).

Reynolds and *Wesberry* were quite controversial initially, drawing vigorous and eloquent dissents from Justice Harlan.⁶¹ *Reynolds* was the more controversial of the two decisions because it invalidated the design of state governments, thus raising federalism concerns that some considered grave.⁶² Members of Congress responded to the decisions by introducing constitutional amendments to overturn them, a position embraced by the Republican party in its 1964 platform.⁶³ Despite this ineffectual and short-lived resistance, one-person, one-vote has now become an uncontested cornerstone of the constitutional canon and a widely accepted principle of democratic legitimacy.⁶⁴ The Supreme Court has extended the doctrine to almost all elections and has shown no appetite for backtracking from it.⁶⁵ The political branches now support *Reynolds* and its progeny unequivocally.⁶⁶ Majoritarianism, therefore, enjoys broad

61. See *Reynolds*, 377 U.S. at 589 (Harlan, J., dissenting); see also *Wesberry*, 376 U.S. at 41–42 (Harlan, J., dissenting) (“[T]he language of Art. I, §§ 2 and 4, the surrounding text, and the relevant history are all in strong and consistent direct contradiction of the Court’s holding.”).

62. See *Reynolds*, 377 U.S. at 624 (Harlan, J., dissenting) (“These decisions . . . cut deeply into the fabric of our federalism.”).

63. Grant M. Hayden, *The False Promise of One-Person, One-Vote*, 102 MICH. L. REV. 213, 223 (2003) (discussing “serious attempts to amend the Constitution and to restrict federal-court review of state reapportionment” immediately after *Reynolds* and *Wesberry*).

64. *Id.* (noting that state legislatures and Congress acceded to the one-person, one-vote decisions by the early 1970s).

65. See *id.* at 214, 224 (describing one-person, one-vote as one of “least controversial aspects of the right to vote” that enjoys “unreflective acceptance[]”).

66. Two fairly recent examples stand out. First, in the Supreme Court’s most recent foray into one-person, one-vote, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), not one state attorney general or other elected politician of any party filed an amicus brief arguing that *Reynolds* should be overturned. By contrast, a bipartisan group of 20 state attorneys general filed an amicus brief embracing *Reynolds*. See Brief for the States of New York, Alaska et al. as Amicus Curiae in Support of Appellees, *Evenwel*, 136 S. Ct. 1120 (No. 14-940), 2015 WL 5719576, at *26–27. Second, when it was revealed during Samuel Alito’s Supreme Court confirmation process that he had questioned the Warren Court’s one-person, one-vote cases when applying for a government job in the 1980s, the outcry was widespread, including from conservative Republicans in the Senate. To dampen the controversy, Alito quickly made clear that he considered one-person, one-vote a “bedrock principle” of constitutional jurisprudence. See Jo Becker, *Alito’s Stance on One Man, One Vote is Debated*, WASH. POST (Nov. 25, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/24/AR2005112400716.html> [<https://perma.cc/A4EN-AWSY>].

support in American political culture despite the egregious exception of the Senate.

B. Partisan Fairness

One-person, one-vote is necessary for lawmakers to represent the median voter, but it is not sufficient. In a district-based legislative system, one-person, one-vote may prove hollow at translating votes into legislative seats. The goal of any political party is to win power, not votes. In a two-party system, if a party consistently obtains more votes yet cannot obtain more seats—and, hence, power—than its opponent, the system is said to suffer from partisan bias.⁶⁷ Without a reasonable rate of partisan symmetry in the seats-to-votes ratio, a government cannot legitimately represent the majority.⁶⁸

A substantial partisan bias in the seats-to-votes ratio occurs when one party wastes more votes than the other by winning more races more lopsidedly.⁶⁹ By contrast, in a multi-member, non-district slate election with proportional representation, partisan conversion is perfect in that a

67. Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 835 (2015) (“Partisan bias refers to the divergence in the share of seats that each party would win given the same share . . . of the statewide vote.”).

68. See Nicholas O. Stephanopoulos, *The Consequences of Consequentialist Criteria*, 3 U.C. IRVINE L. REV. 669, 673 (2013) (noting that partisan fairness is “virtually a consensus position of the [political science] community”) (quoting Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After LULAC v. Perry*, 6 ELECTION L.J. 2, 6 (2007)) (citing Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 554 (1994)) (“The vast majority of American political scientists have adopted the normative position that healthy representative democracies have low levels of partisan bias . . .”).

69. Bernard Grofman et al., *An Integrated Perspective on the Three Potential Sources of Partisan Bias: Malapportionment, Turnout Differences, and the Geographic Distribution of Party Vote Shares*, 16 ELECTORAL STUD. 457, 458 (1997) (“[I]f one party wins most of its seats by disproportionately large vote shares and loses most of the seats it loses by relatively narrow vote shares, while the reverse is true for the other party (or parties), then partisan bias exists against the first party.”); *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 466 (2006) (Stevens, J., concurring in part, dissenting in part) (noting that partisan symmetry, whereby a party “receiv[ing] the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage, . . . is widely accepted by scholars as providing a measure of partisan fairness in electoral systems”).

party that wins 43% of the votes receives 43% of the seats. With reasonably accurate party labeling, perfect or nearly perfect partisan conversion helps ensure that a legislature more accurately reflects the views of the majority. Many prominent political scientists have criticized first-past-the-post systems as nonmajoritarian, particularly in contrast to proportional representation systems.⁷⁰ Few nations that use proportional representation do so “perfectly.” Many require that candidates or parties win a minimum percentage of the vote—for example, 5%—to win any seats, which can lead to a substantial percentage of votes being wasted on small parties.⁷¹ Also, many nations with proportional representation implement it through subnational elections, which can lead to divergence between the national legislature’s seat count and the overall vote count.⁷² Contrasting proportional representation and the American system in depth is not necessary here, however, as the goal is to show only that the system in the United States works in a distinctly anti-urban way.

Similar to one-person, one-vote, partisan fairness has a firm basis in modern constitutional jurisprudence, with a majority of the Supreme Court recognizing that extreme partisan gerrymandering would violate the Constitution.⁷³ As compared to one-person, one-vote, however, the Court has been more reluctant to intervene directly to prevent partisan gerrymandering. To date the Court has never found unconstitutional a districting plan on the basis of extreme political—that is, non-racial—gerrymandering, although it has not ruled out the possibility of such a claim

70. See, e.g., ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 103, 109 (2001) [hereinafter, HOW DEMOCRATIC?]; G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY (2000) (concluding that proportional representation better implements views of majority than first-past-the-post systems).

71. *Id.* at 103, 109; see also Peter Kurrild-Klitgaard, *Election Inversions, Coalitions and Proportional Representation: Examples of Voting Paradoxes in Danish Government Formations*, 36 SCANDINAVIAN POL. STUDS. 121, 124–25 (2013) (discussing the “Threshold Paradox”).

72. Kurrild-Klitgaard, *supra* note 71, at 127 (discussing the “Federal Paradox”).

73. See *Ariz. State Leg. v. Ariz. Ind. Redistricting Comm’n*, 135 S.Ct. 2652, 2658 (quoting *Vieth v. Jubilerer*, 541 U.S. 267, 292 (2004)) (“[P]artisan gerrymanders,’ this Court has recognized, ‘[are incompatible] with democratic principles.’”). In *Davis v. Bandemer*, the Court rooted the prohibition on extreme political gerrymandering in the Equal Protection Clause of the Fourteenth Amendment. 478 U.S. 109, 123–25 (1986). In subsequent cases, litigants and members of the Court have raised Article I or the First Amendment as potential bases for political gerrymandering claims. E.g., *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring) (invoking the First Amendment).

succeeding.⁷⁴ Recently, the Court sustained against constitutional attack the choice of Arizona's voters to establish an independent redistricting commission.⁷⁵ Although the decision does not compel states that use partisan districting to adopt a more neutral, nonpolitical system, it may provide some momentum to the emerging effort to depoliticize districting, particularly in states with direct democracy.⁷⁶ Currently, approximately one-fifth of states grant non- or bipartisan commissions either an advisory or binding role in drawing district lines in an attempt to reduce partisan gerrymandering.⁷⁷ In his recent, and last, State of the Union speech, President Obama also inveighed against gerrymandering and urged more reform of the districting process.⁷⁸

74. In the three most prominent Supreme Court cases raising the issue of partisan gerrymandering as a constitutional violation—*LULAC*, *Vieth*, and *Davis*—the Court has split sharply. In some cases, a minority of justices would have invalidated the political gerrymanders presented as unconstitutional. *E.g.*, *LULAC*, 548 U.S. at 2635 (Stevens, J., concurring in part and dissenting in part) (two justices finding unconstitutional political gerrymander); *Davis*, 478 U.S. at 161 (Powell, J., concurring in part and dissenting in part) (same). In *Vieth*, by contrast, a high of four justices would have held that such claims are by their nature nonjusticiable. 541 U.S. at 271 (opinion of Scalia, J.).

75. *See Ariz. State Leg.*, 135 S.Ct. 2652.

76. *See The Supreme Court — Leading Cases: Constitutional Law* Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 129 HARV. L. REV. 181, 196–97 (2015) (“With independent commissions now bearing the Court’s seal of constitutional approval, redistricting-reform activists may seek their implementation in additional states — especially those in which the people are delegated legislative authority by their state constitutions.”); Peter Miller & Bernard Grofman, *Redistricting Commissions in the Western United States*, 3 U.C. IRVINE L. REV. 637, 642 (2013) (noting that states with direct democracy have been at the forefront of districting reform).

77. *See Ariz. State Leg.*, 135 S. Ct. at 2662 nn.6–9 (citing commissions in Hawaii, Idaho, Montana, New Jersey, Washington, California, Iowa, Ohio, Maine, Connecticut, and Indiana); *see also* League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 369 (Fla. 2015) (invalidating districting plan on the basis of the Fair Districts Amendment to the Florida constitution, FLA. CONST. art. 3, § 20, which was enacted by the voters in 2010 and prohibits redistricting “with the ‘intent to favor or disfavor a political party or an incumbent’”).

78. President Barack Obama, State of the Union Address (Jan. 13, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/12/remarks-president-barack-obama-%E2%80%93-prepared-delivery-state-union-address> [<https://perma.cc/6PHY-ABRD>] (“[W]e’ve got to end the practice of drawing our congressional districts so that politicians can pick their voters, and not the other way around. Let a bipartisan group do it.”).

To treat the ideological views, as opposed to partisan preferences, of all voters equally, even one-person, one-vote and partisan fairness may not be enough.⁷⁹ As Rodden demonstrates, a system may be fair to both parties, but because of the concentration of left-leaning voters in urban districts, their preferred political party in a two-party system will win a majority only by running more conservative candidates in moderate suburban and exurban districts.⁸⁰ Even when they win a seat majority, the so-called “left-leaning” party will actually be quite ideologically incoherent because of the compromises necessary to elect a majority.⁸¹ As an example of such an unwieldy coalition, Rodden cites the post-World-War-II Democrats in Congress.⁸² Another good example might be the Democratic majority in the U.S. House from 2007 to 2011, which included many “Blue Dogs” from swing districts who were wary of health care reform and climate change legislation.⁸³

This Article does not include ideological fairness as an explicit normative premise for several reasons. First, measuring “ideology,” as opposed to partisan affinity as articulated through voting, is more difficult and issue-dependent. Second, the increased homogenization within each of the two major parties recently renders intra-party ideological disunity less relevant now than in years past.⁸⁴ Third, much of the ideological bias in the United States Senate stems from the violation of one-person, one-vote, which is already considered in this analysis. It is important to keep ideological fairness in mind, however, and the issue is addressed herein where particularly relevant.⁸⁵

79. See Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 307 (2014) (“For the will of the people actually to be authoritative, representatives should share not only median voters’ *partisan* preferences but also their *policy* preferences—that is, their general political ideologies as well as their views on more specific policy matters.”).

80. Rodden, *supra* note 5, at 138.

81. *Id.*

82. *Id.* at 166–68.

83. See, e.g., Ari Berman, Opinion, *Boot the Blue Dogs*, N.Y. TIMES (Oct. 23, 2010), <http://www.nytimes.com/2010/10/24/opinion/24berman.html> [<https://perma.cc/YJ67-EDCZ>] (noting that “[c]onservative Democrats . . . opposed key elements of . . . [President Obama’s] agenda”).

84. See Bulman-Pozen, *supra* note 23, at 1086–87.

85. One-person, one-vote and partisan or ideological fairness are hardly exhaustive criteria for a legitimate representative democracy, but they are all that this Article will address. Other important criteria, of course, include the facilitation of voter registration and voting, the possibility of compulsory voting, and minimizing the influence of campaign contributions and lobbying on elected representatives. E.g., Mark Thomas Quinlivan, Note, *One Person, One Vote*

III. THE SENATE AND THE NATIONAL URBAN DISADVANTAGE

Consistent with the normative framework outlined in Part II, this Part explains how the composition of the United States Senate contributes substantially to the urban disadvantage in the national lawmaking process. By giving each state equal suffrage, regardless of population, the United States Senate violates the principle of one-person, one-vote more egregiously than almost any national legislative body in the world.⁸⁶ When the Constitution was written, the most populous state had 11 times more people than the least populous state.⁸⁷ Now the greatest disparity is more than six times that, with California's population exceeding Wyoming's by a factor of 66 to 1. Add in Washington, D.C.'s complete lack of Senate representation, and the malapportionment is even worse: Wyoming's 583,000 people get two votes, and the capital's 646,000 get zero.⁸⁸

Table 1 lists states in order of population and demonstrates their degree of over- or underrepresentation in a few different ways, including how many representatives a state would have in a hypothetical 1000-

Revisited: The Impending Necessity of Judicial Intervention in the Realm of Voter Registration, 137 U. PA. L. REV. 2361, 2365 (1989) (arguing that affirmative judicial action to rectify voting registration systems is necessary to securing promise of one-person, one-vote).

86. See Adam Liptak, *Smaller States Find Outsize Clout in Growing Senate*, N.Y. TIMES (Mar. 11, 2013), http://www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html?_r=0##smallstate [<https://perma.cc/L2SH-VHK4>] (noting that only Brazil, Argentina, and Russia have legislative chambers that violate one-person, one-vote by a greater ratio); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 51 (2006); HOW DEMOCRATIC?, *supra* note 70, at 50; Alfred Stepan, *Federalism and Democracy: Beyond the U.S. Model*, in *FEDERALISM AND TERRITORIAL CLEAVAGES* 448 tbl.16.1 (Ugo M. Amoretti & Nancy Bermeo eds., 2004) (ranking the United States third worst, after Argentina and Brazil, on measures of representational inequality of upper house chambers).

87. When comparing states in terms of population, the Article occasionally refers to the most populous as the "largest" and the least populous as the "smallest." Unless specifically indicated, such labels do not refer to geographic area.

88. The violation of democratic ideals potentially extends further to the five major United States territories of Guam, Northern Marianas Islands, Puerto Rico, the Virgin Islands, and American Samoa. See, e.g., Luis Fuentes-Rohwer, *The Land That Democratic Theory Forgot*, 83 IND. L.J. 1525, 1527 (2008) ("[R]esidents of Puerto Rico are disenfranchised under a political regime that holds plenary power over them."); Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 662 n.17 (2013) (explaining the disenfranchisement of U.S. citizens residing in the territories).

person senate if seats were allocated on the basis of population, as opposed to the current regime where each state would get 20 seats.

TABLE 1 - U.S. SENATE AND ONE-PERSON, ONE-VOTE

State	State population ⁸⁹	% of U.S. ⁹⁰	% of Senate - % of U.S.	Log of representation in current Senate	Seats in 1000-person Senate on 1P1V
CA	38,802,500	12.2%	-10.19%	0.62	122
TX	26,956,958	8.5%	-6.47%	0.67	85
FL	19,893,297	6.3%	-4.25%	0.72	63
NY	19,746,227	6.2%	-4.21%	0.73	62
IL	12,880,580	4.0%	-2.05%	0.81	40
PA	12,787,209	4.0%	-2.02%	0.81	40
OH	11,594,163	3.6%	-1.64%	0.83	36
GA	10,097,343	3.2%	-1.17%	0.87	32
NC	9,943,964	3.1%	-1.13%	0.87	31
MI	9,909,877	3.1%	-1.11%	0.87	31
NJ	8,938,175	2.8%	-0.81%	0.90	28
VA	8,326,289	2.6%	-0.62%	0.92	26
WA	7,061,530	2.2%	-0.22%	0.97	22
MA	6,745,408	2.1%	-0.12%	0.98	21
AZ	6,731,484	2.1%	-0.12%	0.98	21
IN	6,596,855	2.1%	-0.07%	0.99	21
TN	6,549,352	2.1%	-0.06%	0.99	21
MO	6,063,589	1.9%	0.09%	1.02	19
MD	5,976,407	1.9%	0.12%	1.02	19
WI	5,757,564	1.8%	0.19%	1.03	18
MN	5,457,173	1.7%	0.28%	1.05	17
CO	5,355,866	1.7%	0.32%	1.06	17
AL	4,849,377	1.5%	0.48%	1.10	15
SC	4,832,482	1.5%	0.48%	1.10	15
LA	4,649,676	1.5%	0.54%	1.12	15
KY	4,413,457	1.4%	0.61%	1.14	14
OR	3,970,239	1.2%	0.75%	1.19	12
OK	3,878,051	1.2%	0.78%	1.20	12
CT	3,596,677	1.1%	0.87%	1.24	11
IA	3,107,126	1.0%	1.02%	1.31	10
MS	2,994,079	0.9%	1.06%	1.34	9
AR	2,966,369	0.9%	1.07%	1.34	9
UT	2,942,902	0.9%	1.08%	1.35	9
KS	2,904,021	0.9%	1.09%	1.35	9
NV	2,839,099	0.9%	1.11%	1.37	9
NM	2,085,572	0.7%	1.34%	1.59	7
NE	1,881,503	0.6%	1.41%	1.69	6
WV	1,850,326	0.6%	1.42%	1.70	6
ID	1,634,464	0.5%	1.49%	1.83	5
HI	1,419,561	0.4%	1.55%	2.00	4

89. Population numbers are based on the 2014 Census estimate, *Population Estimates*, U.S. CENSUS BUREAU, <https://www.census.gov/popest/data/state/totals/2014/> [<https://perma.cc/T9AF-FU34>] (last visited Aug. 26, 2016).

90. Excluding Washington, D.C. and other territories.

ME	1,330,089	0.4%	1.58%	2.09	4
NH	1,326,813	0.4%	1.58%	2.10	4
RI	1,055,173	0.3%	1.67%	2.50	3
MT	1,023,579	0.3%	1.68%	2.56	3
DE	935,614	0.3%	1.71%	2.78	3
SD	853,175	0.3%	1.73%	3.04	3
ND	739,482	0.2%	1.77%	3.55	2
AK	736,732	0.2%	1.77%	3.57	2
VT	626,562	0.2%	1.80%	4.42	2
WY	584,153	0.2%	1.82%	4.93	2

If partisan and ideological preferences were evenly distributed throughout the nation, the Senate's malapportionment might reflect itself only through overrepresented states receiving a higher distribution of "pork" than underrepresented states, a consequence that many commentators have highlighted.⁹¹ Although this is no doubt one harm, it is not the primary harm, nor is it as benign as it seems because divorcing spending from ideological priorities is impossible.

Consider transportation funding. Although all regions prefer more money for their needs, whether to prioritize private automobile travel over mass transit, cycling, and walking is a highly contested, ideologically charged issue. If preferences regarding transportation were evenly distributed throughout the nation, the only harm resulting from the Senate's malapportionment would be that overrepresented states would receive more money to spend on the agreed-upon mix. But because preferences for transportation policy are not evenly distributed—smaller, overrepresented states generally prefer spending on highways over mass transit, which is preferred more by underrepresented states—the overall spending priorities of the federal government are distorted to support highway spending more than they would if the Senate complied with one-person, one-vote. The 2015 fatal Amtrak crash in Philadelphia highlighted this issue vividly: the United States spends less on rail safety than almost any other advanced nation in the world.⁹² There is little doubt that the

91. *E.g.*, Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 30 (1997) ("[T]he Senate ensures that the federal government will systematically redistribute income from the large states to small ones."); Misha Tseytlin, Note, *The United States Senate and the Problem of Equal State Suffrage*, 94 GEO. L.J. 859, 863 (2006) (noting that malapportionment "increase[s] the power of individuals in small states to achieve their policy and funding procurement goals"), LEVINSON, *supra* note 86, at 59–60.

92. *See* Nicola Clark, *Low U.S. Rail Spending Leads to Poor Safety, Experts Say*, N.Y. TIMES (May 20, 2015), <http://www.nytimes.com/2015/05/21/world/europe/railroads-around-the-globe-find-no-cheap-route-to-safety.html> [<https://perma.cc/TZ98-685S>].

Senate's overrepresentation of rural states that have no passenger rail, such as Wyoming and South Dakota, has played a role in this allocative decision.⁹³ By contrast, the "Northeast Corridor"—where Amtrak train service might benefit most from increased spending—is underrepresented.⁹⁴

In addition to spending decisions, ideological and political preferences more generally correlate significantly with state size and population density. The Senate's malapportionment greatly amplifies the power of residents of rural, less densely populated states that more often vote Republican in presidential elections and can be classified as more ideologically "conservative" on a number of issues. Their overrepresentation helps ensure that bills disliked by rural, conservative voters have little chance of passing, even if the American public supports them. To be sure, the Senate's small-state amplification does not always work in favor of rural, Republican-leaning voters. Some relatively urban or left-leaning small states like Rhode Island, Delaware, Hawaii, and Vermont also benefit. But on balance, the benefit accrues to the more rural states whose voters lean right on a number of key issues.

The near-routine use of the filibuster in the last decade, which requires that bills clear a 60-vote threshold to move forward, and the lack of representation for Washington, D.C., gives senators representing a very small percentage of the American public the power to kill legislation unilaterally.⁹⁵ In theory, it is possible for senators representing less than 11% of the American population to block a bill.⁹⁶ A system that requires

93. *Compare* Amtrak National Route Map, AMTRAK, http://www.amtrak.com/ccurl/948/674/System0211_101web,0.pdf [<https://perma.cc/SD5A-UR2H>] (last visited Aug. 26, 2016) (showing which states lack Amtrak service), *with* Table 2 (demonstrating overrepresentation of states like Wyoming and South Dakota in Senate).

94. The eight states that make up Amtrak's Northeast Corridor, from south to north, are Maryland, Delaware, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts. *See* NE. CORRIDOR INFRASTRUCTURE & OPERATIONS ADVISORY COMM'N, THE NORTHEAST CORRIDOR AND THE AMERICAN ECONOMY (2014), http://www.nec-commission.com/wp-content/uploads/2014/02/NEC_american_economy_report.pdf [<https://perma.cc/7AHP-G4GK>] (last visited Aug. 26, 2016). In a 1000-seat senate, they would receive 187 votes, for 18.7%. In the current Senate, even with help from small states like Rhode Island and Delaware, they receive only 16% of votes. The absence of representation for Washington, D.C., a key component of the Corridor, exacerbates the current Senate's misrepresentation.

95. *See* Olympia J. Snowe, *The Effect of Modern Partisanship on Legislative Effectiveness in the 112th Congress*, 50 HARV. J. ON LEGIS. 21, 29–30 (2013) (noting the significant increase in the use of the filibuster in recent Congresses).

96. This figure is calculated by adding up the populations of the smallest 20 states plus one-half of the population of the 21st-smallest state (for a total of

support from the representatives of almost 90% of the American public to move legislation forward is highly likely to stifle the majority. For treaty ratification and constitutional amendments, the threshold for Senate passage is even higher, requiring two-thirds, or 67 senators. Therefore, 34 senators, who might represent a mere 8.4% of the total population, can block a treaty or amendment.⁹⁷

A. Recent Examples of the Senate's Malapportionment Effect

Some prominent votes in recent years demonstrate that the Senate's malapportionment problem is not just hypothetical. Consider the vote in April 2013, months after the Newtown school shooting, to expand background checks for firearms purchases. Despite polls showing that more than 90% of the American public supported the bill, the Senate "defeated" the bill 54 to 46; that is, 54 senators voted in favor, but not enough to clear the 60-vote filibuster threshold.⁹⁸ When assessed from the perspective of one-person, one-vote, however, the senators in favor of the bill represented 63% of the American public, whereas the senators voting against represented a mere 37%.⁹⁹

Another recent vote illustrating the ideological skewing that results from the Senate's malapportionment was the legislative response to the Supreme Court's 2014 decision interpreting the Religious Freedom Restoration Act ("RFRA") in *Burwell v. Hobby Lobby Stores, Inc.*¹⁰⁰ A proposal to overturn the Court's reading of RFRA—also known as the Not My Boss's Business Act—"failed" in the Senate by a vote of 56 to 43.¹⁰¹

34,282,831) and then dividing by the population of the 50 states plus Washington, D.C. (318,856,856), all based on 2014 Census estimates. *See also* Baker & Dinkin, *supra* note 91, at 29 ("[T]he Senate's cloture rule makes it possible for legislators representing only eleven percent of the population to prevent legislation from coming to a vote even when all 100 Senators are present.").

97. This includes Washington, D.C., but not other territories.

98. U.S. Senate Roll Call Vote No. 97 (Apr. 17, 2013), 113th Cong., 1st Sess., http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00097 [<https://perma.cc/4QRJ-LQJX>].

99. The Appendix includes a spreadsheet demonstrating the calculation. Senate Roll Majority Leader Harry Reid (D-NV) changed his vote to "no" for procedural reasons, and thus counts as a "yes" vote in this calculation. Jonathan Weisman, *Senate Blocks Drive for Gun Control*, N.Y. TIMES (Apr. 17, 2013), <http://www.nytimes.com/2013/04/18/us/politics/senate-obama-gun-control.html?ref=politics> [<https://perma.cc/M3UV-T9Y2>]. *See also infra* Appendix, Table 4.

100. 134 S. Ct. 2751 (2014).

101. The bill was formally titled, "Protect Women's Health from Corporate Interference Act." *See* U.S. Senate Roll Call Vote No. 228 (July 16, 2014), 113th

The senators supporting RFRA represented 61% of the nation's population while the senators in opposition represented 39%. Although increased access to birth control is not an obvious urban issue, the Act likely had more support among urban residents given their partisan preferences—the Act's support was overwhelmingly Democratic—and the reduced sway of so-called “traditional” religious values in urban areas.¹⁰²

Senators vote for or against bills for a number of reasons, among which the views of their constituents is just one. Indeed, senators from 13 states split their votes on the background-check bill, demonstrating that viewing senators purely as the “delegates” of their electorates is overly simplified. Nonetheless, so long as one accepts that senators are not pure “trustees,” the relevance of the views of the senator's geographic constituency cannot be ignored.¹⁰³ A more subtle explanation of split-state votes is that senators represent the views of a potential winning coalition in their states. For instance, in certain states there is a possibility of assembling a winning coalition on either side of the gun control issue, whereas in other states there is not.¹⁰⁴

As evidenced by the background-check bill, the Senate's malapportionment transcends partisanship. Although most Democrats supported the bill, four did not.¹⁰⁵ All four Democratic “no” votes came from rural states vastly overrepresented in the Senate: Alaska, Arkansas, Montana, and North Dakota.¹⁰⁶ Four Republicans supported the bill: two were from states significantly underrepresented in the Senate—Illinois and Pennsylvania—one was from a state significantly overrepresented—Maine—and one was from a state, Arizona, whose Senate representation

Cong., 2nd Sess., http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=2&vote=00228 [<https://perma.cc/ZSW3-6E6F>]. Again, Senate Majority Leader Reid changed his vote to “no” for procedural reasons, and thus counts as a “yes” vote in the calculation. See Kristina Peterson, *Senate Bill to Nullify Hobby Lobby Decision Fails*, WALL ST. J. (July 16, 2014, 7:41 PM), <http://www.wsj.com/articles/senate-bill-against-hobby-lobby-decision-fails-1405537082> [<https://perma.cc/DSV6-QVZH>]. See also *infra* Appendix, Table 5.

102. See *supra* text accompanying note 35 (discussing the secular-religious divide between the city and country).

103. See Andeweg, *supra* note 38, at 267–68 (discussing trustee versus delegate conceptions of representation).

104. See Keith T. Poole & Howard Rosenthal, *The Polarization of American Politics*, 46 J. POL. 1061, 1065–66 (1984).

105. See Senate Roll Call Vote No. 97, *supra* note 98 (indicating “Nay” votes from Baucus (D-MT), Begich (D-AK), Heitkamp (D-ND), and Pryor (D-AR)).

106. See *id.*

is approximately consistent with its share of the nation's population.¹⁰⁷ On issues in which there is a significant urban-rural divide, irrespective of partisanship, therefore, the Senate's malapportionment is still acutely felt.

The filibuster can amplify the Senate's malapportionment, as demonstrated by the above examples, but it can also neutralize it, at least theoretically. It is possible to amass the 60 votes necessary to pass legislation from the senators representing the 30 smallest states. Those senators represent a mere 24% of the nation's population. Put differently, if the senators from the 20 most populous states plus one senator from the 21st most populous state provided the 41 votes for a filibuster, they would represent 77% of the nation's population. The filibuster, therefore, is a double-edged sword with respect to the Senate's countermajoritarianism.¹⁰⁸ Indeed, a potential—if pollyannish—partial solution to the Senate's malapportionment would be to allow the filibuster to hold only when the filibustering coalition represents a significant majority—for example, 55% or 60%—of the national population.¹⁰⁹

Empirical analysis of the two most recent decades of Senate votes demonstrates that filibuster use has been most countermajoritarian when Democrats control the Senate and most majoritarian when Republicans control the Senate.¹¹⁰ The propensity of underrepresented urban voters to favor the position of the national Democratic party helps explain this dynamic.

Given that the Senate's malapportionment often combines with the filibuster to block the advancement of legislation, the Senate significantly privileges the regulatory status quo, particularly if that status quo aligns with the preferences of voters in overrepresented states. Hence, it is extraordinarily difficult institutionally to enact legislation that derives a significant portion of its support from urban voters. The damage includes not just the votes that failed, but the many other proposals that never make it to the Senate floor or even a committee hearing because leaders know that the votes are not there for ultimate passage. Good recent examples include a public insurance option as part of the 2009 health care overhaul and comprehensive climate change legislation that the House of Representatives

107. *Id.* (indicating “Yea” votes from Collins (R-ME), Kirk (R-IL), McCain (R-AZ), and Toomey (R-PA)).

108. See Benjamin Eidelson, Note, *The Majoritarian Filibuster*, 122 *YALE L.J.* 980, 1007 (2013).

109. *Id.* at 1015 (calling such a proposal a “nonstarter” because “[i]t too openly defies the internal logic of the [Senate]”).

110. *Id.* at 1009 fig.2.

passed in 2009.¹¹¹ The Senate is also the gatekeeper for approving executive and judicial nominees by the president. Although the Senate recently eliminated the filibuster for votes on many such nominees, its malapportionment may still result in a grossly countermajoritarian rejection of a nomination, or even a failure to give a nominee a hearing.¹¹²

B. The Relationship Between One-Person, One-Vote and Partisan Fairness

A potential criticism of the methodology used so far to tally the percentage of people represented by senators is that it ignores the margin by which senators win their seats. In other words, it may be simplistic to say that the two senators from California represent 39 million people when each won the most recent election with less than 100% of the vote.¹¹³ If all senators win their elections by the same percentage margins, then this point is moot. If, however, the senators in smaller states win by larger margins than those in larger states, it is possible that the Senate is more effective at representing the mean views of voters nationally than the analysis used heretofore would indicate. Indeed, it is at least hypothetically possible that the violation of one-person, one-vote might bolster partisan fairness. Imagine if Democrats won all seats in the 20 most populous states, which represent more than 239 million combined, by 51% to 49%, while Republicans won all seats by a combined margin of 88% to 12% in

111. Ryan Lizza, *As the World Burns*, NEW YORKER (Oct. 11, 2010), <http://www.newyorker.com/magazine/2010/10/11/as-the-world-burns> [https://perma.cc/F994-PVND] (explaining how the climate change bill passed by the House in 2010 died in the Senate); Robert Pear & Jackie Calmes, *Senators Reject Pair of Public Option Proposals*, N.Y. TIMES (Sept. 29, 2009), http://www.nytimes.com/2009/09/30/health/policy/30health.html?_r=0 [https://perma.cc/XCZ5-AVHZ] (discussing the Senate Finance Committee's narrow defeat of a public option proposal).

112. See Paul Kane, *Reid, Democrats Trigger "Nuclear" Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html [https://perma.cc/KGG6-XGW7].

113. In 2012, for instance, Democrat Dianne Feinstein defeated her Republican opponent, Elizabeth Emken, 62.5% to 37.5%, with Emken gaining the votes of 4.7 million people, a figure that is more than the entire population of more than half the states. See CAL. SEC'Y OF STATE, STATEMENT OF VOTE SUMMARY *1 (2012), <http://elections.cdn.sos.ca.gov/sov/2012-general/06-sov-summary.pdf> [https://perma.cc/C7FK-DFM7]. It should also be noted that the methodology herein includes all residents of a state, including those who are not eligible to vote because of age, lack of citizenship, felony convictions, etc.

the other 30 states. Republicans would therefore enjoy a 60 to 40 senate advantage, which would correspond to the total national vote.

The Senate is a district-based system; each “district” just happens to be a state. In any district-based, winner-take-all system, there will be a disparity between the national popular vote count for parties and the partisan composition of the body. Equipopulous representation by state in the Senate may not be the best solution to the problem of malapportionment—a national, proportional election might be ideal—but it would undoubtedly be much fairer from the standpoint of one-person, one-vote than the current system. Moreover, it is not clear that one party consistently wins Senate races by higher percentages than the other, so this criticism is largely academic. Further, senators undoubtedly moderate their positions to reflect their states’ views rather than the views of their national party to some extent.¹¹⁴ Hence, a Senate that suffered from no partisan imbalance could still very much fail to represent the median voter because of the massive violation of one-person, one-vote. As the gun control issue demonstrates, on certain issues, the strongly held views of a state’s voters can trump those of the national party’s.

C. Counterarguments for Senate Malapportionment

A common argument for the status quo is the essentiality of equal Senate suffrage to the Founding framework as well as its ability to preserve state sovereignty.¹¹⁵ Because this Article proceeds from the normative premise that one-person, one-vote is necessary for democratic governance, it does not address those arguments in depth. Regardless, other scholars have ably rejected such arguments on their own terms: equal state suffrage is not necessary to preserve state sovereignty, and fundamentally unjust political arrangements can rely only for so long on their pragmatic origins as a justification.¹¹⁶ Four additional arguments might be offered in defense of the Senate’s malapportionment: first, that it protects minorities; second, that the Senate’s past performance demonstrates that malapportionment is not a major problem; third, that campaign contributions

114. *E.g.*, Poole & Rosenthal, *supra* note 104, at 1065–66 (noting considerable variation in liberal–conservative positions of senators of different parties, but two senators from the same state and party tend to be very similar; by contrast, senators from the same state but from different parties are highly dissimilar, suggesting that each party represents an extreme support coalition in the state).

115. *E.g.*, Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens’ Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 516 (1997).

116. *E.g.*, William N. Eskridge, Jr., *The One Senator One Vote Clause*, 12 CONST. COMMENT. 159 (1995).

might counteract the effects of malapportionment; and fourth, that malapportionment is of little concern because voters choose to move to or stay in underrepresented states.

1. Minority Protection

Some scholars defend the Senate's countermajoritarian composition as a means of protecting political minorities. Because this Article proceeds from the premise that a majoritarian government is preferable, at least with respect to the matters that are constitutionally "on the table" for the legislature, minority protection is not necessarily a good thing if it impedes the majority's ability to enact legislation. Regardless, the Senate is an extremely poorly designed institution for protecting minority rights in an evenhanded or systematic way.¹¹⁷ Because the Senate relies on winner-take-all elections, one political party could win every Senate election over six years 51% to 49% and then control 100% of the seats in the Senate. With respect to empowering racial minorities, the Senate has had a paucity of such members in its long history, even since passage of the Voting Rights Act in 1964.¹¹⁸ Most crucially, insofar as the Senate is institutionally designed to protect minorities, it does so only in favor of a very particularized popular and geographic minority—residents of low-population states.¹¹⁹ A Senate that complied with one-person, one-vote could protect minorities more evenhandedly and effectively through other means, such as by maintaining a filibuster-like supermajority requirement for the passage of certain laws.

2. Past Performance

Another counterargument is that the Senate has always been malapportioned, yet somehow functioned well in the past. Severe malfunction caused in no small part by the Senate's malapportionment, however, punctuate the historical record. Before the Civil War, the South's exaggerated representation in the Senate "contributed to Congressional

117. See HOW DEMOCRATIC?, *supra* note 70, at 52 ("Unequal representation in the Senate has unquestionably failed to protect the fundamental interests of the least privileged minorities.").

118. See Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659, 668–69 (2010) (discussing paucity of blacks in Senate since the passage of the Voting Rights Act in 1964).

119. HOW DEMOCRATIC?, *supra* note 70, at 53–54 ("Why would we want to protect these regional minorities and not other, far weaker minorities?").

sterility on the slavery issue.”¹²⁰ While it is unrealistic to say that the Civil War could have been avoided, the much less populous Southern states’ equal representation in the Senate allowed them to extract significant pro-slavery concessions in the antebellum decades.¹²¹ Southern overrepresentation, combined with the filibuster, also doomed anti-lynching and other civil rights legislation in the first half of the 20th century.¹²²

Even if one is satisfied with the Senate’s historical record of achievement, the current Senate is arguably less representative than prior Senates for two reasons. First, as noted above, the disparity between the most and least populous states has grown substantially since the founding, and is unprecedented in American history. Today the five most populous states represent 37% of the national population, while the bottom five states represent 1.1%.¹²³ In 1950, the five most populous states amounted to 35% of the population,¹²⁴ and in 1900 they amounted to 34% of the population.¹²⁵ In 1900, the most populous state, New York, would have had 97 seats in a 1000-seat Senate apportioned on the basis of population.

120. Leonard G. Ratner, *Reapportionment and the Constitution*, 38 S. CAL. L. REV. 540, 547 (1964).

121. Such concessions were often extracted upon the admission of new states, with the South demanding that any increase in free states be balanced by the same number of slave states or other significant concessions. *See, e.g.*, JAMES M. MCPHERSON, *ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION* 67–73 (2d ed. 1992) (discussing the Great Compromise of 1850, in which Congress admitted California as a free state and in exchange, *inter alia*, passed a more stringent Fugitive Slave Act); *see also* HOW DEMOCRATIC?, *supra* note 70, at 53 (discussing how equal representation in the Senate enhanced the South’s power and gave it “a veto over any policy affecting slavery”).

122. *See NAACP History: Anti-Lynching Bill*, NAACP, <http://www.naacp.org/pages/naacp-history-anti-lynching-bill> [<https://perma.cc/8E36-HCXN>] (last visited Aug. 29, 2016) (discussing how the anti-lynching Dyer Bill passed the House but died in the Senate in the early 1920s); Deleso Alford Washington, Note, *Exploring the Black Wombman’s Sphere and the Anti-Lynching Crusade of the Early Twentieth Century*, 3 GEO. J. GENDER & L. 895, 914 (2002) (discussing successful filibuster of the Costigan–Wagner anti-lynching bill in May 1935 by a small group of Southern senators); *see also* HOW DEMOCRATIC?, *supra* note 70, at 53 (“After the Civil War, Senators from elsewhere were compelled to accommodate to the Southern [senatorial] veto,” which “prevented the country from enacting federal laws to protect the most basic human rights of African Americans.”).

123. These numbers exclude Washington, D.C. and other territories. *See infra* Appendix, Table 3.

124. In 1950, the least populous 5 states still amounted to 1.1% of the population of the 48 states. *See infra* Appendix, Table 7.

125. In 1910, the least populous 5 states amounted to just under 1% of the 45 states. *See infra* Appendix, Table 6.

In 1950, the number would have remained the same. By contrast, today California would have 122 seats in a 1000-person senate if seats were apportioned on the basis of population.

Moreover, the current geographic dispersion of political views largely on a rural–urban split is unprecedented.¹²⁶ Although past Senates were undoubtedly riven by sectional disputes in which certain geographical blocs exercised disproportionate power, many of today’s most prominent disputes allow blocs of senators from largely rural states—from different sections of the country—to band together to block legislation important to the urban population. For instance, opposition to the background-check bill came from all corners of the nation.¹²⁷

3. Campaign Money as Ameliorative

In part due to recent Supreme Court decisions,¹²⁸ the ability of wealthy private individuals, corporations, and unions to influence the political process has perhaps never been greater.¹²⁹ As a result, the “democracy” that the Senate’s malapportionment allegedly disrupts might not be so democratic after all. Moneyed interests ensure that senators conform to big donors’ priorities regardless of whether a senator represents 600,000 or 30 million people. Moreover, a disproportionate share of the money contributed to political races across the nation comes from the very populous cities—Los Angeles, New York City, San Francisco, and Dallas—that are most hurt by the Senate’s violation of one-person, one-vote.¹³⁰ Perhaps,

126. See Scala et al., *supra* note 11.

127. See Senate Roll Call Vote No. 97, *supra* note 98.

128. *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (invalidating under the First Amendment federal restrictions on the cumulative donations an individual may make to Congressional campaign committees); *Citizens United v. FEC*, 558 U.S. 310 (2010) (invalidating restrictions on independent campaign expenditures by corporations and labor unions under the First Amendment); see also *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) (extending *Citizens United* to invalidate under the First Amendment federal limits on how much money an individual could contribute to a nonprofit organization that made independent expenditures to influence campaigns).

129. See MARIAN CURRINDER, *MONEY IN THE HOUSE: CAMPAIGN FUNDS AND CONGRESSIONAL PARTY POLITICS 200* (2009) (“As money has become central to the way parties compete for majority control [in Congress], partisan polarization and the influence of wealthy interests have intensified.”).

130. *Politicians & Elections, Top Metro Areas 2014*, OPENSECRETS.ORG, <https://www.opensecrets.org/overview/topmetro.php> [<https://perma.cc/Q3UF-CP66>] (last visited Sept. 2, 2016) (demonstrating concentration of candidate and

therefore, money can partially ameliorate the Senate's violation of one-person, one-vote.

The money argument is an unsatisfactory defense of the Senate's malapportionment, as money can only ameliorate the violation of one-person, one-vote if our democratic process remains corrupted by money.¹³¹ Moreover, the ideological views promoted by those from Los Angeles and New York City who spend significant sums to influence the political process often diverge widely from the median views of those cities' residents. For instance, in the 2012 presidential election, voters in Manhattan preferred Obama to Romney by 84% to 15%; among total dollars donated to each candidate from borough residents, Obama "won" by 68% to 32%.¹³² Thus, big donors are affecting the political process in a manner that magnifies their own views, rather than those of the median voter in their city or region.¹³³ Further, while it is self-evident that money significantly affects the political process,¹³⁴ it can only go so far with respect to hot-button issues. However much billionaire former New York City mayor Michael Bloomberg might prefer more stringent gun control,

PAC contributions in 2014 national elections from donors in major metro areas, such as New York City, Washington, D.C., San Francisco, and Chicago).

131. See generally Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009).

132. See *2012 Presidential Campaign Finance*, FED. ELEC. COMM'N, <http://www.fec.gov/disclosure/pnational.do;jsessionid=68966DCCD42B05F48355222D759DB876.worker1> [<https://perma.cc/9KFC-MBP3>] (select the 2012 election cycle, click through to "New York," and zip code "100xx") (last visited Aug. 29, 2016).

133. See Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51 (2013), <http://faculty.wcas.northwestern.edu/~jnd260/cab/CAB2012%20-%20Page1.pdf> [<https://perma.cc/M2DU-5G3F>]; Filipe R. Campante, *Redistribution in a Model of Voting and Campaign Contributions*, 95 J. PUB. ECON. 646, 647 (2011) ("When [campaign] contributions are important, parties are moved to adopt platforms to attract the wealthy."); see generally MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012) (documenting how the American political system is increasingly more responsive to the different policy preferences of the affluent).

134. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 522 (2007) (Souter, J., dissenting) (observing that the "documented threats to electoral integrity . . . posed by large sums of money from corporate or union treasuries" are "obvious to any voter").

millions in campaign contributions or independent expenditures will affect certain senators' votes only so much.¹³⁵

4. *Mobility and Voluntary Waiver*

Given that Americans appear to be gravitating to locations in part based on an area's political leanings, one might argue that those moving to vastly underrepresented states like New York, Texas, or California are voluntarily waiving a better representation ratio in the Senate. This argument is intriguing, but must be rejected for two reasons. First, among all the factors an individual takes into account when moving, representation in the Senate likely ranks quite low on the list. Job opportunities, family, cost of living, recreation, and related factors all play a much larger role in relocation decisions.¹³⁶ Moreover, a person might move to an underrepresented city like New York or San Francisco precisely because of frustration over the political culture in the more overrepresented state and in the nation at large, and seek a local political culture more consistent with personal preferences. Second, as with any valuable political right, the right to equal representation that one-person, one-vote embodies should be considered un-waivable. Political equality is undoubtedly as important as the rights protected from a supposedly "voluntary" waiver by the unconstitutional conditions doctrine, such as free speech, private property ownership, and free exercise of religion.¹³⁷

135. See Dan Friedman, *Wins and Losses for Bloomberg Candidates and Causes on Tuesday*, N.Y. DAILY NEWS, (Nov. 5, 2014, 2:53 AM), <http://www.nydailynews.com/blogs/dc/wins-losses-bloomberg-candidates-tuesday-blog-entry-1.1999765> [<https://perma.cc/8BGW-68TT>] (noting that all of the Senate incumbents who voted for the background-check bill after Newtown who were backed by Bloomberg nonetheless lost their re-election races).

136. Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 523 & n.242 (1991) (citing surveys showing that residents consider schools, taxes, and public safety the most important factors in choosing neighborhoods or cities); but see Wendy K. Tam Cho et al., *Voter Migration and the Geographic Sorting of the American Electorate*, 103 ANNALS ASS'N. AM. GEOGRAPHERS 856, 856 (2013) (finding that partisans relocate based on characteristics "such as racial composition, income, and population density but additionally prefer to relocate in areas populated with copartisans").

137. See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); cf. Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 69 (2012) (arguing that "[u]nconstitutional conditions questions are everywhere").

In sum, the U.S. Senate's egregious violation of one-person, one-vote works to the distinct detriment of voters in highly populous states with major metropolitan areas. The Senate's malapportionment results not just in warped federal spending priorities, but also in the death—or impossibility ab initio—of numerous regulatory measures that enjoy strong support from urban populations.

IV. THE URBAN DISADVANTAGE IN THE U.S. HOUSE: PARTISAN BIAS

Although the Senate skews federal priorities away from urban preferences in a massive, obvious, and nearly permanent way, the House of Representatives now does so in a subtler and more contingent manner that is nonetheless significant. As currently composed, and based on current population distributions, the House suffers from substantial partisan bias in its seats-to-vote ratio in a manner that mutes the voice of urban America. Before explaining this phenomenon in detail, it is helpful to understand how the House does and does not comply with one-person, one-vote.

Since *Wesberry*, all House districts within a state must be apportioned equally. The requirement that every state have at least one representative,¹³⁸ combined with the presumed prohibition of House districts crossing state lines,¹³⁹ nonetheless leads to some disparity in House district populations.¹⁴⁰ Unlike the Senate's institutional bias, however, the rounding errors that result from House apportionment do not systematically favor small states. Because a state needs more than 1.5 times the average district population to receive two representatives, a state with, for example, 900,000 people will receive only one representative when the average House district population nationally is 713,000.¹⁴¹ The House, therefore, roughly complies with one-

138. U.S. Const. art. I, § 2, cl. 3 (“[E]ach State shall have at Least one Representative.”).

139. Article I does not state this requirement clearly; it is only implicit in the text and recognized by continuous historical practice. See *U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442, 448 n.14 (1992).

140. See Jeffrey W. Ladewig & Mathew P. Jasinski, *On the Causes and Consequences of and Remedies for Interstate Malapportionment of the U.S. House of Representatives*, 6 *PERSP. ON POL.* 89 (2008).

141. In actuality, the method for determining a state's total number of representatives is more complex. See Kristin D. Burnett, *Congressional Apportionment*, C2010BR-08, 2010 U.S. CENSUS BUREAU CENSUS BRIEFS 6 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf> [<https://perma.cc/6A4E-7R2A>] (describing the “equal proportions” method for determining a state's number of representatives in the House); 2 U.S.C. § 2(a) (2012) (establishing the method of “equal proportions” as the means for allocating representatives after a census). For

person, one-vote, even if the smaller the state, the more likely its district populations stray—up or down—from the national mean.¹⁴²

With respect to the seats-to-vote ratio, however, the House now suffers from significant partisan bias in favor of Republicans, and to the detriment of urban voters' preferences. The 2012 House election acutely demonstrated this bias: Democratic House candidates received 1.4 million more votes than Republican House candidates, yet Republicans comfortably retained their majority in the chamber by a count of 234 to 201.¹⁴³ Stated differently, although the Democrats defeated Republicans 48.8% to 47.6% nationally, Republicans won the seat count 54% to 46%. The 2012 results are not anomalous, but rather are emblematic of a structural bias in U.S. House elections in favor of Republicans over the last two or three decades. For instance, in 1996, just as in 2012, Republicans won a majority of House seats while amassing fewer votes than Democrats.¹⁴⁴ The U.S. House elections in 1996 and 2012 were the only ones in the last 50 years in which either party won a seat majority while losing the popular vote to the other party.¹⁴⁵ In addition to occasionally winning the House majority despite losing the popular vote, Republicans experience greater proportional gains in seats to their vote share when they outpoll Democrats.¹⁴⁶

more on the deviation of one-person, one-vote due to interstate apportionment, see Ladewig & Jasinski, *supra* note 140, at 90–94. The Supreme Court unanimously upheld Congress's choice of the "equal proportions" method against a challenge that it was inconsistent with Article I, Section 2. See *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 465–66 (1992).

142. See Ladewig & Jasinski, *supra* note 140, at 93 & fig.2.; see also ROYCE CROCKER, CONG. RESEARCH SERV., R41584, HOUSE APPORTIONMENT 2012: STATES GAINING, LOSING, AND ON THE MARGIN 2, tbl.1 (2013), <https://www.fas.org/sgp/crs/misc/R41584.pdf> [<https://perma.cc/CN62-QGF6>].

143. KAREN L. HAAS, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOV. 6, 2012 (2013), <http://history.house.gov/Institution/Election-Statistics/2012election/> [<https://perma.cc/KPC4-STHC>].

144. See Michael P. McDonald, *Mechanical Effects of Duverger's Law in the USA*, in *DUVERGER'S LAW OF PLURALITY VOTING* 76 (Bernard Grofman et al. eds., 2009).

145. *Id.*

146. *Id.*; see also Jonathan P. Kastellec et al., *Predicting and Dissecting the Seats-Votes Curve in the 2006 U.S. House Election*, 41 POL. SCI. & POL. 139, 141 (2008) (documenting Democrats' structural disadvantage in 2006 House elections).

TABLE 2 - SEAT-VOTE MARGINS IN RECENT U.S. HOUSE ELECTIONS

Year	Nat'l % for R	Nat'l % for D	Seats won for R	Seats won for D	Seat % for R	Seat % for D	Seat % - vote % for seat victor	Seat % - vote % for seat loser
2006	44.3	52.3	202	233	46.4	53.6	1.3	2.1
2008	42.6	53.2	178	257	40.9	59.1	5.9	-1.7
2010	51.7	44.9	242	193	55.6	44.4	3.9	-0.5
2012	47.6	48.8	234	201	53.8	46.2	6.2	-2.6
2014	50.9	45.3	247	188	56.8	43.2	5.9	-2.1

Table 2 shows the results of the last five House elections. The first apparent trend is that Democrats need a much higher national vote percentage than Republicans to obtain the same number of seats. For instance, in 2006, Democrats outpolled Republicans 52.3% to 44.3%, yet gained “only” a 233 to 202 majority, whereas in 2010, Republicans outpolled Democrats by less—51.7% to 44.9%—yet gained a more substantial 242 to 193 majority. Second, Republicans have cemented their gains from incumbency obtained in their 2010 win. In addition to winning the House comfortably in 2012 despite losing the national popular vote, they won more seats in 2014 with less of the national popular vote—and by a smaller margin—than in 2010.

The national vote count is necessarily of limited value. Voters might prefer the national platform of one party, but vote for a candidate of a different party because they like the candidate personally, agree with the candidate’s own political views that diverge from the party’s, or appreciate the candidate’s record of constituent service. Further, House elections are battled out district by district. Competitive races draw the best candidates and attract the most campaign contributions and independent expenditures.¹⁴⁷ If Democrats and Republicans in 2012 had reason to care about their national vote count performance, they would have spent money trying to reach voters in numerous districts that each instead ceded as noncompetitive.¹⁴⁸

147. See Robert C. Lowry, *Analyzing Campaign Contributions in Context*, 43 AM. POL. RES. 425, 426 (2015) (“The . . . competitiveness of specific elections directly affect the amounts contributed to the candidates who are running in those races”); Jennifer A. Heerwig, *Donations and Dependence: Individual Contributor Strategies in House Elections*, 60 SOC. SCI. RES. 181, 185 (2016) (hypothesizing that “candidate quality may also be more similarly matched in tight races” for the U.S. House).

148. See Drew DeSilver, *Only 1 in 7 House Districts Were Competitive in 2012*, PEW RESEARCH CTR. (Nov. 5, 2013), <http://www.pewresearch.org/fact-tank/2013/11/05/only-1-in-7-house-districts-were-competitive-in-2012/> [<https://perma.cc/AAV8-DXSQ>].

Even accepting that “everything would be different” if we had a national slate election for the House, the national popular results still speak volumes. Most Americans intuitively understand that a vote for the district candidate is a vote for the national party’s agenda.¹⁴⁹ This association is more pronounced in presidential election years when each party’s standard-bearer might have a coattail effect on candidates for federal office down the ballot.¹⁵⁰ Moreover, in a national slate election, Republican candidates would be likely to take more moderate political positions closer to the views of urban voters. That they feel no need to do so is evidence of the profound disadvantage from which densely populated areas suffer in U.S. House elections.¹⁵¹

Given that urban areas overwhelmingly support Democratic candidates in House and other federal elections, partisan bias in favor of Republican House candidates works to the disadvantage of urban voters.¹⁵² The three primary contributors to this emerging systematic bias are partisan gerrymandering, the presumed constitutional prohibition on House districts

149. See Gary C. Jacobson, *How the Economy and Partisanship Shaped the 2012 Presidential and Congressional Elections*, 128 POL. SCI. Q. 1, 28 (2013) (describing the 2012 U.S. House elections as “the most partisan, nationalized, president-centered elections in at least 60 years”).

150. See, e.g., Joseph Bafumi et al., *Balancing, Generic Polls, and Midterm Congressional Elections*, 72 J. POL. 705, 705 (2010) (explaining the coattail phenomenon); see also Angus Campbell, *Surge and Decline: A Study of Electoral Change*, 24 PUB. OPINION Q. 397 (1960).

151. Some also blame partisan primaries for the perceived increased polarization of members of Congress, especially among Republicans. E.g., Joe Nocera, *Fixing the System*, N.Y. TIMES (Nov. 4, 2013), http://www.nytimes.com/2013/11/05/opinion/nocera-fixing-the-system.html?_r=0 [https://perma.cc/D6HA-VLXA] (“Why are so many extremist Republicans being elected to Congress? A large part of the reason is that highly motivated, extremist voters dominate the current Republican primary system.”). The scholarly work testing this proposition is inconclusive. See, e.g., Shigeo Hirano et al., *Primary Elections and Partisan Polarization in the U.S. Congress*, 5 Q.J. POL. SCI. 169 (2010) (finding little evidence linking primary elections with partisan polarization in congressional roll call voting); Eric McGhee et al., *A Primary Cause of Partisanship? Nomination Systems and Legislator Ideology*, 58 AM. J. POL. SCI. 337, 347–49 (2014) (finding no association between open primaries and more moderate candidates; if anything, open primaries have produced only more extreme candidates).

152. See Nate Cohn, *Why Democrats Can’t Win the House*, N.Y. TIMES (Sept. 6, 2014), <http://www.nytimes.com/2014/09/07/upshot/why-democrats-cant-win.html?abt=0002&abg=1> [https://perma.cc/N2CV-EGF9].

crossing state lines, and the unintentional effects of the current geographical distribution of voter preferences—so-called “unintentional gerrymandering.”

A. Partisan Gerrymandering

The United States is unique in that political officials have traditionally controlled districting.¹⁵³ Using this power, the political party in charge of districting will often try to draw a map to its advantage. Such gerrymandering is as old as the Republic, but computer mapping and other technological advances have allowed parties to employ it with unprecedented levels of sophistication in recent years.¹⁵⁴ Following the censuses of 2000 and 2010, many Republican-controlled state legislatures engaged in intense gerrymandering of state legislative and House seats. Scholars and advocacy groups have demonstrated how the 2010 gerrymandering in key large states contributed significantly to the Republicans’ 2012 House victory.¹⁵⁵ In these states, listed in Table 3, Republicans’ seat share greatly outpaced their vote share. In states like Michigan, North Carolina, and Ohio, Republicans lost the statewide popular vote for House candidates yet comfortably won the majority of the state’s House seats.

153. See Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 780 (2013) (explaining how American redistricting differs from that of other liberal democracies).

154. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 624 (2002) (noting that the “pattern of incumbent entrenchment has gotten worse as the computer technology for more exquisite gerrymandering has improved”). But see Micah Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting*, 5 DUKE J. CONST. L. & PUB. POL’Y 69, 106 (2010) (noting that although “computers permit the exploration of a greater number of alternative configurations of districts within the short period of time between the census and the next election,” “the motivations of professional political actors . . . have at best only marginally been more easily realized by the advent of computerized redistricting”).

155. See Wang, *supra* note 9; Sundeeep Iyer, *Redistricting and Congressional Control Following the 2012 Election*, BRENNAN CTR. FOR JUST. (Nov. 28, 2012), <http://www.brennancenter.org/analysis/redistricting-and-congressional-control-following-2012-election> [<https://perma.cc/5A9M-YHJW>]; see also Stephanopoulos & McGhee, *supra* note 67, at 872 & n.172 (citing Anthony J. McGann et al., *Revenge of the Anti-Federalists: Constitutional Implications of Redistricting* 28–29, 42–50 (2014) (unpublished manuscript) (on file with author)) (“[T]he striking outcomes of the 2012 [House] election are due, at least in part, to more extreme gerrymandering.”). Only in Illinois have analysts attributed Democratic gains in the 2012 election to gerrymandering. See Wang, *supra* note 9.

TABLE 3 - 2012 SEAT-VOTE MARGIN IN KEY LARGE STATES

State	R total vote %	D total vote %	R seats	D seats	R seat %	R seat % - vote % margin
FL	52	46	17	10	63	11
MI	46	51	9	5	64	18
NC	49	51	9	4	69	20
OH	51	47	12	4	75	24
PA	49	51	13	5	72	23
VA	50	48	8	3	73	23
IN	53	45	7	2	78	25

Were partisan gerrymandering the only explanation for the Republican advantage in 2012 as cemented by incumbency in 2014, urban areas might not be at a permanent disadvantage. A shift in state legislature control in 2020 could, in theory, reverse the damage for urban-favored Democrats. However, state legislative districts too have been gerrymandered in favor of Republicans in many states, thus creating a feedback loop that cannot be broken without removing the politics from districting.¹⁵⁶ It is natural to look to the growing movement to reduce political control of districting as a means of breaking this vicious cycle.¹⁵⁷ The built-in Republican advantage in the U.S. House, however, is so strong that even the elimination of partisan gerrymandering is unlikely to erase it.

B. Prohibition on Districts Crossing State Lines

The presumed prohibition on House districts crossing state lines leads Democrats to waste proportionally more votes in smaller states. This is so because the fewer seats in a state, the more substantial the expected seats-vote margin. Those states with single or few seats are more likely to elect Republicans, thus amplifying Republican strength because of the inevitably larger seat-vote spread in small states. For instance, in a state with only one representative, a candidate receiving 51% of the vote, as compared to his opponent's 49%, wins 100% of the seats in the state, thereby leading to a 49% margin. Indeed, in both 2012 and 2014, the House margin in single-seat states was significant. As shown in Table 4, in the seven states with single seats, Republicans won the same five of seven in 2012 and 2014. Republicans thus won 71% of seats in these states despite winning only 50.5% and 53% of the vote, respectively, in each year. Democrats, by contrast, won a mere 29% of the seats despite winning 46% and 43% of the vote.

156. See generally DAVID DALEY, *RATF**KED: HOW THE DEMOCRATS WON THE PRESIDENCY BUT LOST AMERICA* (2016).

157. See text accompanying notes 77-78.

TABLE 4 - 2012 AND 2014 U.S. HOUSE RESULTS
IN ONE-SEAT STATES

U.S. House 2012					
	R	D	Other	Total	Win %
AK	185,296	82,927	21,581	289,804	64%
DE	129,757	249,933	8,369	388,059	64%
MT	255,468	204,939	19,333	479,740	53%
ND	173,433	131,869	10,922	316,224	55%
SD	207,640	153,789	0	361,429	57%
VT	67,543	208,600	13,610	289,753	72%
WY	166,452	57,573	17,596	241,621	69%
Total	1,185,589	1,089,630	91,411	2,366,630	50%
U.S. House 2014					
	R	D	Other	Total	Win %
AK	142,572	114,602	22,567	279,741	51%
DE	85,146	137,251	9,220	231,617	59%
MT	201,436	146,474	15,105	363,015	55%
ND	138,100	95,678	14,892	248,670	56%
SD	183,834	92,485	0	276,319	67%
VT	59,432	123,349	8,723	191,504	64%
WY	113,038	37,803	14,259	165,100	68%
Total	923,558	747,642	84,766	1,755,966	53%

The four two-seat states—Hawaii, Idaho, Maine, and New Hampshire—as a whole occasionally lean more Democratic. In 2012, for instance, Democrats’ total vote share in two-seat states was 51% as compared to Republicans’ 46%, yet Democrats won six of eight, or 75%, of the seats. In 2014, by contrast, the Democrats again won the total vote in two-seat states by 51% to 46%, but this time tied the Republicans at only four seats apiece.¹⁵⁸

TABLE 5 - 2012 U.S. HOUSE RESULTS IN TWO-SEAT STATES

State	R vote	D vote	Other	Total vote	R %	D %	R seats	D seats	R seat - vote margin
HI	137,531	265,327	34,301	437,159	31.5	60.7	0	2	-31.5
ID	406,814	208,297	20,107	635,218	64	32.8	2	0	36
ME	265,982	427,819	0	693,801	38.3	61.7	0	2	-38.3
NH	311,636	340,925	29,855	682,416	45.7	50	0	2	-45.7
Total	1,121,963	1,242,368	84,263	2,448,594	45.8	50.7	2	6	-20.8

158. See *infra* Table 6. A seat in each of Maine (Second Congressional District) and New Hampshire (First Congressional District) switched from Democratic to Republican control in 2014.

TABLE 6 - 2014 U.S. HOUSE RESULTS IN TWO-SEAT STATES

State	R vote	D vote	Other	Total vote	R %	D %	R seats	D seats	R seat - vote margin
HI	120,043	235,356	0	355,399	33.8	66.2	0	2	-33.8
ID	275,072	160,078	7	435,157	63.2	36.8	2	0	36.8
ME	228,071	305,242	59,058	592,371	38.5	51.5	1	1	11.5
NH	232,379	247,469	0	479,848	48.4	51.6	1	1	1.6
Total	855,565	948,145	59,065	1,862,775	45.9	50.9	4	4	4.1

Combined, in one- and two-seat states, the margins largely canceled each other out in 2012, with Democrats and Republicans essentially tied at 48% of the total vote and with Democrats receiving about 25,000 more votes total; Democrats won eight seats as compared to Republicans' seven, or 53% compared to 47%. In 2014, by contrast, the Republican small-state advantage was clearer, with Republicans winning a mere 49% of the vote in one- and two-seat states, but nine of 16 House seats, or 56%.

When adding in three-seat states—Nebraska, New Mexico, and West Virginia—the margins more clearly favor Republicans. In 2012, Republicans won a combined 49% of the vote in one-, two-, and three-seat states, yet scored 13 of 24, or 54%, of the seats, as compared to Democrats' 48% of the combined vote and 46% of seats. In 2014, this advantage was much more pronounced, with Republicans defeating Democrats in the popular vote in one-, two-, and three-seat states by 51% to 46%, yet winning 15 of 24, or 63%, of the seats.

TABLE 7 - 2012 U.S. HOUSE RESULTS IN THREE-SEAT STATES

State	R vote	D vote	Other	R %	D %	R seats	D seats	R seat - vote margin
NE	321,387	276,239	0	53.8	46.2	3	0	46.2
NM	343,269	422,189	632	44.8	55.1	1	2	-11.5
WV	384,253	257,101	0	59.9	40.1	2	1	26.6
Total	1,048,909	955,529	632	52.3	47.7	6	3	14.3

TABLE 8 - 2014 U.S. HOUSE RESULTS IN THREE-SEAT STATES

State	R vote	D vote	Other	Total vote	R %	D %	R seats	D seats	R seat - vote margin
NE	340,816	185,234	9,021	535,071	63.7	34.6	2	1	3
NM	271,222	240,663	0	511,885	53.0	47.0	1	2	-3
WV	242,823	182,484	13,932	439,239	55.3	41.5	3	0	44.7
Total	854,861	608,381	22,953	1,486,195	57.5	40.9	6	3	9.1

Including four-seat states—Arkansas, Iowa, Kansas, Mississippi, and Utah—makes the Republican advantage all the more evident. In 2012, in the 19 states with one, two, three, or four seats, Republicans won 54% of the total vote compared to Democrats' 42%. That translated into 29 of 44, or 66%, of

seats, for a 12% margin. In 2014, this advantage was magnified. Republicans outpolled Democrats 54% to 42% in these 19 states, yet gained 33 of the 44 seats, for a 75% seat share. Nationally, Republicans won 51% to 45% in votes for 247 of 435 seats, or 57%. The seats–vote margin nationally, therefore, was a mere 6% while in the smaller states, it was 21%.

TABLE 9 - 2012 AND 2014 U.S. HOUSE RESULTS IN ONE-, TWO-, THREE-, AND FOUR-SEAT STATES COMBINED

Year	R vote	D vote	Other	Total vote	R %	D %	R seats	D seats	R seat -vote margin
2012	6,813,046	5,295,896	551,066	12,660,008	53.8	41.8	29	15	12.1
2014	4,918,034	3,775,678	351,893	9,045,605	54.4	41.7	33	11	20.6

That Republicans benefit disproportionately from few-seat states would undoubtedly benefit from more rigorous empirical analysis. Nonetheless, its logic is intuitive. Requiring at least one seat per state, in combination with a prohibition on seats crossing state lines, prohibits coupling moderately pro-Republican areas with highly Democratic urban areas in other states to form a more heterogeneous district. Thus, out-of-state areas cannot be sliced into districts that emanate from nearby major cities or their stateside densely populated ring suburbs that overwhelmingly lean Democratic. Examples include New Hampshire (Boston), Arkansas and Mississippi (Memphis), Kansas (Kansas City, Missouri), New Jersey (New York City), West Virginia (Washington, D.C.),¹⁵⁹ Baltimore, and Pittsburgh), and Washington (Portland, Oregon).¹⁶⁰

159. Washington, D.C., of course, has no vote, which is part of the problem. See text accompanying note 88.

160. Splitting majority–minority urban districts might raise potential problems under § 2 of the Voting Rights Act (“VRA”), 42 U.S.C. § 1973. See *Thornburg v. Gingles*, 478 U.S. 30 (1986) (applying § 2 of the VRA to a claim that redistricting diluted blacks’ chance of electing a representative of their choice). For instance, Tennessee’s Ninth Congressional District, centered in Memphis, has one of the highest percentages of African Americans in the country, although ironically it has had a white representative, Steve Cohen, since 2006. Kyle Veazey, *Examining Another Challenge to Cohen, and Representation by Race in the 9th District*, COMM. APPEAL (May 30, 2014), <http://www.commercialappeal.com/news/examining-another-challenge-to-cohen-and-representation-by-race-in-the-9th-ep-510143392-328949521.html> [<https://perma.cc/S2TX-S7EE>] (noting that Tennessee’s Ninth District “has the highest percent of blacks—65.3 percent—than [sic] any other Congressional district in the nation”); see also U.S. Census Bureau, *Tennessee, Congressional District 9*, MY CONG. DISTRICT, <http://www.census.gov/mycd/application/index.html?st=47&cd=09&cnngdst=426720> [<https://perma.cc/36U9-CB3P>] (last visited Aug. 27, 2016) (noting that 464,002 of the

For instance, Democrats utterly dominate Oregon's Third Congressional District, centered on Portland, Oregon, with incumbent Earl Blumenauer winning 70% to 75% of the vote regularly. Meanwhile, just across the Columbia River in a district whose population base is in the Portland suburbs of Clark County, Washington, a Republican, Jaime Herrera Beutler, first won in 2010 in a close vote—53% to 47%—and, with the advantage of incumbency, has since won victories of approximately 60% to 40%. Clearly, Democrats are “wasting” a significant number of votes on the south side of the Columbia River, unable to transfer them north.

C. Voter Geographical Distribution, or “Unintentional Gerrymandering”

In their pathbreaking work, political scientists Jowei Chen and Jonathan Rodden explain how even if House districts were drawn by neutral commissions not seeking to advantage either political party, Republicans would still enjoy an advantage in converting votes to seats because of the electorate's residential patterns and the presumed requirements of compact and contiguous districts.¹⁶¹ Particularly in the Midwest, Northeast, and Florida, areas that were essential to President Barack Obama's 2008 and 2012 presidential wins, Democrats earn huge majorities in uncompetitive districts while Republicans generally win by smaller, even if still comfortable, majorities in suburban and rural districts. Democrats thus

Tennessee's Ninth District's 711,664 residents, or 65.2%, are African American) (based on 2013 estimates). Kansas City, Mo., has a black representative, Emanuel Cleaver, although his district, Missouri's Fifth, is only about one-fifth black. U.S. Census Bureau, *Missouri, Congressional District 5*, MY CONG. DISTRICT <http://www.census.gov/mycd/application/index.html?st=29&cd=05&cngdst=426720> [<https://perma.cc/H9FJ-N7FL>] (last visited Aug. 27, 2016) (163,411 of 758,911, or 21.5%, is African American) (based on 2013 estimates). In 2014, Cleaver defeated his Republican opponent by the relatively small margin of 52% to 45%. In 2009, the Supreme Court held that VRA § 2 claims can only be brought when redistricting dilutes a minority group's population that was previously greater than 50%. *Bartlett v. Strickland*, 556 U.S. 1, 19–20 (2009) (“[A] party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent.”). Under *Bartlett*, therefore, unpacking a district like Missouri's Fifth would not raise VRA problems.

161. Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q. J. POL. SCI. 239 (2013).

“waste” many more votes than Republicans due to the urban concentration of their base.¹⁶²

At least theoretically, in a square-shaped state with a concentration of Democratic votes in the center of the state, pie-slice-shaped districts radiating out from the central city to rural areas could distribute partisan preferences evenly, or perhaps even in Democrats’ favor.¹⁶³ Colorado, with Denver somewhere near the middle, is perhaps the most realistic approximation of this hypothetical state. In most states, however, Democratic-leaning, densely populated urban areas are located in random spots around the state and they cannot easily be combined with more rural areas while preserving contiguity and compactness.¹⁶⁴ Moreover, given the state-line barrier, pie-shaped districts cannot penetrate into another state in an effort to create more competitive districts, and the Voting Rights Act might prevent intentional dilution of urban or Democratic majorities when they are majority African-American or Hispanic.¹⁶⁵

The phenomenon of unintentional gerrymandering is dependent on demographic patterns that are prevalent in many or most, but not all, states. In a handful of very urbanized states, such as Massachusetts and New Jersey, Democratic voters are spread sufficiently throughout the state so that unintentional gerrymandering is less likely.¹⁶⁶ Moreover, in some southern and western states, the presence of rural voters who frequently vote for Democratic candidates—Hispanics in southern Colorado; African Americans in some Deep South states—also reduces unintentional gerrymandering.¹⁶⁷

Chen and Rodden recognize that voter preferences might not be completely exogenous of districting. The concentration of liberal voters in urban districts might lead to a more liberal Democratic platform than

162. *Id.* at 256.

163. *Id.* (“In theory, it seems that a clever Democratic cartographer might generate radial districts emanating from the city centers so as to break up the major agglomerations and create snake-like districts to connect some of the smaller cities.”).

164. *Id.* at 257 (“[H]uman geography makes the task of a Democratic cartographer far more difficult than that facing a Republican-favoring cartographer.”); *cf.* *Davis v. Bandemer*, 478 U.S. 109, 164, 173 n.12 (1986) (Powell, J., concurring and dissenting) (disfavoring “grotesque” districting).

165. *See* 52 U.S.C. § 10301(b) (2012) (prohibiting state action that results in “less opportunity [for citizens of a particular racial group] than other members of the electorate to participate in the political process and to elect representatives of their choice”).

166. Chen & Rodden, *supra* note 161, at 264 (discussing New Jersey).

167. *Id.* at 242, 262; Morrill et al., *supra* note 27, at 527 (discussing rural counties that favor Democrats).

would occur if Democratic voters were spread out, which then makes it harder for the party to compete in crucial moderate districts.¹⁶⁸ If urban liberals were mixed with more moderate and conservative suburban voters, Democrats might present different views to win in such a system. In a similar vein, commentators have argued that the Democrats' strategy of relying, successfully, on urban voters to win presidential elections backfires in House elections by linking House candidates to urban-friendly, liberal policies unpopular in their districts.¹⁶⁹ This may be true, but it is only normatively defensible if there is something sacred about a legislature composed of contiguous districts. The cost is not defensible if one proceeds from the premise that the government, as a whole, ought to be majoritarian, and that votes should count equally regardless of where they are cast. The very majority that elects a president ought to be able to elect its preferred representatives in the national legislature.

Unlike the Senate, the House's bias in favor of rural and exurban Republican-leaning voters is more lightly etched in constitutional stone. Ending the prohibition on districts crossing state lines would presumably require a federal constitutional amendment. Other changes, however, would require only statutory or state constitutional change. One possibility is returning to at-large elections in states with multiple representatives. Several states elected at least some of their representatives at-large 50 years ago.¹⁷⁰ Fearing that the South might use at-large elections to prevent the election of African-American representatives, Congress in 1967 required that states with more than one seat elect all representatives by district.¹⁷¹ Although this provision, in conjunction with the Voting Rights Act, has helped enlarge the number of African Americans in the House, it may now substantially contribute to the weakening of urban—and, to a large extent, African-American—political power.¹⁷² An alternative change

168. Chen & Rodden, *supra* note 161, at 266 (citing Stephen Ansolabehere et al., *When Parties Are Not Teams: Party Positions in Single Member District and Proportional Representation Systems*, 49 *ECON. THEORY* 521 (2012)).

169. Cohn, *supra* note 152 (noting that a strategy that works for national presidential elections can backfire in House).

170. *Wesberry v. Sanders*, 376 U.S. 1, 20 n.1 (1964) (Harlan, J., dissenting) (noting that in 1962, all representatives were elected at large in Alabama (eight), Hawaii (two), and New Mexico (two), while five other states each elected one of their multiple representatives at large).

171. Act of Dec. 14, 1967, Pub. L. No. 90-196, 81 Stat. 581.

172. *See supra* note 160. With respect to majority-minority districts, the "general consensus" in the scholarly literature is that they have helped minority voters, but hurt the Democratic party, which is the party overwhelmingly supported by both African Americans and urban dwellers. Adam B. Cox & Richard

would be to abandon contiguous and compact districts as the goal for district drawing.¹⁷³ Because the current representatives of large cities might lose their “safe seats” under such a scheme, they might be loath to support it.¹⁷⁴

D. Note on the President and the Electoral College

Although this Article focuses primarily on the lawmaking process and thus looks most intently at Congress, it is worth examining the presidential selection process briefly given the president’s crucial role in the lawmaking process. The Electoral College allocates electoral votes on the basis of a state’s total Congressional representation—Senate plus House.¹⁷⁵ The Electoral College thus skews somewhat away from one-person, one-vote, and in favor of smaller states because of the extra two votes attributable to Senate seats. Thus, although California—the nation’s largest state—has 12.1% of the nation’s population, it cast only 55 of 538, or 10.2%, of electoral votes in the 2012 presidential election.¹⁷⁶ By contrast, Wyoming—the nation’s least populous state with less than 0.2% of the population—casts 3 of 538 electoral votes, or almost 0.6%. The Electoral College is far more adherent to one-person, one-vote than the grossly malapportioned

T. Holden, *Reconsidering Partisan and Racial Gerrymandering*, 78 U. CHI. L. REV. 553, 559 & n.21 (2011) (citing numerous works on the subject); *see also* Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 809–10 (1996) (concluding that “[o]utside the South, substantive minority representation is best served by distributing black voters equally among all districts,” and a “trade-off does exist between substantive and descriptive representation”); David Epstein et al., *Estimating the Effect of Redistricting on Minority Substantive Representation*, 23 J.L. ECON. & ORG. 499, 517 (2007) (concluding that “fewer minority representatives” in certain states might correspond with “greater overall influence on policy”). Cox and Holden question this consensus in recent work. *See* Cox & Holden, *supra* at 603–04.

173. *See, e.g.*, IOWA CODE ANN. § 42.4(2)–(4) (West 2016) (requiring that Congressional districts coincide with boundaries of political subdivisions; that they be of “convenient contiguous territory”; and that they be “reasonably compact in form . . . and not irregularly shaped”).

174. *Cf.* Rodden, *supra* note 5, at 10 (noting that many leftist leaders opposed moving from district-based representational systems to proportional representation because they would lose the power that came with safe seats).

175. U.S. Const. art. II, § 1, cl. 2.

176. Because Washington, D.C. is part of the Electoral College, *see* U.S. CONST. amend. XXIII, the author includes its population in the nation’s population for these purposes.

Senate, but less so than the House. The addition of the District of Columbia to the Electoral College by the Twenty-third Amendment in 1961, however, has slightly mitigated the college's amplification of rural states given that the highly urban District receives the same two "extra" votes as small states.¹⁷⁷

With respect to partisan bias, the Electoral College is likely to function better than the House of Representatives because all but two small states, Maine and Nebraska, allocate their electoral votes on a statewide basis.¹⁷⁸ Thus, the countermajoritarian statewide results that occurred with respect to U.S. House elections in 2012 will not occur in 48 states.¹⁷⁹ On the other hand, severe imbalance in performance among the several states could lead to some partisan bias in the college. Imagine a candidate winning the bare majority of states to amass an electoral majority by a combined vote of 51% to 49%, while her opponent wins the other states by a much greater margin. Obviously, from the standpoint of one-person, one-vote and partisan fairness, the Electoral College falls short of the ideal of a national popular vote. As in 2000 and before, a candidate might win the popular vote and lose the college.¹⁸⁰ Moreover, the state-by-state allocation of electoral votes leads to candidates spending far more money and attention on a handful of "swing states," and the traditional role of certain early states like Iowa and New Hampshire in the party nominating process leads to excess attention to issues of particular concern to these states. Nonetheless, the presidential selection process has the potential to disadvantage urban voters less than the Senate and the U.S. House as currently districted.

177. *Id.*

178. See Mitch Smith, *Nebraska Legislature Rejects Winner-Take-All Electoral Vote System*, N.Y. TIMES (Apr. 12, 2016), http://www.nytimes.com/2016/04/13/us/nebraska-legislature-rejects-winner-take-all-electoral-vote-system.html?_r=0 [https://perma.cc/UR4K-CKS9] (noting that Maine and Nebraska are the only states that do not allocate their electoral votes on a winner-take-all basis).

179. Others, focusing only on one-person, one-vote, have declared the House to be more democratic than the presidency. See Ronald Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1641–42 n.230 (2012).

180. See *2000 Official Presidential Election Results*, FED. ELEC. COMMISSION, <http://www.fec.gov/pubrec/2000presgeresults.htm> [https://perma.cc/59S5-242G] (showing that Al Gore won 544,000 more votes than George W. Bush nationwide yet lost the Electoral College vote) (last visited Oct. 7, 2016).

V. THE URBAN DISADVANTAGE IN THE STATES

As compared to the federal government, states are a beacon of democracy. *Reynolds's* strict mandate ensures that all state legislative houses conform to one-person, one-vote.¹⁸¹ Moreover, governors are elected on a simple, statewide one-person, one-vote basis in almost every state,¹⁸² and to the extent that many states rely on direct democracy to enact laws, these too are voted for on the basis of one-person, one-vote.

A. Partisan Bias in State Legislatures is Similar to the U.S. House

Although states comply with one-person, one-vote, many suffer from partisan biases similar to those that plague the U.S. House. The same overlap of residential demography and political preference that skews the U.S. House in favor of Republicans operates, perforce, at the state level because a vast majority use contiguous, single-member, winner-take-all districts to elect legislators.¹⁸³ Florida, for instance, is relatively evenly

181. *Reynolds v. Sims*, 377 U.S. 533 (1964). Despite applying one-person, one-vote to state legislative districts just as to U.S. House districts within states, the Supreme Court has allowed somewhat greater variation in the former than in the latter. *See Karcher v. Daggett*, 462 U.S. 725, 733–34 (1983) (citing *Mahan v. Howell*, 410 U.S. 315, 321–23 (1973)) (requiring nearly absolute equality for House districts, but permitting more variation for state legislative districts to accommodate “local interests”).

182. Vermont and Mississippi are the most notable deviants from one-person, one-vote in gubernatorial elections. Mississippi uses an “electoral” system similar to the presidential election. In Mississippi, state house districts serve as the constituent units of which a gubernatorial candidate must win a majority. MISS. CONST. art. V, § 140. When no candidate receives both an electoral and popular majority, the house of representatives picks the governor by viva voce vote. *Id.* § 141. In Vermont, members of the legislature from both houses, voting jointly, select the governor by secret ballot when no candidate receives an outright majority. VT. CONST. ch. II, § 47; *see also* D. Gregory Sanford & Paul Gillies, *And If There Be No Choice Made: A Meditation on Section 47 of the Vermont Constitution*, 27 VT. L. REV. 783 (2003).

183. Only ten states still use any form of multi-member district (“MMD”) to elect state legislators, and all but two of those, Vermont and West Virginia, use them only for their lower house. *See* Karl Kurtz, *Changes in Legislatures Using Multimember Districts after Redistricting*, NAT’L CONF. OF ST. LEG.: THE THICKET (Sept. 11, 2012), http://ncsl.typepad.com/the_thicket/2012/09/a-slight-decline-in-legislatures-using-multimember-districts-after-redistricting.html [<https://perma.cc/Y3BP-CJBH>]. Among the ten states that use MMDs, only four—Arizona, New Jersey, North Dakota, and South Dakota—are “pure” MMD states that elect all members of their lower house from MMDs, and all four of these states elect only

divided between Democratic and Republican voters statewide. President Obama won the state narrowly in both 2008 and 2012 on the strength of a strong urban performance.¹⁸⁴ The recent governor's races have been extraordinarily close.¹⁸⁵

Divide the Florida electorate into reasonably compact, contiguous districts for the purpose of electing state legislators, however, and Democratic strength rapidly dissipates. Democrats simply waste too many votes in densely packed urban enclaves. Indeed, as Chen and Rodden show, the more contiguous districts that a state like Florida is divided into, the more pronounced the partisan bias.¹⁸⁶ Hence, according to Chen and Rodden, the partisan bias should be more pronounced in the state house than in the state senate because the former has more seats. Beyond a certain number of districts, around 75 in Florida, it becomes impossible to correct the pro-Republican bias even with blatant, intentional pro-Democratic gerrymandering.¹⁸⁷ Bearing out

two members from a district. See Jeffrey Alan Taylor, *Electoral Systems and Representation: The Effects of District Magnitude 7–9* (2013) (unpublished Ph.D. dissertation, University of Maryland) (on file with author). Because a two-member district in these states remains small geographically—usually, the size of a state senate district—the use of MMDs would not substantially cut into any unintentional gerrymandering. Moreover, among the states that use pure MMDs, only Arizona, perhaps, might be expected to experience significant anti-urban unintentional gerrymandering.

184. In 2008, Obama defeated McCain 51% to 48.2% in Florida; in 2012, Obama defeated Romney 50% to 49.1% in Florida. See *United States Presidential Election Results*, DAVID LIEP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, <http://uselectionatlas.org/RESULTS/> [<https://perma.cc/9E6K-HBBQ>] (last visited Oct. 26, 2016) (select from dropdown menu General by Year: 2012; then select the state of Florida); *id.* (select from dropdown menu General by Year: 2008; then select the state of Florida). The results demonstrate that President Obama won populous Miami-Dade, Broward, Palm Beach, and Orange (Orlando) counties by comfortable margins, and Pinellas and Hillsborough counties (Tampa Bay area) by smaller margins.

185. Republican Rick Scott won both races in 2010 and 2014 by small margins over his Democratic opponents: 48.1% to 47.1% and 48.9% to 47.7%, respectively.

186. Chen & Rodden, *supra* note 161, at 252 fig.4.

187. *Id.* at 252, 256 (discussing the impossibility of producing any simulation whereby Congressional, state senate, or state house districts are either neutral or pro-Democratic in distribution of seats). It should be noted that the hypothetical districts drawn by Chen and Rodden in their simulations were not districts that complied with state districting law or the Voting Rights Act. See *Legislative Parties' Answer Brief and Initial Brief on Cross Appeal* at 46–48, *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (2015) (No. SC14-1905), 2015 WL 7340037 (criticizing expert report submitted by Chen and Rodden as part of political gerrymandering litigation in Florida).

Chen and Rodden's thesis, in recent years, Republicans have utterly dominated control of Florida's state legislature, now enjoying a two-to-one majority in the state house and a solid majority in the state senate¹⁸⁸—a dominance that would persist even with neutrally drawn districts. The end result is a state legislature that veers away from the median statewide voter's view in the direction of the ideology of rural and exurban voters. The Florida legislature, for instance, has steadfastly refused to expand Medicaid under the Affordable Care Act, which is the signature domestic accomplishment of President Obama, for whom the state voted twice.¹⁸⁹

The same partisan bias exhibited by the Florida legislature can be expected in other states with significant urban–rural divides in the electorate. Just as Florida's U.S. House partisan bias is magnified by the many legislative districts in its statehouse, it is likely that the same dynamic occurs in Indiana, Michigan, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin. These are all states that have voted for a Democratic president in one or both of the last two national elections. Yet, the chart below shows their state house composition after the 2008 and 2012 elections, respectively.

188. As of 2016, Republicans control the Florida senate by 26 to 14 and the house of representatives by 81 to 39. *2016 Governors and Legislatures*, MULTISTATE ASSOC. INC., <https://www.multistate.com/state-resources/governors-legislatures> [<https://perma.cc/XA3D-N2SU>] (last visited Oct. 14, 2016). Even in Democratic “wave” years like 2008 and 2012, Republicans maintained their iron grip on the statehouse, with majorities of 76 to 44 and 26 to 14 after 2008 and majorities of 74 to 46 and 26 to 14, respectively after 2012. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 261 tbl.419, <http://www2.census.gov/library/publications/2011/compendia/statab/131ed/2012-statab.pdf> [<https://perma.cc/6VJE-E2WH>]; *Florida House of Representatives Elections, 2012*, BALLOTPEDIA, https://ballotpedia.org/Florida_House_of_Representatives_elections,_2012 [<https://perma.cc/645Y-BU28>] (last visited Sept. 9, 2016); *Florida State Senate Elections, 2012*, BALLOTPEDIA, http://ballotpedia.org/Florida_State_Senate_elections,_2012 [<https://perma.cc/ZB6G-VSQT>] (last visited Sept. 9, 2016).

189. See Nick Madigan, *Health Care Expansion Is Rejected in Florida*, N.Y. TIMES (June 5, 2015), <http://www.nytimes.com/2015/06/06/us/health-care-expansion-is-rejected-in-florida.html> [<https://perma.cc/DH69-DQC2>] (reporting that the Florida House of Representatives rejected an expansion of Medicaid that would have covered as many as 650,000 residents by 72 to 41, with all 37 Democrats and four Republicans voting for the measure).

TABLE 10 - RECENT PARTISAN COMPOSITION
OF LEGISLATURES IN KEY STATES¹⁹⁰

State	After 2008 election		After 2012 election	
	Senate (R-D)	House (R-D-I) ¹⁹¹	Senate (R-D)	House (R-D)
IN	33-17	48-52	37-13	69-31
MI	21-17	43-67	26-12	59-50
NC	20-30	52-68	33-17	77-43
OH	21-12	46-53	23-10	60-39
PA	30-20	99-104	27-23	110-93
VA	19-21	52-44-2	20-20	67-33
WI	15-18	46-52	18-15	60-39

As the numbers indicate, after the 2008 presidential election, Democrats controlled 9 of the 14 houses in these states. To some extent, this control was attributable to gains made during the Democratic “wave” of the 2006 midterms, some of which were further cemented in 2008.¹⁹² After the pro-Republican tidal wave of the 2010 midterms, however, followed by pro-Republican gerrymandering in many of these states, Democrats controlled none of these houses by 2013, despite President Obama carrying five—Michigan, Ohio, Pennsylvania, Virginia, and Wisconsin—of the seven states in 2012 and finishing close behind in a sixth (North Carolina). It is likely that the pro-Republican wave of 2010, followed by political gerrymandering, helped restore Republicans’ natural advantage in these states.¹⁹³ The 2014 pro-Republican midterm wave only further cemented this advantage insofar as it was compounded by incumbency. Thus, it will require another huge pro-

190. Virginia holds its state office elections in odd years, so they are not simultaneous with presidential elections. *See* VA. CODE ANN. § 24.2-214 (West 2016) (timing of Virginia senate elections); *id.* § 24.2-215 (timing of its house of delegates elections). Michigan elects its entire state senate in Congressional “midterm” or non-presidential election years. MICH. COMP. LAWS ANN. § 168.170 (West 2016) (establishing state senate elections in 1966 and then every four years after).

191. Wisconsin’s lower house is known as the Assembly. WIS. CONST. art. IV, § 1. Virginia’s lower house is known as the House of Delegates. VA. CONST. art. IV, § 1.

192. *See* James E. Campbell, *The Midterm Landslide of 2010: A Triple Wave Election*, FORUM, Jan. 2010, at 4–7, DE GRUYTER, File No. 10.2202/1540-8884.1405 (discussing the pro-Democratic waves of the 2006 and 2008 elections).

193. *See id.* (discussing 2010 pro-Republican wave); *see also* McDonald, *supra* note 144, at 76–77 (discussing “wave” elections and their disparate partisan effect); *see also* DALEY, *supra* note 156, at 82 (noting that Democrats in Michigan won the aggregate vote for the state house by 54.7% to 45.3% in 2012 yet Republicans maintained a 59 to 51 lock on the state legislature due to post-2010 gerrymandering).

Democratic national wave for Democrats to even have a chance at parity in many of these states' legislatures in the future.¹⁹⁴

As noted earlier, Chen and Rodden demonstrate that the greater the number of districts, the more difficult it is to correct Republicans' seats-to-votes advantage in states with a political demography like Florida's. At the same time, increasing the number of seats does reduce and narrow the range of the potential pro-Republican advantage.¹⁹⁵ Interestingly, the evidence in Table 10, albeit from a limited time frame, shows that most state houses with more seats are less Republican-leaning as compared to state senates. Only in Virginia is the percentage of Republicans in the state house after 2012—67%—notably greater than the percentage in the state senate—50%.¹⁹⁶ This evidence confirms that many of these state legislatures engaged in intentional, pro-Republican gerrymandering in 2010; as predicted by Chen and Rodden, the effect of such intentional gerrymandering is greater in the legislative house with fewer seats.

Three caveats must be offered to the conclusion that states suffer from partisan bias in a manner similar to that of the U.S. House. First, as noted above, the phenomenon of unintentional gerrymandering depends upon residential political patterns that exist in many, but not all, states.¹⁹⁷ Second, just as partisan affiliation serves as a stand-in for ideology in the House, state political parties might have ideologies that vary even more greatly from the national party's than individual House candidates.¹⁹⁸ This variation might cause more or less polarization. If Republican legislators are nearly as liberal as Democrats in a particular state, the partisan divide might not matter much.¹⁹⁹ By contrast, in some states, Democrats in the state legislature may be more liberal than their national counterparts and Republicans may be more

194. *Id.* at 215 (noting that Democrats would need a “historic record” in 2018 state legislative elections and “another big one” in 2020 to neutralize the Republican advantage in districting).

195. Chen & Rodden, *supra* note 161, at 252–53 & fig.4 (“As the size of the legislature increases further, some of the medium-density Democratic clusters in suburbs and small towns that had previously been subsumed . . . begin to win their own seats, and thus the Republican seat share slowly declines.”).

196. In Wisconsin, it is 60% to 54.5%, while in Pennsylvania it is an infinitesimal 54.2% to 54%.

197. *See supra* notes 166–67 and accompanying text.

198. *See* Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 549 (2011) (“[D]espite strong nationalizing trends in American politics, political parties below the national level are quite heterogeneous.”).

199. *See id.* at 546 (noting that Rhode Island and Louisiana have two of the least polarized state legislatures because Democrats and Republicans are more liberal in the former, while they are more conservative in the latter).

conservative, thus causing more polarization at the state level than exists at the national.²⁰⁰

The third caveat is that Democratic state legislative candidates are particularly likely to suffer from reduced turnout. State legislative elections often occur in non-presidential election years, when Democratic voters are often especially unlikely to turn out, thus leading to “dropoff” for Democratic candidates.²⁰¹ In New Jersey and Virginia, all state legislative elections are in uneven years,²⁰² and in Michigan, the entire state senate is elected in midterm even years.²⁰³ Regardless of when their elections are held, state legislative candidates also suffer from higher “roll-off”—that is, voters failing to complete their ballots “down” to lower-profile races like state legislature.²⁰⁴ In the vast majority of states that lack straight-ticket voting, down-ballot roll-off reduces votes by core Democratic constituencies like African Americans.²⁰⁵ Low turnout thus at least partly explains why President Obama

200. *See id.* (concluding that 15 state legislatures are more polarized than Congress for the previous 15 years).

201. *See* Thomas F. Schaller, *Democrats Dread 2014 Drop-Off*, SABATO’S CRYSTAL BALL (Jan. 10, 2013), <http://www.centerforpolitics.org/crystalball/articles/democrats-dread-2014-drop-off/> [<https://perma.cc/K2QR-FMLY>] (noting “[l]ower midterm turnouts tend to skew the electorate” toward Republican-leaning voters).

202. *General Info*, NEW JERSEY LEGISLATURE, <http://www.njleg.state.nj.us/legislativepub/our.asp> [<https://perma.cc/A3ZZ-4EU3>] (last visited Nov. 2, 2016); *see also supra* note 190 (citing Virginia election code).

203. *See supra* note 190 (citing Michigan election code).

204. *See* Chris W. Bonneau & Eric Loepp, *Getting Things Straight: The Effects of Ballot Design and Electoral Structure on Voter Participation*, 34 ELECTORAL STUD. 119, 121 (2014) (defining “roll-off”); Matthew Davis & Priscilla Southwell, *Closing the Gap in State Legislative Races: The Effect of Campaign Spending on Ballot Drop-Off*, 8 J. POL. & L. 118, 118 (2015) (“State legislative races . . . usually account for relatively lower turnout compared to the races at the top of the ticket.”). Some scholars use the terms “roll-off” and “drop-off” interchangeably, or use “roll-off” to signify a specific form of “drop-off.” *E.g., id.* at 120.

205. Douglas G. Feig, *Race, Roll-Off, and the Straight-Ticket Option*, 35 POL. & POL’Y 548, 559 (2007) (concluding that black roll-off exceeds white roll-off for election to lower-level offices except where straight-ticket voting is an option); *see also* Mich. St. A. Philip Randolph Inst. v. Johnson, 2016 WL 3922355, at *2 (E.D. Mich. July 22, 2016) (enjoining under the Voting Rights Act a Michigan law abolishing straight-ticket voting because plaintiffs’ expert had shown “that African-American voters were much more likely to use straight-party voting than white voters, and that [the law in question] would have a larger impact on African-American populations than white ones”). Only ten states now offer straight-ticket voting, down from 14 since just 2010. *Straight Ticket Voting States*, NAT’L CONF. OF STATE LEGS. (Jan. 8, 2016) <http://www.ncsl.org/research/elections-and->

might win a state like Florida twice while at the same time, Republicans overwhelmingly retain control of the state legislature.²⁰⁶

B. Governors, Other Officials Elected Statewide, and Direct Democracy

States' elections for governor fully comply with the mandate of one-person, one-vote. Moreover, because governors are elected statewide, and not by a composite of intrastate district votes, there is no partisan bias in their election.²⁰⁷ Governors, therefore, are the most democratically legitimate branch of any government that has been discussed thus far, at least when elected by a majority or significant plurality. As such, majoritarian governors have the potential to serve as a moderating force on their legislatures in states that suffer from pro-Republican partisan bias, whether they are Republican, Democrat, or independent.²⁰⁸ Almost every state also elects other executive officials with some policymaking authority, such as an attorney general, a secretary of state, and a treasurer.²⁰⁹ Although these officials usually play only minor roles in the legislative process, they may promulgate regulations and

campaigns/straight-ticket-voting.aspx#2 [https://perma.cc/7ERM-M2DL] (noting the abolition of straight-ticket voting in West Virginia in 2015, in Rhode Island in 2014, in North Carolina in 2013, and in Wisconsin in 2011, as well as the Michigan legislature's now-enjoined attempt to eliminate it in 2016).

206. Florida does not have straight-ticket voting. *Id.*

207. The lone exceptions are Mississippi and, to a lesser extent, Vermont. *See* discussion *supra* note 182.

208. *Cf.* Nate Silver, *In State Governments, Signs of a Healthier G.O.P.*, N.Y. TIMES: FIVETHIRTYEIGHT (Apr. 16, 2013, 8:35 PM), <http://fivethirtyeight.blogs.nytimes.com/2013/04/16/in-state-governments-signs-of-a-healthier-g-o-p/> [https://perma.cc/W9JS-AZM8] (demonstrating that the more moderate Republican governors enjoy higher popularity ratings). Recent examples of Republican governors with a "moderate" reputation in states with Republican legislatures include John Kasich of Ohio and Rick Snyder of Michigan. *See* Nate Silver, *Kasich Could Be the GOP's Moderate Backstop*, N.Y. TIMES: FIVETHIRTYEIGHT (Apr. 14, 2015, 1:07 PM), <http://fivethirtyeight.com/datalab/kasich-could-be-the-gops-moderate-backstop/> [https://perma.cc/UH3G-VERZ]; *see also* Harry Enten, *Rick Snyder Has a Chris Christie Problem*, N.Y. TIMES: FIVETHIRTYEIGHT (Apr. 29, 2015, 12:08 PM), <http://fivethirtyeight.com/datalab/rick-snyder-has-a-chris-christie-problem/> [https://perma.cc/7TC8-PEHM] (rating Snyder as a moderate Republican). Other recent Republican governors in states won by President Obama, by contrast, have not served as a moderating force on their legislatures, such as Scott Walker of Wisconsin. *Id.* (rating Walker as more conservative than Kasich and Snyder).

209. John Dinan, *United States of America*, in 3 A GLOBAL DIALOGUE ON FEDERALISM 316, 328–29 (Katy Le Roy et al. eds., 2006).

set enforcement priorities that bring the state's governmental output, as a whole, more toward the views of the mean statewide voter.

In addition to executive officials, a strong majority of states elect the members of the highest state court. Many states also elect members of their intermediate appellate courts. In almost all of these states, such elections are conducted statewide.²¹⁰ In many states, therefore, elected judges might also serve as a moderating influence on legislatures suffering from partisan bias. Although state judges enjoy broad authority to interpret the common law, the possibility of an override by the legislature might constrain judges' ability to interpret the common law more in line with the median voter's views. Obviously, with respect to positive legislation, or statutes, judges play only a reactive role, and any such decisions in this context also remain vulnerable to legislative override. More broadly, judicial elections are notoriously low-information affairs with relatively weak voter participation.²¹¹ Codes of conduct and professional norms prohibit judges from sharing their views openly with the electorate.²¹² Prevailing mythology, popular among many judges, lawyers, and voters, holds that despite being elected officials, judges interpret the law "neutrally" rather than represent the views of their constituents.²¹³ For all these reasons, a state judiciary might serve as a modest corrective, at most, to a state legislature suffering from partisan bias.

The final way in which statewide elections might temper a legislature suffering from anti-urban partisan bias is through direct democracy, whether initiative or referendum. All such statewide votes are conducted on a strict

210. In 42 states, the top courts' judges are either elected statewide or appointed by the governor who is elected statewide. See Diller, *supra* note 6, at 1162.

211. See, e.g., Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 53–54 (2003) (noting low turnout in judicial elections and voters' lack of familiarity with candidates).

212. See *id.* at 60–61 (discussing the canons of judicial conduct that help make it "impossible for voters to gather the information they need to make intelligent decisions").

213. See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1659 (2015) (distinguishing judges from politicians); *Republican Party of Minn. v. White*, 536 U.S. 765, 803–04 (2002) (Ginsburg, J., dissenting) ("Whether state or federal, elected or appointed, judges perform a function fundamentally different from that of the people's elected representatives."); *id.* at 799 (Stevens, J., dissenting) ("[T]he elected judge . . . does not serve a constituency He may make common law, but judged on the merits of individual cases, not as a mandate from the voters."); see also John M. Scheb II. & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928, 929 (2000) (asserting that the American people believe the "myth of legality"—"that cases are decided by the application of legal rules formulated and applied through a politically and philosophically neutral process of legal reasoning").

one-person, one-vote basis statewide, thereby suffering from no district-induced partisan bias. In states with robust systems of direct voter participation, therefore, voters might police the legislature by repealing or merely threatening to repeal legislation that strays too far from the statewide median view.²¹⁴ Moreover, voters could affirmatively enact legislation that is in keeping with their views if the legislature fails to do so.

Direct democracy, however, is far from a substitute for a legislature that represents the median voter. As an initial matter, about half the states either do not have direct democracy or have only a very limited variety.²¹⁵ Moreover, direct democracy suffers from a number of pathologies like the up-or-down nature of ballot measures and the lack of any deliberative process preceding their adoption.²¹⁶ The particularly potent influence of interest-group money in the direct democracy context is also a concern.²¹⁷ Nonetheless, in the states that have it, direct democracy might serve as a modest corrective to the legislature with respect to issues where district-based representatives do not adequately reflect the views of the voters, especially to the disadvantage of urban voters.²¹⁸

214. See Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1372 (1985) (reviewing DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* (1984)) (“[L]egislative lawmaking that occurs in the shadow of a vigorous initiative process may be more responsive to popular wishes than a legislature not subject to check by direct legislation.”).

215. RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 39 (2002).

216. See Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 299 (2007).

217. See Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845, 1847 (1999).

218. See Kevin Arceneaux, *Direct Democracy and the Link between Public Opinion and State Abortion Policy*, 2 ST. POL. & POL’Y Q. 372, 383 (2002) (finding that states with initiatives and referenda are more responsive to public opinion on abortion policy); see also John G. Matsusaka, *Direct Democracy Works*, 19 J. ECON. PERSP. 185, 200 (2005) (finding that initiative states were more likely to reflect popular opinion); see also Dave Jamieson, *Minimum Wage Raise Passes in Four GOP States*, HUFFINGTON POST: POLITICS (Nov. 4, 2014, 9:16 PM), http://www.huffingtonpost.com/2014/11/04/minimum-wage-raise-passes_n_6095458.html [<https://perma.cc/D4XR-GVLL>] (noting that voters in states voted for minimum wage as a way of “bypass[ing] reluctant state legislatures, particularly those led by Republicans”); but cf. Edward L. Lascher Jr. et al., *Gun Behind the Door? Ballot Initiatives, State Policies and Public Opinion*, 58 J. POL. 760, 769 (1996) (finding no evidence that the initiative process is associated with more responsive legislative politics).

VI. OTHER STRUCTURAL URBAN DISADVANTAGES

Densely populated urban areas suffer from other harms in the state and federal systems not directly attributable to representational dilution. Metropolitan areas lack a strong, institutional mechanism for collective action. States, of course, can join together through interstate compacts, subject to approval by Congress,²¹⁹ but cities and metros have no such mechanism. Moreover, the action of the federal government is, to some extent, the action of the states, as famously theorized by Herbert Wechsler. Wechsler asserted that the Constitution's institutional safeguards protect states from overreach by the federal government, so much so that it may not be necessary for the judiciary to enforce independently asserted constitutional constraints on federal power.²²⁰ One may disagree with Wechsler's conclusion and still recognize the vast institutional advantages that states enjoy, such as the composition of the Senate and the Electoral College.

The Constitution, by contrast, completely ignores cities and counties. States are largely free under the federal Constitution to draw Congressional districts in a manner that disrespects local jurisdictional lines.²²¹ House district lines slicing through cities and counties presumably weaken any affinity between a House member and the interests of the particular municipal communities that he represents. With respect to multistate metropolitan areas, the Constitution actively disfavors any institutional representation thereof. The confinement of Senate and House seats to single states ensures that such metro areas are divided among numerous representatives. There is no senator for the 18-million-person New York City metropolitan area—only senators who represent one of the three states it comprises. One might argue that this means that there are six senators who care about the region—two each from New York, New Jersey, and Connecticut. That is to some degree true, but each pair of senators will be concerned with only their slice of the metro area and must also focus on the far-flung regions of the rest of the state.

Ironically, cities' and counties' lack of institutional representation at the state level is to some degree the result of one-person, one-vote. Before *Reynolds* and *Wesberry*, many states used local jurisdictional boundaries—usually counties—as the means for allocating state legislative and U.S. House

219. U.S. CONST. art. I, § 10, cl. 3 (allowing states to enter into “Agreement[s] or Compact[s]” with “the Consent of Congress”).

220. Wechsler, *supra* note 10.

221. *But see* *Karcher v. Daggett*, 462 U.S. 725, 758–59 (1983) (Stevens, J., concurring) (stressing the importance of respect for political subdivision boundaries when analyzing whether *de minimis* variations from equal population violate the Equal Protection clause).

seats.²²² This rigid reliance on local boundaries—for example, giving each county at least one state senator regardless of population—caused the massive disparities that the Supreme Court corrected in 1964. From the standpoint of urban political influence, the tradeoff was obviously worth it, as the localities most advantaged by the prior system were low in population and rural.²²³ Even after *Reynolds*, many states have sought to ensure that their legislative districts respect local boundaries while complying with one-person, one-vote, usually by directing that cities and counties not be sliced up unless necessary.²²⁴ A handful of states use multi-member districts to accommodate the deviations in population among building-block units of towns or counties.²²⁵ Some of the recent efforts to cut down on political gerrymandering by delegating districting to neutral commissions have included in their mandates that local boundaries be respected “to the extent practicable.”²²⁶ In these states, cities and counties enjoy more institutional protection than the federal Constitution alone provides.

222. See *Reynolds v. Sims*, 377 U.S. 533, 539 (1964) (discussing Alabama constitutional provisions requiring state senate and house seats for each county regardless of population); see also Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1405–09 (2012) (tracing the history of legislative representation based on political subdivision units from England to pre-1964 United States) (“In 1955, on the eve of the reapportionment revolution, nine states still elected at least one chamber purely by town or by county.”).

223. See, e.g., VT. CONST. ch. II, § 13 (1964) (providing each town with one representative in the General Assembly); see also *Buckley v. Hoff*, 234 F. Supp. 191, 197 (D. Vt. 1964) (noting that “gross[] malapportion[ment]” of the Vermont House of Representatives resulted in one representative for the town of Stratton’s 38 people and one representative for Burlington’s 35,531 people), *modifying sub nom.* *Parsons v. Buckley*, 379 U.S. 359 (1965) (per curiam).

224. See James A. Gardner, *Foreword: Representation Without Parity: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 896 & n.45 (2006) (“Twenty state constitutions . . . contain some kind of restriction on the division of local government units or the crossing of local government boundaries in the creation of election districts.”); see also, e.g., OR. REV. STAT. ANN. § 188.010 (West 2016) (imploping mapmakers to “consider . . . political boundaries” when redrawing legislative districts).

225. See, e.g., VT. CONST. ch. II, §§ 13, 18 (urging legislature to respect county and political subdivision boundaries in drawing districts while allowing one or two representatives and one or more senators).

226. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015) (observing that Arizona voters adopted redistricting reform in 2000 in part to “end[] the practice of gerrymandering”); ARIZ. CONST. art. IV, pt. 2, § 1(14) (setting goal that district lines use “city, town, and county boundaries” “[t]o the extent practicable”).

The value of any such institutional safeguards for localities is limited, however, for a number of reasons. First, as they are not established by the federal Constitution, these safeguards may be eliminated through state legislation or constitutional amendment. Second, by their very nature, these safeguards cannot apply to interstate metropolitan areas. Third, they are subject to override by both one-person, one-vote, even if there is more flexibility for state legislatures than for U.S. House districts,²²⁷ and the Voting Rights Act. Finally, unlike states, cities' territorial integrity enjoys no federal constitutional protection, and in most states, no state constitutional protection.²²⁸ Hence, even if state law requires that city or county boundaries be respected when districting, state legislatures remain relatively free to redraw those boundaries.²²⁹ The net result is that cities, counties, and metropolitan areas lack anything near the institutional safeguards that the states enjoy.

This institutional disadvantage compounds the numeric, representational disadvantage from which cities suffer at the national level. The compounded disadvantage means that federal policy is likely to tilt away from urban preferences even more than it would if the disadvantage were merely a result of malapportionment and partisan bias. To be sure, the policies of some states—compact, urbanized states like Maryland, Massachusetts, and New Jersey, and even California, Illinois, and New York²³⁰—likely mirror in large

227. See *supra* note 181 (discussing *Mahan v. Howell*, 410 U.S. 315, 321–23 (1973)); see also Stephanopoulos, *supra* note 222, at 1413–15 (discussing the Supreme Court's tolerance of deviations from equipopulous state legislative districts when the reason for such deviation was respecting political subdivision boundaries).

228. For the federal constitutional protection of state boundaries, see U.S. CONST. art. IV, § 3 (“[N]o new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the . . . Parts of States, without the Consent of the Legislatures of the States.”).

229. EUGENE MCQUILLIN, 1 MCQUILLIN MUNICIPAL CORPORATIONS § 3.26 (3d ed., updated 2015) (“[T]he power of the state legislature to establish the boundaries of local government units is plenary in the absence of a state or federal constitutional provision to the contrary.”).

230. California and New York are hardly compact, but the urban areas in those states are so populous that they might dominate their Congressional delegations. In California, for instance, 95% of the population lives in areas denominated “urban” by the Census Bureau, the highest of any state. See *Urban Percentage of the Population for States, Historical*, IOWA ST. UNIV., <http://www.icip.iastate.edu/tables/population/urban-pct-states> [<https://perma.cc/46AA-84ZX>] (last visited Sept. 2, 2016). In New York, for instance, 13 of the state's 27 House members represent at least part of New York City. See ALMANAC OF AMERICAN

part the preferences of urban areas. Hence, insofar as the institutional safeguards of federalism reflect the preferences of these states, urban voters would not be disadvantaged. However, the Senate's malapportionment ensures that, on the whole, any benefits from institutional safeguards will accrue to the more sparsely populated states. This will be particularly evident with respect to blocking legislation; the representatives from a large number of relatively sparsely populated states can team up to stymie legislation in a way that the U.S. Conference of Mayors never can.²³¹

Similarly, cities are not in as strong a position vis-à-vis state government as the states stand vis-à-vis the national government. Many state legislators from large cities represent districts entirely within those cities and thus may identify with a particular city in the way that federal lawmakers identify with a state. More common will be legislators who represent multiple local jurisdictions and whose district boundaries might change over time, resulting in a less identifiable link to a particular city or county.²³² Moreover, in almost all states, governors are elected by a statewide popular vote, with no equivalent to an electoral college.²³³ Cities *qua* cities therefore do not exercise the same power as states *qua* states in the election of the chief executive. The respect for local boundaries in districting in the states that have it might help protect local interests to some degree, but it is not as robust a protection as the many institutional advantages that states enjoy at the national level.

The lack of strong institutional protection for local governments disadvantages all residents to some extent because everyone lives in a city, county, or both. The lack of institutional protection, however, might disproportionately affect residents of the largest and most densely populated cities because those cities often pursue the most ambitious policy agendas and would therefore benefit most from safeguards that protect them from preemption or enable them to further their agenda at the state or federal levels.²³⁴ Moreover, while many rural residents live in

POLITICS 1136 (Michael Barone et al. eds., 2014). Several other members represent the New York City suburbs. *Id.*

231. See Baker & Dinkin, *supra* note 91 and accompanying text.

232. See Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule & Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1368 (2009) (“[R]epresentation in state legislatures does not respect the geographic boundaries of municipalities . . .”).

233. The primary exception is Mississippi, which uses something like an electoral college to elect its governor. See MISS. CONST. art. V, § 140. Mississippi’s system primarily relies on state house districts to serve as electoral units, although it apportions electoral votes among counties when a house district comprises more than one county. *Id.*

234. See *supra* note 32.

counties only because they do not reside within an incorporated city, most urban residents live in cities and counties.

The lack of any Wechslerian protection for cities is not necessarily a reason for the state judiciary to enforce a rigid “dual localism” akin to the dual federalism of years past, as some have suggested.²³⁵ Rather, the lack of Wechslerian protection merely demonstrates that the urban disadvantage explained in Parts III and IV is significant. Indeed, to the extent that cities enjoy modest institutional protection in some states, they would likely be better off waiving it in exchange for gerrymandering that consciously sought to spread urban votes around, if that could be accomplished legally and politically.²³⁶ Ironically, more gerrymandering of a very specific, targeted variety, rather than less, could help remedy the urban disadvantage in the lawmaking process, at least to a degree.

CONCLUSION

No democracy is perfect, but the violation of one-person, one-vote in the Senate is so severe that it impugns the entire national structure. Despite the occasional stray commentary by a large-state public official,²³⁷ however, there appears to be no significant public support for seriously reconsidering the Senate’s makeup. Indeed, Dahl thought there was “virtually zero” likelihood of reducing the extreme inequality in the Senate.²³⁸ Doing so in a manner consistent with the current Constitution is essentially impossible.²³⁹ The

235. See Baker & Rodriguez, *supra* note 232, at 1370–71.

236. See *supra* note 160 (discussing Voting Rights Act implications of dividing up majority-minority urban areas).

237. E.g., Senator Daniel Patrick Moynihan, *Introduction* to JAY H. WALDER & HERMAN B. LEONARD, *THE FEDERAL BUDGET AND THE STATES* 19 (22d ed.1998) (“[S]ometime in the next century the United States is going to have to address the question of apportionment in the Senate.”).

238. HOW DEMOCRATIC?, *supra* note 70, at 154.

239. See U.S. CONST. art. V (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”). For intriguing suggestions as to how the Senate malapportionment might be addressed in a manner consistent with article V, see Baker & Dinkin, *supra* note 91, at 72–74 (discussing the possibility of large states self-partitioning to reduce malapportionment and making one-time payments to small states to secure the support necessary for Congressional approval of new states); see also Scott J. Bowman, Note, *Wild Political Dreaming: Constitutional Reformation of the United States Senate*, 72 *FORDHAM L. REV.* 1017, 1034 & n.111 (2004) (citing Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *COLUM. L. REV.* 457, 461 (1994)) (“[C]ouldn’t the ‘equal suffrage’ rules of Article V be easily evaded by two successive ‘ordinary’ amendments, the first of which repealed the equal

Senate's deeply undemocratic nature is so ingrained in the national political psyche that the public is largely oblivious to its distortive effect on legislative output.

The notable flaws in the other elements of the governmental system—the House, the presidency, and state legislatures—are all significant even if of less severity. Unlike the Senate's malapportionment, the partisan bias in the House and state legislatures could be fixed, at least in part, with something less than a federal constitutional change. For the House and state legislatures, moving toward proportional representation combined with at-large elections would help mitigate the partisan bias that currently exists. Although members of the Supreme Court have emphatically rejected the notion that the Constitution requires proportional representation, there is nothing in the Constitution that prohibits it either.²⁴⁰ Congress could simply repeal and replace the statute that requires single-member House districts. States are certainly free under the federal Constitution to adopt proportional representation or more at-large elections for their own legislatures, albeit subject to the federal Voting Rights Act. Nonetheless, there is no strong movement toward at-large or proportional systems raging in the political culture at the moment. Hence, the more practical step for achieving greater political fairness for urban areas is reducing partisan gerrymandering. Although eliminating such gerrymandering will not completely remedy the urban disadvantage, it would at least reduce it in states where a rural-exurban minority has a lock on the political process in a way disproportionate to its share of the population.

Any changes to federal and state districting remain a very tall order, and progress is likely to be slow if at all existent. Meanwhile, the serious problems facing our nation and the world—income inequality, crumbling infrastructure, the devastating effects of climate change, and immigration—demand urgent action. Even if most Americans support climate change legislation, for instance, and most of that majority lives in urban America, it is very unlikely that the national government will produce such legislation. Similarly, if most Floridians support extended health insurance, and most or much of that majority resides in Florida's urban areas, the systematic underrepresentation of those residents' views in the state legislature will greatly hinder the ability of those views to turn into law.

Given the federal and state systems' propensity to block an urban-centered majority from implementing its will, it is only natural for that majority to look to governments at the local level—city, county, or metro—

suffrage rules themselves, and the second of which reapportioned the Senate?" (arguing that two amendments could reapportion the Senate, with the first being the one that struck the Equal Suffrage Clause).

240. *E.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 288 (plurality opinion of Scalia, J.).

for action. Even if modest and uneven, the successes at the local level give voice to the muted majority. The ability of local government to serve as an outlet for policy ideas is limited, however, by a large number of factors, including the relatively small size and scale of local government. Reforming the health care market, for instance, is hard to do in Miami alone due to issues of both scale and law. Miami cannot, on its own, opt into a Medicaid expansion under the Affordable Care Act even if its residents favor such action. In addition to federal law, numerous state law doctrines—from Dillon’s Rule to home rule, preemption to *imperio* home rule—prescribe and proscribe the powers of local government. Having elucidated the urban disadvantage in this Article, the second article in this series will explore whether and how state home rule doctrine might remedy the disadvantage.

APPENDIX

TABLE 1 - U.S. POPULATION, HOUSE SEATS, AND ELECTORAL VOTES BY STATE

	2013 population ²⁴¹	2010 population ²⁴²	2000 population ²⁴³	Total seats in House ²⁴⁴	Total Electoral Votes ²⁴⁵
California	38,332,521	37,253,956	33,871,648	53	55
Texas	26,448,193	25,145,561	20,851,820	36	38
New York	19,651,127	19,378,102	18,976,457	27	29
Florida	19,552,860	18,801,310	15,982,378	27	29
Illinois	12,882,135	12,830,632	12,419,293	18	20
Pennsylvania	12,773,801	12,702,379	12,281,054	18	20
Ohio	11,570,808	11,536,504	11,353,140	16	18
Georgia	9,992,167	9,687,653	8,186,453	14	16
Michigan	9,895,622	9,883,640	9,938,444	14	16
North Carolina	9,848,060	9,535,483	8,049,313	13	15
New Jersey	8,899,339	8,791,894	8,414,350	12	14
Virginia	8,260,405	8,001,024	7,078,515	11	13
Washington	6,971,406	6,724,540	5,894,121	10	12
Massachusetts	6,692,824	6,547,629	6,349,097	9	11
Arizona	6,626,624	6,392,017	5,130,632	9	11

241. The 2013 population data was obtained from U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION: APRIL 1, 2010 TO JULY 1, 2013 (2014).

242. The 2010 population data was obtained from U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, CENSUS 2010: FINAL REPORT TO CONGRESS (2011).

243. The 2000 population data was obtained from U.S. CENSUS BUREAU, CENSUS 2000 (2001) (Table 1, "States Ranked by Population: 2000").

244. Data for the apportionment of representatives in the House in 2010 was obtained from *Congressional Apportionment*, U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Institution/Appportionment/Appportionment/> [<https://perma.cc/BJ9R-5ELH>] (last visited Nov. 3, 2016).

245. *Distribution of Electoral Votes*, FED. ELECTION COMMISSION, <http://www.fec.gov/pages/elevote.htm> [<https://perma.cc/CA2Q-L49S>] (last updated Oct. 3, 2003).

Indiana	6,570,902	6,483,802	6,080,485	9	11
Tennessee	6,495,978	6,346,105	5,689,283	9	11
Missouri	6,044,171	5,988,927	5,595,211	8	10
Maryland	5,928,814	5,773,552	5,296,486	8	10
Wisconsin	5,742,713	5,686,986	5,363,675	8	10
Minnesota	5,420,380	5,303,925	4,919,479	8	10
Colorado	5,268,367	5,029,196	4,301,261	7	9
Alabama	4,833,722	4,779,736	4,447,100	7	9
South Carolina	4,774,839	4,625,364	4,012,012	7	9
Louisiana	4,625,470	4,533,372	4,468,976	6	8
Kentucky	4,395,295	4,339,367	4,041,769	6	8
Oregon	3,930,065	3,831,074	3,421,399	5	7
Oklahoma	3,850,568	3,751,351	3,450,654	5	7
Connecticut	3,596,080	3,574,097	3,405,565	5	7
Iowa	3,090,416	3,046,355	2,926,324	4	6
Mississippi	2,991,207	2,967,297	2,844,658	4	6
Arkansas	2,959,373	2,915,918	2,673,400	4	6
Utah	2,900,872	2,763,885	2,233,169	4	6
Kansas	2,893,957	2,853,118	2,688,418	4	6
Nevada	2,790,136	2,700,551	1,998,257	4	6
New Mexico	2,085,287	2,059,179	1,819,046	3	5
Nebraska	1,868,516	1,826,341	1,711,263	3	5
West Virginia	1,854,304	1,852,994	1,808,344	3	5
Idaho	1,612,136	1,567,582	1,293,953	2	4
Hawaii	1,404,054	1,360,301	1,211,537	2	4
Maine	1,328,302	1,328,361	1,274,923	2	4
New Hampshire	1,323,459	1,316,470	1,235,786	2	4
Rhode Island	1,051,511	1,052,567	1,048,319	2	4
Montana	1,015,165	989,415	902,195	1	3
Delaware	925,749	897,934	783,600	1	3
South Dakota	844,877	814,180	754,844	1	3
Alaska	735,132	710,231	626,932	1	3
North Dakota	723,393	672,591	642,200	1	3
Vermont	626,630	625,741	608,827	1	3
Wyoming	582,658	563,626	493,782	1	3
D.C.	646,449	601,723	572,059	1	3
Total 50 states	315,482,390	308,143,815	280,849,847	435	535
Total 50 states and D.C.	316,128,839	308,745,538	281,421,906	435	538
Total 50 states and all territories	-	312,913,872	285,620,445	435	538

TABLE 2 - U.S. POPULATION PER HOUSE SEAT, U.S. POPULATION AS PERCENT OF TOTAL POPULATION, NUMBER OF SENATORS IN 1000-SEAT SENATE

State	2013 population per House seat	2010 population per House seat	2013 percent of U.S. (50 states)	2010 percent of U.S. (50 states)	Number of senators in 1000-seat senate (% x 1000)
California	723,255	702,905	12.15%	12.09%	122
Texas	734,672	698,488	8.38%	8.16%	84
New York	727,820	717,707	6.23%	6.29%	62
Florida	724,180	696,345	6.20%	6.10%	62
Illinois	715,674	712,813	4.08%	4.16%	41
Pennsylvania	709,656	705,688	4.05%	4.12%	40
Ohio	723,176	721,032	3.67%	3.74%	37
Georgia	713,726	691,975	3.17%	3.14%	32
Michigan	706,830	705,974	3.14%	3.21%	31
North Carolina	757,543	733,499	3.12%	3.09%	31
New Jersey	741,612	732,658	2.82%	2.85%	28
Virginia	750,946	727,366	2.62%	2.60%	26
Washington	697,141	672,454	2.21%	2.18%	22
Massachusetts	743,647	727,514	2.12%	2.12%	21
Arizona	736,292	710,224	2.10%	2.07%	21
Indiana	730,100	720,422	2.08%	2.10%	21
Tennessee	721,775	705,123	2.06%	2.06%	21
Missouri	755,521	748,616	1.92%	1.94%	19
Maryland	741,102	721,694	1.88%	1.87%	19
Wisconsin	717,839	710,873	1.82%	1.85%	18
Minnesota	677,548	662,991	1.72%	1.72%	17
Colorado	752,624	718,457	1.67%	1.63%	17
Alabama	690,532	682,819	1.53%	1.55%	15
South Carolina	682,120	660,766	1.51%	1.50%	15
Louisiana	770,912	755,562	1.47%	1.47%	15
Kentucky	732,549	723,228	1.39%	1.41%	14
Oregon	786,013	766,215	1.25%	1.24%	13
Oklahoma	770,114	750,270	1.22%	1.22%	12
Connecticut	719,216	714,819	1.14%	1.16%	11
Iowa	772,604	761,589	0.98%	0.99%	10
Mississippi	747,802	741,824	0.95%	0.96%	10
Arkansas	739,843	728,980	0.94%	0.95%	9
Utah	725,218	690,971	0.92%	0.90%	9
Kansas	723,489	713,280	0.92%	0.93%	9
Nevada	697,534	675,138	0.88%	0.88%	9
New Mexico	695,096	686,393	0.66%	0.67%	7
Nebraska	622,839	608,780	0.59%	0.59%	6
West Virginia	618,101	617,665	0.59%	0.60%	6
Idaho	806,068	783,791	0.51%	0.51%	5
Hawaii	702,027	680,151	0.45%	0.44%	5
Maine	664,151	664,181	0.42%	0.43%	4
New Hampshire	661,730	658,235	0.42%	0.43%	4
Rhode Island	525,756	526,284	0.33%	0.34%	3
Montana	1,015,165	989,415	0.32%	0.32%	3
Delaware	925,749	897,934	0.29%	0.29%	3
South Dakota	844,877	814,180	0.27%	0.26%	3
Alaska	735,132	710,231	0.23%	0.23%	2
North Dakota	723,393	672,591	0.23%	0.22%	2
Vermont	626,630	625,741	0.20%	0.20%	2
Wyoming	582,658	563,626	0.18%	0.18%	2

TABLE 3 - 2013 U.S. POPULATION TOTALS

Portion of population	Total	Percent of total
Total population of largest 30 states	282,965,672	89.69%
Total population of largest 20 states	239,180,470	75.81%
Total population of largest 17 states ²⁴⁶	221,464,772	70.20%
Total population of largest 5 states	116,866,836	37.04%
Total population of smallest 20 states	32,516,718	10.31%
Total population of smallest 19 states plus 1/2 Mississippi	31,021,115	9.83%
Total population of smallest 5 states	3,512,690	1.11%

TABLE 4 - MANCHIN-TOOMEY SENATE VOTE (APRIL 2013)

State	2010 population ²⁴⁷	Vote ²⁴⁸	
California	37,341,989	Y	Y
Colorado	5,044,930	Y	Y
Connecticut	3,581,628	Y	Y
Delaware	900,877	Y	Y
Hawaii	1,366,862	Y	Y
Illinois	12,864,380	Y	Y
Maine	1,333,074	Y	Y
Maryland	5,789,929	Y	Y
Massachusetts	6,559,644	Y	Y
Michigan	9,911,626	Y	Y
Minnesota	5,314,879	Y	Y
New Jersey	8,807,501	Y	Y
New Mexico	2,067,273	Y	Y
New York	19,421,055	Y	Y
Oregon	3,848,606	Y	Y
Pennsylvania	12,734,905	Y	Y
Rhode Island	1,055,247	Y	Y
Vermont	630,337	Y	Y
Virginia	8,037,736	Y	Y
Washington	6,753,369	Y	Y
West Virginia	1,859,815	Y	Y
Total population fully in favor	155,225,662		
Arizona	6,412,700	Y	N
Florida	18,900,773	Y	N
Indiana	6,501,582	Y	N
Iowa	3,053,787	Y	N
Louisiana	4,553,962	Y	N
Missouri	6,011,478	Y	N
Nevada	2,709,432	Y	N
New Hampshire	1,321,445	Y	N
North Carolina	9,565,781	Y	N
Ohio	11,568,495	Y	N
South Dakota	819,761	Y	N
Wisconsin	5,698,230	Y	N
Montana	994,416	Y	N
Total population half in favor	78,111,842		
Alabama	4,802,982	N	N
Alaska	721,523	N	N

246. Required for Senate ratification blocking.

247. See U.S. CENSUS BUREAU, *supra* note 242.248. See Senate Roll Call Vote No. 97, *supra* note 98.

Arkansas	2,926,229	N	N
Georgia	9,727,566	N	N
Idaho	1,573,499	N	N
Kansas	2,863,813	N	N
Kentucky	4,350,606	N	N
Mississippi	2,978,240	N	N
Nebraska	1,831,825	N	N
North Dakota	675,905	N	N
Oklahoma	3,764,882	N	N
South Carolina	4,645,975	N	N
Tennessee	6,375,431	N	N
Texas	25,268,418	N	N
Utah	2,770,765	N	N
Wyoming	568,300	N	N
Total population fully against	75,845,959		
Total population	309,183,463		
Total in favor	194,281,583	63%	
Total against	114,901,880	37%	
District of Columbia	601,723	Y	Y

TABLE 5 - RFRA MOTION TO PROCEED VOTE (JUNE 2014)

State	2010 population ²⁴⁹	Vote ²⁵⁰	
Alaska	721,523	Y	Y
California	37,341,989	Y	Y
Colorado	5,044,930	Y	Y
Connecticut	3,581,628	Y	Y
Delaware	900,877	Y	Y
Hawaii ²⁵¹	1,366,862	Y	-
Illinois	12,864,380	Y	Y
Maine	1,333,074	Y	Y
Maryland	5,789,929	Y	Y
Massachusetts	6,559,644	Y	Y
Michigan	9,911,626	Y	Y
Minnesota	5,314,879	Y	Y
Montana	994,416	Y	Y
New Jersey	8,807,501	Y	Y
New Mexico	2,067,273	Y	Y
New York	19,421,055	Y	Y
Oregon	3,848,606	Y	Y
Rhode Island	1,055,247	Y	Y
Vermont	630,337	Y	Y
Virginia	8,037,736	Y	Y
Washington	6,753,369	Y	Y
West Virginia	1,859,815	Y	Y
Total population fully in favor	143,523,265		
Arkansas	2,926,229	Y	N
Florida	18,900,773	Y	N
Indiana	6,501,582	Y	N
Iowa	3,053,787	Y	N
Louisiana	4,553,962	Y	N
Missouri	6,011,478	Y	N

249. See U.S. CENSUS BUREAU, *supra* note 242.

250. See Senate Roll Call Vote No. 228, *supra* note 101.

251. Hawaii's population is halved because one of its senators (Brian Schatz) did not vote. *Id.*

Nevada	2,709,432	Y	N
New Hampshire	1,321,445	Y	N
North Carolina	9,565,781	Y	N
Ohio	11,568,495	Y	N
Pennsylvania	12,734,905	Y	N
South Dakota	819,761	Y	N
Wisconsin	5,698,230	Y	N
Total population half in favor	86,365,860		
Alabama	4,802,982	N	N
Arizona	6,412,700	N	N
Georgia	9,727,566	N	N
Idaho	1,573,499	N	N
Kansas	2,863,813	N	N
Kentucky	4,350,606	N	N
Mississippi	2,978,240	N	N
Nebraska	1,831,825	N	N
North Dakota	675,905	N	N
Oklahoma	3,764,882	N	N
South Carolina	4,645,975	N	N
Tennessee	6,375,431	N	N
Texas	25,268,418	N	N
Utah	2,770,765	N	N
Wyoming	568,300	N	N
Total population fully against	78,610,907		
Total population	308,500,032		
Total in favor	186,706,195	61%	
Total against	121,793,837	39%	
District of Columbia	601,723	Y	Y

TABLE 6 - 1910 U.S. POPULATION BY STATE

State	Population ²⁵²	Population as % of total
New York	7,268,894	9.74%
Pennsylvania	6,302,115	8.45%
Illinois	4,821,550	6.46%
Ohio	4,157,545	5.57%
Missouri	3,106,665	4.16%
Total population of largest 5 states	25,656,769	34.39%
Texas	3,048,710	4.09%
Massachusetts	2,805,346	3.76%
Indiana	2,516,462	3.37%
Michigan	2,420,982	3.24%
Iowa	2,231,853	2.99%
Georgia	2,216,331	2.97%
Kentucky	2,147,174	2.88%
Wisconsin	2,069,042	2.77%
Tennessee	2,020,616	2.71%
North Carolina	1,893,810	2.54%

252. Population data for 1910, for states Alabama through Montana, was obtained from 2 U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, THIRTEENTH CENSUS OF THE UNITED STATES: 1910 (1915). Population data for 1910, for states Nebraska through Wyoming, was obtained from 3 U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, THIRTEENTH CENSUS OF THE UNITED STATES: 1910 (1913).

New Jersey	1,883,669	2.52%
Virginia	1,854,184	2.49%
Alabama	1,828,697	2.45%
Minnesota	1,751,394	2.35%
Mississippi	1,551,270	2.08%
California	1,485,053	1.99%
Kansas	1,470,495	1.97%
Louisiana	1,381,625	1.85%
South Carolina	1,340,316	1.80%
Arkansas	1,311,564	1.76%
Maryland	1,188,044	1.59%
Nebraska	1,066,300	1.43%
West Virginia	958,800	1.29%
Connecticut	908,420	1.22%
Maine	694,466	0.93%
Colorado	539,700	0.72%
Florida	528,542	0.71%
Washington	518,103	0.69%
Rhode Island	428,556	0.57%
Oregon	413,536	0.55%
New Hampshire	411,588	0.55%
South Dakota	401,570	0.54%
Vermont	343,641	0.46%
North Dakota	319,146	0.43%
Utah	276,749	0.37%
Montana	243,329	0.33%
Delaware	184,735	0.25%
Idaho	161,772	0.22%
Wyoming	92,531	0.12%
Nevada	42,335	0.06%
Total population of smallest 5 states	724,702	0.97%
Total population	74,607,225	100%

TABLE 7 - 1950 U.S. POPULATION BY STATE

State	Population ²⁵³	Population as % of total
New York	14,830,192	9.83%
California	10,586,223	7.01%
Pennsylvania	10,498,012	6.96%
Illinois	8,712,176	5.77%
Ohio	7,946,627	5.27%
Total population of largest 5 states	52,573,230	34.83%
Texas	7,748,000	5.13%
Michigan	6,421,000	4.25%
New Jersey	4,860,000	3.22%
Massachusetts	4,690,000	3.11%
North Carolina	4,060,000	2.69%
Indiana	3,952,000	2.62%
Missouri	3,946,000	2.61%
Georgia	3,451,000	2.29%
Wisconsin	3,449,000	2.29%
Tennessee	3,304,000	2.19%
Virginia	3,262,000	2.16%
Alabama	3,060,000	2.03%

253. Population data for 1950 was obtained from 1 U.S. CENSUS BUREAU, U.S. DEPARTMENT OF COMMERCE, CENSUS OF POPULATION: 1950 (1952).

Minnesota	2,995,000	1.98%
Kentucky	2,957,000	1.96%
Florida	2,821,000	1.87%
Louisiana	2,701,000	1.79%
Iowa	2,621,000	1.74%
Washington	2,386,000	1.58%
Maryland	2,376,000	1.57%
Oklahoma	2,193,000	1.45%
Mississippi	2,169,000	1.44%
South Carolina	2,119,000	1.40%
Connecticut	2,007,280	1.33%
West Virginia	2,006,000	1.33%
Kansas	1,915,000	1.27%
Arkansas	1,906,000	1.26%
Oregon	1,532,000	1.02%
Colorado	1,337,000	0.89%
Nebraska	1,324,000	0.88%
Maine	911,000	0.60%
District of Columbia	814,000	0.54%
Rhode Island	779,000	0.52%
Arizona	756,000	0.50%
Utah	696,000	0.46%
New Mexico	687,000	0.46%
South Dakota	652,000	0.43%
North Dakota	616,000	0.41%
Montana	598,000	0.40%
Idaho	592,000	0.39%
New Hampshire	531,000	0.35%
Vermont	377,000	0.25%
Delaware	321,000	0.21%
Wyoming	292,000	0.19%
Nevada	162,000	0.11%
Total population of smallest 5 states	1,683,000	1.12%
Total population	150,925,510	100%