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## The Speciation of Partisan Ideology in the United States: How Preventing Ideological Gene Flow Contributes to Political Factions

Katherine Rath

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**THE SPECIATION OF PARTISAN IDEOLOGY IN THE UNITED STATES:  
HOW PREVENTING IDEOLOGICAL GENE FLOW CONTRIBUTES TO POLITICAL FACTIONS**

Katherine Rath

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## I. INTRODUCTION†

The United States faces a critical issue: extreme polarization between its two main political parties, Democrats and Republicans. As of September 2022, only two states—Minnesota and Virginia—had a divided state legislature.<sup>1</sup> The Democratic Party controls seventeen states, and the Republican Party controls thirty states.<sup>2</sup> Partisan identification predicts voter preferences about a range of social policy issues nearly three times as well as any other demographic factor.<sup>3</sup> While this is not the first time the U.S. has been in a politically polarized environment, polarization at this point in history could create highly divisive factions unable to reconcile moral and ideological differences.<sup>4</sup>

This Article uses evolutionary principles to explain why political polarization is a distinctly new threat in the U.S. and to show how political polarization impacts both states and the federal government. Specifically, it argues that the lack of ideological and partisan “gene flow” has led predominantly “red” ideas to spread among Republicans and “blue” ideas among Democrats. Consequently, the lack of ideological movement across the U.S. has led the country towards “speciation,” resulting in only two, entirely distinct political parties.<sup>5</sup> Ultimately, the speciation evolved in a manner that the Founders most feared: two divisive factions that hinder both democratic and federalist principles of government.<sup>6</sup>

First, this Article will draw on two evolutionary biology traits, gene flow and speciation, to show political polarization in a new framework.<sup>7</sup> Second, it will examine the Founders’ fear of political factions within the U.S.<sup>8</sup> Third, it will explore three factors that have prevented gene flow across individual states and through the U.S.: geography, systemic racism and

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† Katherine Raths is a 2022 graduate of Mitchell Hamline School of Law. She would like to thank Professor Mark Gordon for inspiring this Article. Many thanks to the Mitchell Hamline Law Review for its thoughtful feedback throughout the editorial process.

<sup>1</sup> *State Partisan Composition*, NAT’L CONF. STATE LEGISLATURES (Sept. 10, 2022), <https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx> [https://perma.cc/EE9D-ZXEE].

<sup>2</sup> *Id.* In only one state, Nebraska, members are elected on a nonpartisan basis. *Id.*

<sup>3</sup> *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/> [https://perma.cc/RE3K-7XAB].

<sup>4</sup> THE FEDERALIST NO. 10 (James Madison).

<sup>5</sup> As this Article later describes, speciation is the process by which a new species is created. Kim Rutledge et al., *Speciation*, NAT’L GEOGRAPHIC SOC’Y (July 15, 2022), <https://www.nationalgeographic.org/encyclopedia/speciation/> [https://perma.cc/3DK3-YTLP].

<sup>6</sup> Unlike other countries that have also been experiencing a rise in polarization, the U.S. stands as an exception with its “rigid, two-party electoral system.” Michael Dimock & Richard Wike, *America Is Exceptional in its Political Divide*, PEW CHARITABLE TR. (Mar. 29, 2021), <https://www.pewtrusts.org/en/trust/archive/winter-2021/america-is-exceptional-in-its-political-divide> [https://perma.cc/J3V7-MVHG].

<sup>7</sup> See *infra* Part II.

<sup>8</sup> See *infra* Part III.

sexism, and technology.<sup>9</sup> Fourth, it will analyze two traits stemming from speciation: a partisan U.S. Supreme Court and a disrupted breakdown in the federalist system of governance.<sup>10</sup> Fifth, this Article recommends that the U.S. embrace proportional representation or ranked-choice voting in order to support a multiparty political system.<sup>11</sup> Finally, this Article concludes that increasing ideological and partisan gene flow within and across state boundaries will mitigate the harmful effects of speciation.

## II. EVOLUTIONARY BIOLOGY FRAMEWORK TO EXPLORE POLITICAL POLARIZATION

### *A. Strengths and Weaknesses of Using Evolutionary Biology as a Metaphor*

Scholars have used evolutionary biology to help explain legal concepts.<sup>12</sup> Using biological comparisons as interdisciplinary frameworks can provide alternative explanations for legal issues.<sup>13</sup> Nonetheless, legal scholars have also noted the danger in applying these interdisciplinary evolutionary principles without fully understanding the nuances of biology, which can lead to “misrepresentation.”<sup>14</sup>

This Article borrows two ideas from evolutionary biology. First, it compares the evolutionary gene flow of traits in a population to the ideological and partisan gene flow throughout individual states and across the U.S. Second, it analyzes how those factors have frustrated gene flow and contributed to the political “speciation,” or polarization, between Democrats and Republicans.

Importantly, this analogy is not perfect. Inherent limitations exist when comparing biological factors and traits to political ideology, such as failing to recognize that humans and ideas fundamentally differ from controlled experiments and nature.<sup>15</sup> Although gene flow and speciation are not perfect comparisons to polarization—polarization cannot explain the

<sup>9</sup> See *infra* Part IV.

<sup>10</sup> See *infra* Part V.

<sup>11</sup> See *infra* Part VI.

<sup>12</sup> See, e.g., Scott Dodson, *A Darwinist View of the Living Constitution*, 61 VAND. L. REV. 1319 (2008) (analyzing the Constitution by using metaphorical comparisons to natural selection, artificial selection, and intelligent design); Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645 (1985) (exploring jurisprudence through Darwinian biology); William Rodgers, *Where Environmental Law and Biology Meet: Of Pandas’ Thumbs, Statutory Sleepers, and Effective Law*, 65 U. COLO. L. REV. 25 (1993) (noting the overlap between environmental law and evolutionary biology).

<sup>13</sup> See generally Mark Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 647–53 (1996) (using different examples of path dependency to demonstrate how, and why, society may choose one path over another).

<sup>14</sup> See generally Brian Leiter & Michael Weisberg, *Why Evolutionary Biology Is (So Far) Irrelevant to Law*, UNIV. TEX. SCH. L. (2007) (Research Paper No. 89, 2007).

<sup>15</sup> See *id.* at 5 (“Evolutionary biology offers nothing to law—more precisely, it offers nothing to help with questions about legal regulation of behavior . . .”). This Article does not intend to show that we should rely entirely on biological principles to explain human behavior concerning polarization.

variety of nuances that exist in these evolutionary traits—they provide a compelling lens to see increased partisan polarization and the rise of factions between Democrats and Republicans.

### *B. Gene Flow*

First, this Article uses gene flow as a metaphor to compare how ideas spread across individual states and the U.S. as a whole. In evolutionary biology, gene flow means that one population of species introduces genetic material to another population of species.<sup>16</sup> Specifically, gene flow occurs when members of one species migrate from one population to another and interbreed with the new population's members.<sup>17</sup>

Generally, gene flow leads to a positive outcome because introducing new genetic material to a population creates increased variation of species within a population.<sup>18</sup> A more diverse gene flow allows new combinations of potentially valuable traits in a species.<sup>19</sup> However, sometimes gene flow is harmful for the population because new genes can carry mutations or inappropriate genetic material for the environment, thus disrupting the population.<sup>20</sup> This Article posits that gene flow, or the migration of diverse ideas into different populations, benefits society.<sup>21</sup>

### *C. Speciation*

Second, this Article uses speciation to describe the partisan and ideological polarization that currently exists throughout the U.S. Generally, speciation is the process by which a new species is created.<sup>22</sup> Speciation can occur when the members of one species separate from another species; when this separation occurs, the separated members can become so different that they ultimately evolve into their own species, entirely separate from the original population.<sup>23</sup>

Speciation is a critical component of evolutionary development because it is responsible for “the origin of biologic diversity.”<sup>24</sup> Speciation

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<sup>16</sup> Aakanksha Gaur & Kara Rodgers, *Gene Flow*, BRITANNICA (Sept. 8, 2022), <https://www.britannica.com/science/gene-flow> [https://perma.cc/9MC9-K3XJ].

<sup>17</sup> Francisco Jose Ayala et al., *Dynamics of Genetic Change*, BRITANNICA (Oct. 31, 2021), <https://www.britannica.com/science/evolution-scientific-theory/Dynamics-of-genetic-change#ref311620> [https://perma.cc/K2G5-XNSY].

<sup>18</sup> Gaur & Rodgers, *supra* note 16.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* This alternative hypothesis is a general weakness of this Article's overall metaphor.

<sup>21</sup> Feng Shi et al., *Are Politically Diverse Teams More Effective*, HARV. BUS. REV. (July 15, 2019), <https://hbr.org/2019/07/are-politically-diverse-teams-more-effective> [https://perma.cc/NS9A-7QWH] (noting that “decades of social science research has found that the presence of diverse perspectives is beneficial for creative companies and teams”).

<sup>22</sup> Rutledge, *supra* note 5.

<sup>23</sup> *Id.*

<sup>24</sup> See generally Susan Rutherford et al., *Speciation in the Presence of Gene Flow: Population Genomics of Closely Related and Diverging Eucalyptus Species*, THE GENETICS SOCIETY

typically begins with a barrier to gene flow, which ultimately leads to a greater divergence in genetic compositions.<sup>25</sup> Eventually, the divergence may become so extreme that it leads to the creation of a new species.<sup>26</sup> As a result, if not enough diverse genetic material is introduced, then natural selection will subsume the new genes into the dominant species.<sup>27</sup> Conversely, antagonistic relationships among species lead to diversity, which ultimately “beget more diversity.”<sup>28</sup>

This Article posits that, while Republicans and Democrats could once share ideas, especially surrounding abortion and gun control, several factors have prevented these ideas from freely flowing across gene flow populations. Much like speciation, political polarization occurs when “subsets of a population adopt increasingly dissimilar attitudes towards parties and party members, as well as ideologies and policies.”<sup>29</sup> As a result of the lack of gene flow, the Republican and Democratic parties have diverged into two separate and uncompromising populations, or “species,” unable to reconcile differences.

### III. A HISTORICAL PERSPECTIVE: THE FOUNDERS’ FEAR OF FACTIONS

Political factions are a part of this country’s founding. Hoping to leave behind the violent seventeenth-century civil wars in England, the Founders acknowledged political parties could create the factionalism they wanted to avoid.<sup>30</sup> For example, Alexander Hamilton stated the new Union would stand “as a barrier against domestic faction and insurrection.”<sup>31</sup>

Additionally, James Madison claimed that a function of a “well-constructed Union” should be “its tendency to break and control the

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(Apr. 10, 2018), <https://www.nature.com/articles/s41437-018-0073-2> [<https://perma.cc/9QCD-6YRY>] (explaining the general process of speciation).

<sup>25</sup> *Id.*

<sup>26</sup> Rutledge, *supra* note 5.

<sup>27</sup> *Id.*

<sup>28</sup> Scott Solomon, *Cambrian Explosion to Dinosaur Extinction, What Darwin Didn’t Know: The Modern Science of Evolution*, WONDRIUM (2021), <https://www.wondrium.com/what-darwin-didnt-know-the-modern-science-of-evolution> [<https://perma.cc/Y5VZ-FZNY>]. Importantly, times of relative calm partisan politics, such as the 1950s, stemmed, in part from systemic racism as whites attempted to keep non-whites out of the political processes. Dimock & Wike, *supra* note 6. Polarization did not exist at the same levels because diversity of thought was thwarted as a result of political suppression. *See id.*

<sup>29</sup> Gordon Heltzel & Kristin Laurin, *Polarization in America: Two Possible Futures*, 34 CURRENT OPINION BEHAV., SCI. 179, 179 (2020).

<sup>30</sup> Sarah Pruitt, *The Founding Fathers Feared Political Factions Would Tear the Nation Apart*, HISTORY (Mar. 7, 2019), <https://www.history.com/news/founding-fathers-political-parties-opinion> [<https://perma.cc/SWH4-BKNF>]. Throughout the seventeenth century, three civil wars erupted throughout England, Scotland, and Ireland. *English Civil Wars*, HISTORY (Sept. 10, 2021), <https://www.history.com/topics/british-history/english-civil-wars> [<https://perma.cc/M8M3-L3TC>]. Professor Willard Sterne Randall, a professor emeritus of history, stated that “[j]ust the idea of a party brought back bitter memories to some of [the Founding Fathers]. Pruitt, *supra* note 30.

<sup>31</sup> THE FEDERALIST NO. 9 (Alexander Hamilton).

violence of faction.”<sup>32</sup> Specifically, Madison defined a faction as a group of people “who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”<sup>33</sup> Madison argued that the country could mitigate the deleterious effects of factions through pluralism. He wrote, “The increased variety of parties comprised within the Union, increase this security [from one group gaining dominance].”<sup>34</sup> Having a greater number of diverse sects, therefore, secures the U.S. against potential danger from factionalism.<sup>35</sup>

In 1796, President George Washington again warned the newly formed country about the danger of factions. In his farewell address, he stated:

I have already intimated to you the danger of parties in the State, with particular reference to the founding of them on geographical discriminations. Let me now take a more comprehensive view, and warn you in the most solemn manner against the baneful effects of the spirit of party generally . . . . Without looking forward to an extremity of this kind (which nevertheless ought not to be entirely out of sight), the common and continual mischiefs of the spirit of party are sufficient to make it the interest and duty of a wise people to discourage and restrain it.<sup>36</sup>

On the other hand, Thomas Jefferson acknowledged that factions are inevitable: “Men by their constitutions are naturally divided into two parties.”<sup>37</sup> Ultimately, even though the Founders warned of the dangers of factions, they did precisely what they warned against and created two parties, the Federalists and the Anti-Federalists.<sup>38</sup>

As history demonstrates, the fear of factions in the U.S. is nothing new. In fact, the country has experienced times of extreme polarization, such as the Civil War, between different factions.<sup>39</sup> However, the next two sections explore why the factors preventing gene flow have contributed to modern speciated factions.

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<sup>32</sup> THE FEDERALIST NO. 10 (James Madison).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See id.*

<sup>36</sup> President George Washington, Farewell Address (1796) (*available at* [https://avalon.law.yale.edu/18th\\_century/washing.asp](https://avalon.law.yale.edu/18th_century/washing.asp)) [<https://perma.cc/SV54-LVCZ>].

<sup>37</sup> Letter from Thomas Jefferson to Henry Lee (10 August 1824) (*available at* <https://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-04-02-02-4451>) [<https://perma.cc/9X4J-BABR>].

<sup>38</sup> Pruitt, *supra* note 30.

<sup>39</sup> For example, during the U.S. Civil War, the nation broke into two nations: President Abraham Lincoln’s Union and Robert E. Lee’s Confederate Army, causing more than three million men to go to war. *Civil War Facts*, AMER. BATTLEFIELD TR. (Aug. 24, 2021), <https://www.battlefields.org/learn/articles/civil-war-facts> [<https://perma.cc/MLA9-TFMP>].

#### IV. FACTORS PREVENTING GENE FLOW

##### *A. Metaphorical Overview*

Exploring factors that prevent gene flow, or more broadly, the sharing of political views and ideology across populations, provides a framework to survey the political polarization in the U.S. This Article does not aim to provide an exhaustive list of all the factors that have prevented gene flow across populations.<sup>40</sup> Instead, this Article focuses on certain factors thrusting the U.S. toward a critical juncture that, if left unrecognized and unresolved, could end in destruction.

Broadly, researchers now agree that the “ideological distance” between elected, partisan leaders reached an all-time high over the past century.<sup>41</sup> Before the 2020 election, approximately eight in ten registered Democrats and Republicans stated they were concerned “that a victory by the other [side] would lead to ‘lasting harm’ to the United States.”<sup>42</sup> This Article explores three factors that contribute to the lack of gene flow: (1) geography; (2) systemic racism and sexism; and (3) social media.

##### *B. Geography*

One factor thwarting the ideological gene flow across populations is geographical boundaries when people move to like-minded communities. People in like-minded communities do not encounter much political opposition.<sup>43</sup> By self-sorting into like-minded communities, one party’s voters are “more geographically clustered than those of the opposing party due to residential patterns and human geography.”<sup>44</sup> As a result of the “geographic cluster,” people naturally segregate into communities where others share similar ideas.<sup>45</sup>

Segregation into like-minded communities means one’s views on political concerns become binary. For example, people remain strongly attached to their political parties, which, given the binary Republican and

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<sup>40</sup> Polarization has increased, in part, because partisan identity is also heavily shaped by “ideology, race and religion,” in a way that is unique to the U.S. PEW RSCH. CTR., *supra* note 3. As a result of these three diverging identities, the U.S. seems to struggle to find its “collective national identity.” *Id.*

<sup>41</sup> DAVID DARMOFAL & RYAN STRICKLER, DEMOGRAPHY, POLITICS, AND PARTISAN POLARIZATION IN THE UNITED STATES, 1828–2016 2 (Jeremy R. Porter & Stephen A. Matthews eds., 2019).

<sup>42</sup> PEW RSCH. CTR., *supra* note 3.

<sup>43</sup> See BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 248 (1st ed. 2009).

<sup>44</sup> Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 2013 J. POLI. S. 239, 240 (2013).

<sup>45</sup> See generally BISHOP, *supra* note 43 (noting that Democrats more commonly move to urban areas while Republicans move to suburbs and rural regions).



Democrat nature of U.S. politics, leads to increasingly divergent ideas.<sup>46</sup> “[P]arties have come to represent lifestyle—and as lifestyle has defined communities—everything seems divisible, Republican or Democrat.”<sup>47</sup> Because of the two-party political system in the U.S., voters must decide between one political party or the other, and thus become more like-minded.<sup>48</sup> Specifically,

[t]here is clear evidence of significant spatial polarization of support for the country’s two main political parties across recent presidential elections as like people tend to vote the same way, and like people tend to cluster together . . . such clustering increases greater polarization in voting patterns is the consequence.<sup>49</sup>

Interestingly, in 2016, most people found little common ground with those they disagreed with politically.<sup>50</sup> According to a 2016 study, forty-six percent of people found that talking about politics with people they disagreed with was generally stressful and frustrating.<sup>51</sup> Majorities in both parties said that “when they talk to people on the other side, they usually end up finding they have less in common politically than they thought.”<sup>52</sup> Accordingly, people who “have become so ideologically inbred that [they] don’t know, can’t understand, and can barely conceive of ‘those people’ who live just a few miles away,”<sup>53</sup> give support for the analogous evolutionary argument that geographic polarization has stymied gene flow between different populations. In turn, that self-segregation divides, or speciates, the population into Democrats or Republicans.

### C. Systemic Racism and Sexism

Continuing the analogy, the racist and sexist history of the U.S. has influenced the lack of gene flow. Historically, the American political system

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<sup>46</sup> Milenko Martinovich, *Americans’ Partisan Identities Are Stronger Than Race and Ethnicity*, *Stanford Scholar Finds*, STAN. NEWS (Aug. 31, 2017), <https://news.stanford.edu/2017/08/31/political-party-identities-stronger-race-religion/> [https://perma.cc/GU2D-MGU2]. Stanford scholar Shanto Iyengar suggested that people are more connected to their political parties than “racial and cultural heritage, the language they speak and their choice of worship.” *Id.*

<sup>47</sup> BISHOP, *supra* note 43, at 232.

<sup>48</sup> See Richard Florida, *America’s ‘Big Sort’ Is Only Getting Bigger*, BLOOMBERG (Oct. 25, 2016), <https://www.bloomberg.com/news/articles/2016-10-25/how-the-big-sort-is-driving-political-polarization> [https://perma.cc/N8MD-Y9N6].

<sup>49</sup> *Id.*

<sup>50</sup> *Partisanship and Political Animosity in 2016*, PEW CHARITABLE TR. (June 22, 2016), <https://www.pewresearch.org/politics/2016/06/22/partisanship-and-political-animosity-in-2016/> [https://perma.cc/3G48-U5US].

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> BISHOP, *supra* note 43, at 40.

has denied non-whites<sup>54</sup> and women the same opportunities as white men.<sup>55</sup> Yet, while racism and sexism are part of the U.S.'s founding, recently increased racial and ethnic diversity has contributed to a stifling of those diverse voices at the state and federal levels. Two factors, white identity politics and homogenous state legislatures, contribute to the lack of gene flow across both the state and national populations.

### 1. *White Identity Politics*

When one hears the expression “white identity politics,” it elicits images of the Ku Klux Klan, the White Citizen’s Council, or the Jim Crow laws that existed throughout the U.S. Until recently, scholarly research acknowledged that white people did not generally “think about their whiteness—at least in a way that [was] politically meaningful.”<sup>56</sup> Recent research, however, suggests that white identity politics are not necessarily “synonymous with prejudice,” and have intensified following President Barack Obama’s presidency.<sup>57</sup> Even though U.S. voters are increasingly diverse, a resurgence of white identity awareness has hindered gene flow across states, as white people have aimed to support candidates appealing to their white identity.<sup>58</sup>

An increased awareness of white identity arose following President Barack Obama’s first presidential term.<sup>59</sup> President Barack Obama was elected as the U.S.’s forty-fourth president on November 4, 2008, and became the country’s first Black president. Notably, during President Obama’s reelection in 2012, “whites who reported that their racial identity is extremely important were fifty percent more likely to vote for Romney rather than Obama compared to whites low on identity.”<sup>60</sup> Importantly, President Obama’s two presidential terms and their symbolic and actual threat to white identity may have augmented President Trump’s appeal to white identity.<sup>61</sup>

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<sup>54</sup> Based on guidance from the Chicago Manual of Style, this Article leaves “white” in lower-case letters and capitalizes Black. Chicago Manual, *Black and White: A Matter of Capitalization*, CMOS SHOP TALK (June 22, 2020), <https://cmosshoptalk.com/2020/06/22/black-and-white-a-matter-of-capitalization/> [https://perma.cc/V43F-QN4H].

<sup>55</sup> American women gained the right to vote with the ratification of the Nineteenth Amendment. U.S. CONST. amend. XIX. Even though non-white citizens gained the right to vote with the Fifteenth Amendment, which was ratified in 1870, the end of the Reconstruction period and rise of Jim Crow led to unequal civic participation. See U.S. CONST. amend. XV; Farrell Evans, *How Jim-Crow Era Laws Suppressed the African-American Vote for Generations*, HISTORY (May 13, 2021), <https://www.history.com/news/jim-crow-laws-black-vote> [https://perma.cc/CA4V-XP8N].

<sup>56</sup> ASHLEY JARDINA, *WHITE IDENTITY POLITICS* 6 (2019) (ebook).

<sup>57</sup> *Id.* at 4.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 139.

<sup>60</sup> *Id.* at 223.

<sup>61</sup> *Id.* at 230–32.

Trump's incendiary political rhetoric drew support from white nationalists and white supremacists, but he also drew support more broadly from white people who supported his strong stance against immigration.<sup>62</sup> Crucially, President Trump departed from the traditional Republican Party platform of limiting big government and instead promised to keep government policies, such as Social Security and Medicare, in place.<sup>63</sup> Evidence also shows the importance of white identity's role in presidential vote choice.<sup>64</sup> For example, President Trump emerged as the leader from the Republican primaries in part because of his appeal to those who strongly identified with whiteness, even though he departed from many of the traditional Republican Party platforms.<sup>65</sup> By mobilizing white voters who participated in the political process, President Trump secured the Republican presidential nomination.

This argument emphasizes President Trump's ability to mobilize white voters and win the presidential primary; however, it fails to explain why President Trump won the national election. Yet, at the federal level, evidence shows that "[w]hite voters are substantially more likely than voters of other racial and ethnic backgrounds to vote for Republican candidates in both the congressional and presidential elections."<sup>66</sup>

In relating this factor to evolutionary biology, we can see that President Trump, and by nature the Republican Party, secured white votes, perhaps due to a growing awareness of white identity politics. President Trump's 2016 election came in part because of the political participation of voters who associated with Trump's white identity during the presidential primaries. As a result, if the Republican Party continues to draw white voters, then that may similarly stifle any diversity of ideas between Republicans and Democrats.

## 2. *Lack of Diverse Gender and Racial Representation at the State Level*

Second, the lack of diverse gender and racial representation at the state level means state legislatures consist of a majority of white men. Even though the U.S. population is roughly fifty percent women, state capitols

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<sup>62</sup> "Even after accounting for the range of factors we usually believe motivate electoral outcomes, it is clear that white identity is a key component in support or opposition of candidates in recent presidential elections . . . It is, perhaps, entirely unsurprising that white identity and consciousness were two of the best indicators of support for President Trump." Travis Dove, *Transcript of Donald Trump's Immigration Speech*, N.Y. TIMES (Sept. 1, 2016), <https://www.nytimes.com/2016/09/02/us/politics/transcript-trump-immigration-speech.html> [<https://perma.cc/NK3E-A6B8>].

<sup>63</sup> JARDINA, *supra* note 56, at 234.

<sup>64</sup> *Id.* at 257.

<sup>65</sup> *Id.* at 233–34.

<sup>66</sup> *Large Shares of Voters Plan to Vote a Straight Party Ticket for President Senate and House*, PEW CHARITABLE TR. (Oct. 21, 2020), <https://www.pewresearch.org/politics/2020/10/21/large-shares-of-voters-plan-to-vote-a-straight-party-ticket-for-president-senate-and-house/> [<https://perma.cc/N2B4-DCAZ>].

contain a minority of women serving in the legislatures. This lack of gender diversity stands in stark contrast to the U.S. House of Representatives, where “historically underrepresented groups, including women and people of color, are serving in record numbers.”<sup>67</sup>

Since President Trump was elected in 2016, many states attempted to increase the diversity of power in state capitols.<sup>68</sup> However, even though some states saw gains in the number of women serving in state legislatures from 2015 to 2020, most states saw the number of women legislators decline or stay the same.<sup>69</sup> Only six states saw “double-digit increases” in the number of women state legislators.<sup>70</sup>

The year 2022 is no exception. In 2022, despite efforts to increase female representation at the state level, women still make up only 30.6% of all state legislators nationwide.<sup>71</sup> Two states show the lack of female representation at the state level. In Texas, only 25.4% of the legislators are female.<sup>72</sup> Mississippi fares no better. Only 16.7% of its legislators are female.<sup>73</sup>

Only one state, Nevada, has women serving as a majority of its state legislators.<sup>74</sup> According to Jill Tolles, a Nevada Republican Assemblywoman, the “growing ranks of female lawmakers also have helped bring more legislation to the forefront on previously under-addressed issues, including measures aimed at preventing sexual assault or sex trafficking.”<sup>75</sup> Recently, Nevada passed a variety of policies that “mandate[d] state leave, boosted the minimum wage, put a state equal rights amendment on the ballot, and made sure that breast, uterine and cervical cancer were included in a law that provides compensation to firefighters who develop cancer on the job.”<sup>76</sup> While the increase in female legislators hardly proves that the increased diversity caused a policy shift, Democratic Assemblywoman

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<sup>67</sup> Renuka Rayasam et al., *Why State Legislatures Are Still Very White—And Very Male*, POLITICO (Feb. 21, 2021), <https://www.politico.com/interactives/2021/state-legislature-demographics/> [<https://perma.cc/RL7L-LM6L>].

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Women in State Legislatures for 2021*, NAT’L CONF. STATE LEGISLATURES (Feb. 12, 2021), <https://www.ncsl.org/legislators-staff/legislators/womens-legislative-network/women-in-state-legislatures-for-2021.aspx> [<https://perma.cc/CPY4-E6SB>] [hereinafter *Women in State Legislatures*].

<sup>72</sup> *See id.* As of the writing of this Article, the Texas Senate has ten female legislators (four Democrats and six Republicans). *Id.* The Texas House has thirty-six female legislators (thirty Democrats and six Republicans). *Id.*

<sup>73</sup> *Id.* As of the writing of this Article, the Mississippi Senate has twenty-nine female legislators. *Id.* Twelve women serve in the Senate (four Democrats and eight Republicans) and seventeen serve in the House (nine Democrats and eight Republicans). *Id.*

<sup>74</sup> Riley Snyder, *Nevada Grows Majority-Female Legislature After 2020 Election, with More than 60 Percent of Seats to Be Filled by Women*, THE NEV. INDEP. (Nov. 17, 2020), <https://thenevadaindependent.com/article/nevada-grows-majority-female-legislature-after-2020-election-with-more-than-60-percent-of-seats-to-be-filled-by-women> [<https://perma.cc/Q4RD-VLVG>]; *see Women in State Legislatures*, *supra* note 71.

<sup>75</sup> Snyder, *supra* note 74.

<sup>76</sup> Rayasam et al., *supra* note 67.

Maggie Carlton acknowledged that the legislative process improves when legislators bring diverse viewpoints to the table, and the differing outlooks ultimately bring beneficial results.<sup>77</sup>

Furthermore, the U.S. continues to have an increasingly racially diverse population.<sup>78</sup> Yet, every state legislature has fewer non-white people in proportion to the state's population.<sup>79</sup> Also, most statehouses have become even whiter or did not see any increase in non-white representation from 2015 to 2020. Virginia was an exception and saw a seven-percentage point increase in non-white representation at the state level in 2020. Susan Swecker, the state Democrat party chair, stated that white men are no longer the face of the Democratic Party in Virginia. As a result, when "the General Assembly looks more like Virginia, then you're reflecting more about what the voters really want."<sup>80</sup>

Even though more women and candidates of color are running for the state legislature, white men continue to enter these races in increasing numbers.<sup>81</sup> Accordingly, historically underrepresented groups continue to face white men, who are often seen as the candidates with the best chance to win an election.<sup>82</sup> Several other factors, including low and inconsistent wages for state legislators, problems with childcare, and implicit biases about the role of historically underrepresented groups, contribute to state capitol demographics that do not reflect the state population.<sup>83</sup>

When state legislatures fail to reflect the general population, legislation fails to implement statutes to meet the needs of traditionally marginalized groups, such as women and people of color. In relating this issue to evolution, without gender or racial diversity, crucial relevant perspectives remain blocked. Political parties dominated by white men fail to discuss policies that serve their constituents. Without new ideas, parties remain unchallenged, content with the status quo, and unilaterally frustrate healthy gene flow.

#### *D. Social Media and Cable News Create Echo Chambers*

Social media and twenty-four-hour cable news cycles stifle ideological gene flow between political parties. Even if people have the potential to move to different geographic areas to allow for the gene flow of ideas, people live in echo chambers that reinforce the ideas that they have created for themselves because of tailored news. For example, on January

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<sup>77</sup> Snyder, *supra* note 74.

<sup>78</sup> William Frey, *The Nation Is Diversifying Even Faster Than Predicted, According to New Census Data*, BROOKINGS (July 1, 2020), <https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted/> [https://perma.cc/6HKV-JBFX].

<sup>79</sup> Rayasam et al., *supra* note 67.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

6, 2020, a group of insurrectionists stormed the U.S. Capitol. As Congress and federal law enforcement agencies investigate the events of this day, social media has emerged as a critical issue potentially contributing to extreme polarization.<sup>84</sup>

Regardless of whether the criticism is warranted, the media has garnered blame for the rise in partisan polarization across the U.S.<sup>85</sup> Historically, news consumers had fewer news sources: one or two local hometown newspapers, limited radio stations, and perhaps a few magazine subscriptions.<sup>86</sup> With the rise of the internet, internal search engines, and Google, news has, theoretically, increased the opportunity to become broadly informed.<sup>87</sup> In reality, the internet “has become much better at learning what we want and giving us more of it since [the 2000s].”<sup>88</sup> And, unlike past decades, where the hometown newspaper listed the political news in addition to the local news, now people must seek out politics—and to seek out politics means that a person must choose one side of the political spectrum or the other.<sup>89</sup>

Echo chambers in social media and cable news can lead to intensified partisan views.<sup>90</sup> An echo chamber is “an environment where a person only encounters information or opinions that reflect and reinforce their own.”<sup>91</sup> An echo chamber filters the existing news and information so that, in part, it confirms information that reinforces a person’s already-existing beliefs.<sup>92</sup> Zeynep Tufekci, a digital scholar, tracked YouTube’s algorithms: “[Tufekci] noticed that videos of Trump rallies led to recommendations for videos of alt-right content. Videos of Hillary Clinton speeches eventually served up leftist conspiracies . . . . [YouTube] promotes, recommends, and disseminates videos in a manner that appears to consistently up the stakes.”<sup>93</sup> Tailored algorithms may lead people to increasingly radicalized content stemming from their initial point of view.<sup>94</sup> Indeed, “we’ve cocooned ourselves into hearing information that only tells us how right we are, and that’s making us more extreme.”<sup>95</sup> One study

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<sup>84</sup> Paul Barrett et al., *How Tech Platforms Fuel U.S. Political Polarization and What Governments Can Do About It*, BROOKINGS (Sept. 27, 2021), <https://www.brookings.edu/blog/techtank/2021/09/27/how-tech-platforms-fuel-u-s-political-polarization-and-what-government-can-do-about-it/> [https://perma.cc/8S8P-4FGK].

<sup>85</sup> Gregory Martin & Ali Yurukoglu, *Bias in Cable News: Persuasion and Polarization*, 107 AMER. ECON. REV. 2565, 2565 (Sept. 2017), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20160812> [https://perma.cc/CFD9-WFW3].

<sup>86</sup> EZRA KLEIN, *WHY WE’RE POLARIZED* 140 (2020) (ebook).

<sup>87</sup> *Id.* at 141.

<sup>88</sup> *Id.* at 144.

<sup>89</sup> *Id.* at 146.

<sup>90</sup> *Id.* at 156.

<sup>91</sup> GCF Global, *What Is an Echo Chamber?*, GOODWILL CMTY. FOUND. GLOB., <https://edu.gcfglobal.org/en/digital-media-literacy/what-is-an-echo-chamber/1/> [https://perma.cc/Q53U-UECM].

<sup>92</sup> *Id.*

<sup>93</sup> KLEIN, *supra* note 86, at 156.

<sup>94</sup> *See id.*

<sup>95</sup> *Id.* at 159.

showed that introducing Democrats and Republicans to more diverse news sources may have increased the polarization between parties so that Republicans became more conservative than liberal.<sup>96</sup> The impact of social media and twenty-four-hour cable news are addressed in turn.

### 1. *Social Media*

Social media is one factor that continues to play a role in preventing the gene flow of ideas across communities.<sup>97</sup> Social media can lead to echo chambers, which in turn reinforce confirmation bias. For example, on a Facebook newsfeed, people can “unfriend” acquaintances who share different beliefs. As a result, a person curates a friend circle that reinforces a person’s already-held beliefs.<sup>98</sup>

Facebook remains one of the most widely used online platforms among U.S. adults.<sup>99</sup> While younger adults report using Facebook less than adults over the age of thirty, it is important to note that a majority of Facebook and Instagram users say that they visit the site daily, while up to forty-nine percent use the site several times per day.<sup>100</sup>

Studies have shown that even though staying off social media sites, like Facebook, “significantly reduced polarization of views on policy issues,” it did not necessarily reduce partisan polarization or identity.<sup>101</sup> Importantly, social media algorithms create a “personal, unique universe of information that you live in online. And what’s in your filter bubble depends on who you are, and it depends on what you do.”<sup>102</sup> For example, Facebook has a content-ranking algorithm that limits users’ exposures to news outlets that show viewpoints contrary to their own opinions.<sup>103</sup> The algorithms intend to increase user engagement across the sites.<sup>104</sup> If users spend more time on these sites and increase engagement with paid advertisements, then that

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<sup>96</sup> *Id.* Specifically, the study found that when Republicans followed a liberal Twitter feed, they became more conservative. *Id.* at 160. Democrats demonstrated a slight increase in liberal views after following a conservative Twitter feed, but that result was statistically insignificant. *Id.*

<sup>97</sup> See Barrett et al., *supra* note 84 (citing Eli Finkel et al., *Political Sectarianism in America*, 370 SCIENCE 533, <https://www.science.org/doi/10.1126/science.abe1715> [<https://perma.cc/3NXD-BU2F>]).

<sup>98</sup> Wendy Gould, *Are You in a Social Media Bubble? Here’s How to Tell*, NBC (Oct. 21, 2019), <https://www.nbcnews.com/better/lifestyle/problem-social-media-reinforcement-bubbles-what-you-can-do-about-ncna1063896> [<https://perma.cc/7ZM7-KBK2>].

<sup>99</sup> Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW CHARITABLE TR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/> [<https://perma.cc/9C9L-J2GW>].

<sup>100</sup> *Id.*

<sup>101</sup> Hunt Allcott et al., *The Welfare Effects of Social Media*, 110 AMER. ECON. REV. 629, 631 (2020), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.20190658> [<https://perma.cc/GW3D-NN3E>]; see Barrett et al., *supra* note 84.

<sup>102</sup> Gould, *supra* note 98.

<sup>103</sup> Ro’ee Levy, *Social Media, News Consumption, and Polarization: Evidence from a Field Experiment*, 111 AMER. ECON. REV. 831, 834 (2021).

<sup>104</sup> Barrett et al., *supra* note 84.

increases the social media company's profit.<sup>105</sup> Yet, by controlling what users view and tailoring it specifically to reinforce users' own perspectives, the algorithm prevents the spread of ideas across communities.<sup>106</sup> Without diversity of ideas, the two political ideologies continue to become more distinct.<sup>107</sup>

## 2. *Rise of Twenty-Four-Hour Partisan Cable News*

Another factor preventing gene flow and creating echo chambers may be the rise of twenty-four-hour cable news. Some scholars have connected the rise in polarization to the rise of partisan cable news networks throughout the U.S.<sup>108</sup> For example, one study showed that watching Fox News, a slanted Republican media outlet,<sup>109</sup> increased the probability of voting Republican in presidential elections. People choose news channels, in part, based on whether the news channel aligns with the viewer's already-existing ideological beliefs.<sup>110</sup>

Moreover, another study suggests that those on the far left and far right end of the spectrum—those people who consider themselves consistently liberal and consistently conservative—impact the political process more than those who consider themselves having mixed ideological views because “[t]hey are the most likely to vote, donate to campaigns and participate directly in politics.”<sup>111</sup> Within the conservative sphere, conservatives, “are tightly clustered around a single news source, far more than any other group in the survey, with [forty-seven percent] citing Fox News as their main source for news about government and politics.”<sup>112</sup> Conversely, those people with consistently liberal views rely on a wider variety of news sources, such as National Public Radio and the New York Times.<sup>113</sup>

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<sup>105</sup> *Id.*

<sup>106</sup> *See id.*

<sup>107</sup> *See supra* Section II.C (Speciation).

<sup>108</sup> *See* John v. Duca & Jason L. Saving, *Income Inequality, Media Fragmentation, and Increased Political Polarization*, 35 *CONT. ECON. POL'Y* 392, 396 (2016).

<sup>109</sup> Approximately two-thirds of Republicans and those people who lean Republican state they trust Fox News as a source. Mark Jurkowitz et al., *U.S. Media Polarization and the 2020 Election: A Nation Divided*, PEW CHARITABLE TR. (Jan. 24, 2020), <https://www.pewresearch.org/journalism/2020/01/24/u-s-media-polarization-and-the-2020-election-a-nation-divided/> [<https://perma.cc/T5HA-GWMA>]. Among Democrats, CNN is the most trusted source of information. *Id.*

<sup>110</sup> Martin & Yurukoglu, *supra* note 85, at 2597; *see also* Stefano DellaVigna & Ethan Kaplan, *The Fox News Effect: Media Bias and Voting*, 122 *QTRLY. J. ECON.* 1187, 1187 (Aug. 2007) (noting that Republicans gained .4 to .7 percentage points in the towns that broadcast Fox News, and that Fox News affected voter turnout and the Republican vote share in the Senate in 2000).

<sup>111</sup> Amy Mitchell et al., *Political Polarization and Media Habits*, PEW CHARITABLE TR. (Oct. 21, 2014), <https://www.pewresearch.org/journalism/2014/10/21/political-polarization-media-habits/> [<https://perma.cc/FPY9-HZCX>].

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*



These studies do not provide perfect insight into how gene flow is stymied across a population; however, the studies suggest that people who hold strong views and political power drive politics.<sup>114</sup> Once the politically active and powerful create and hone the political system, then everyday people choose news from those increasingly polarized sources.<sup>115</sup> Internet and social media permit sharing ideas across the U.S.; yet, in reality, people absorb and share already-held values and ideas, or merely echo the media ideology they actively consume. As a result, gene flow is stifled across populations, and the same red and blue ideas circulate more broadly within the same communities.

## V. TRAITS STEMMING FROM SPECIATION: A PART ISAN U.S. SUPREME COURT AND A BREAKDOWN IN THE FEDERALIST SYSTEM

### A. *Highly Partisan U.S. Supreme Court*

Increasingly polarized state and federal levels of government may have contributed to a shift in the public's perception of the U.S. Supreme Court's neutrality. The President of the U.S. has the power, with the "advice and consent of the Senate" to nominate a U.S. Supreme Court justice.<sup>116</sup> While the Constitution undoubtedly paved the way for a partisan Supreme Court by allowing the executive branch to nominate justices, only since 2005 has Senate voting on U.S. Supreme Court nominees become increasingly partisan.<sup>117</sup> Justice Breyer, who served from 1994 to 2022, was the last Justice sitting on the Court who was confirmed by overwhelming positive votes from the U.S. Senate.<sup>118</sup> Before Justice Thomas, almost every Justice since the turn of the twentieth century received unanimous or near unanimous positive votes.<sup>119</sup>

<sup>114</sup> KLEIN, *supra* note 86, at 162-63.

<sup>115</sup> *Id.*

<sup>116</sup> U.S. CONST. art. II, § 2.

<sup>117</sup> Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 324 (2016) [hereinafter *Split Definitive*].

<sup>118</sup> *See id.* Justice Breyer received nine negative votes in 1994. *Supreme Court Nominations (1789-Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [https://perma.cc/Z2DZ-8HLD] [hereinafter *Supreme Court Nominations*]. Granted, Justice Thomas, who was nominated before Justice Breyer, had a more divided vote, with forty-eight negative votes. *Id.*

<sup>119</sup> For example, Justice Sandra Day O'Connor, who was nominated in 1981, received no negative votes. *Supreme Court Nominations*, *supra* note 118. Justice Rehnquist was one of the more controversial Supreme Court nominations in the 1980s, and he received only thirty-three negative votes. *Id.* The voting results of current U.S. Supreme Court Justices are summarized in the chart below:

Nominee	Vote (Positive-Negative)	Date of Nomination
Amy Coney Barrett	52-48	September 29, 2020

Growing partisan and ideological polarization gives presidents “stronger incentives to choose nominees whose ideological orientations match those of the president’s own party.”<sup>120</sup> In fact, having unpredictable Supreme Court Justices, such as Justice Kennedy,<sup>121</sup> made parties develop “more ideological and reliable methods of sourcing judges.”<sup>122</sup>

Indeed, after Justice John Roberts, nominees provoked more negative votes from opposing party senators.<sup>123</sup> Justices Roberts, Alito, and Sotomayor had unanimous votes from the President’s party in Congress.<sup>124</sup> One Democrat voted against Justice Elena Kagan.<sup>125</sup> A majority of the non-nominating party opposed Justices Alito, Sotomayor, Kagan, and Gorsuch.<sup>126</sup> In reviewing past nominations, it is hard to imagine that only three senators opposed Justice Ginsburg or that the Senate unanimously confirmed Justice Scalia.<sup>127</sup>

The Republican Party’s decision to block Merrick Garland’s nomination in the spring of 2016 reinforces the Supreme Court’s partisan nature.<sup>128</sup> Senate Majority Leader Mitch McConnell declared that any presidential nomination by the sitting president would be “null and void,” and that the winner of the 2016 election should nominate the next Supreme Court justice.<sup>129</sup> All eleven Republican members of the Senate Judiciary Committee stated they would not consent to any of President Obama’s Supreme Court nominations.<sup>130</sup> As a result, Garland did not have any proceedings concerning his nomination.<sup>131</sup>

Brett Kavanaugh	50-48	October 6, 2018
Neil Gorsuch	54-45	April 7, 2017
Elena Kagan	63-37	May 10, 2010
Sonia Sotomayor	68-31	June 1, 2009
Samuel Alito	58-42	November 10, 2005
John Roberts, Jr.	78-22	September 6, 2005

*Id.*

<sup>120</sup> *Split Definitive*, *supra* note 117, at 361.

<sup>121</sup> Mark Walsh, *Never Predictable, Justice Anthony Kennedy Leaves Legacy in Conservative, Liberal Decisions*, ABA J. (June 28, 2018), [https://www.abajournal.com/news/article/never\\_predictable\\_justice\\_anthony\\_kennedy\\_leaves\\_legacy](https://www.abajournal.com/news/article/never_predictable_justice_anthony_kennedy_leaves_legacy) [https://perma.cc/36AM-26ZY].

<sup>122</sup> KLEIN, *supra* note 86, at 206.

<sup>123</sup> See *Split Definitive*, *supra* note 117, at 325.

<sup>124</sup> *Id.*

<sup>125</sup> Ken Rudin, *Senate Confirms Kagan to Court 63-37*, NPR (Aug. 5, 2010), <https://www.npr.org/sections/politicaljunkie/2010/08/05/129008337/senate-confirms-kagan-to-court-63-37> [https://perma.cc/4ZJR-3SLL].

<sup>126</sup> *Split Definitive*, *supra* note 117, at 325.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now> [https://perma.cc/4S4H-ATL6].

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

Furthermore, the impact of the Federalist Society on Supreme Court nominations should not be ignored.<sup>132</sup> The Federalist Society is a “group of conservatives and libertarians interested in the current state of the legal order.”<sup>133</sup> Although the Federalist Society does not take official legal or policy positions, its conservative reputation aligns with the Republican Party’s primary social issues. Six of the current Supreme Court Justices are connected to the Federalist Society: Justices Roberts, Alito, Thomas, Gorsuch, Kavanaugh, and Coney Barrett.<sup>134</sup>

The leak of *Dobbs v. Jackson Women’s Health* may have also contributed to the U.S. public’s perception of the Court’s lack of political neutrality. In May 2022, an initial opinion draft circulated outside of the Court’s chambers, where “[n]o draft decision in the modern history of the court has been disclosed publicly while a case was still pending.”<sup>135</sup> In the draft decision, the Justices overturned *Roe v. Wade*, thereby eliminating a woman’s fundamental right to obtain an abortion.<sup>136</sup> As explained below, the *Dobbs* decision was one of the most anticipated decisions of its term, in part because of its highly political, and highly impactful, nature. On one hand, some argue that leaks of this kind delegitimize the public’s perception of the Court.<sup>137</sup> On the other hand, some contend that “it is not clear what influence, if any, introducing leaks into the information environment has on how the public views the institution or the legitimacy the public confers.”<sup>138</sup> The politicization of the leak has spurred both sides of the political aisle and “caused many Americans to express doubts about whether the justices are guided by the law rather than by their political beliefs.”<sup>139</sup>

As partisan ideology intensifies between Republicans and Democrats, the Supreme Court Justices may become more ideologically

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<sup>132</sup> “The idea [of the Federalist Society] was to train, credential, and socialize a generation of alternative elites.” Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court> [<https://perma.cc/RGT2-BFZX>].

<sup>133</sup> *About Us*, FEDERALIST SOCIETY, <https://fedsoc.org/about-us> [<https://perma.cc/N9EF-V3R4>].

<sup>134</sup> *The Conservative Club That Came to Dominate the Supreme Court*, HARV. GAZETTE (Mar. 4, 2021), <https://news.harvard.edu/gazette/story/2021/03/in-audiobook-takeover-noah-feldman-lidia-jean-kott-explore-how-federalist-society-captured-supreme-court/> [<https://perma.cc/Q8PZ-6DLX>]; *Split Definitive*, *supra* note 117, at 343.

<sup>135</sup> Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/TL5S-EFNK>].

<sup>136</sup> *Id.*

<sup>137</sup> See Ariane de Vogue, *SCOTUS Maintains Public Silence on Dobbs Opinion Leak Investigation* (Oct. 21, 2022), <https://www.cnn.com/2022/10/21/politics/supreme-court-leak-investigation> [<https://perma.cc/KX7N-CNHR>].

<sup>138</sup> Nathan T. Carrington & Logan Strother, *Plugging the Pipe? Evaluating the (Null) Effects of Leaks on Supreme Court Legitimacy* (May 4, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4100667](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4100667) [<https://perma.cc/5WEP-29VE>].

<sup>139</sup> Shawn Hubler & Michael Wines, *Leak Heightens the Perception of a Politicized Supreme Court*, N.Y. TIMES (May 4, 2022), <https://www.nytimes.com/2022/05/04/us/supreme-court-approval-rating-roe-v-wade.html> [<https://perma.cc/S8X7-EDB7>].

distant. The Senate’s increasingly divided votes for Supreme Court Justice nominations, including the Republican’s blockade of Merrick Garland, demonstrates the Senate’s increasingly polarized views toward the judicial branch. This division stands in stark contrast to nomination proceedings occurring before 2005. The emphasis of Republican presidents on ideology and reliance on the Federalist Society leads to increased ideological polarization that aligns with Republican Party values. Therefore, the lack of gene flow between the two ideological camps, Republican and Democrat, have coincided with an increasingly partisan U.S. Supreme Court.

*B. Breakdown in the American Federalist System*

Party polarization has grown in the U.S. throughout state and federal governments.<sup>140</sup> Initially, “presidents, senators, and House members all had different electoral incentives, complicating partisan unity. . . .”<sup>141</sup> Now state political parties mimic the national political parties, so the interests align and hinder ideological gene flow between the state and federal levels. The proportion of legislators considered ideologically “moderate” has diminished in both the House and Senate.<sup>142</sup> Accordingly, the contemporary polarization between Republicans and Democrats, combined with a divided government at the federal level, has contributed to Congressional dysfunction.<sup>143</sup>

Importantly, American federalism naturally creates policy divergence across states as the states serve as laboratories of democracy.<sup>144</sup> According to Drutman, “[F]ederalism did work sort of as intended for a

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<sup>140</sup> PEW RSCH. CTR., *supra* note 3. Scholars have not agreed on one clear method to measure partisan polarization in Congress. *See, e.g.*, Sarah Binder, *Polarized We Govern?*, BROOKINGS (2014), [https://www.brookings.edu/wp-content/uploads/2016/06/BrookingsCEPM\\_Polarized\\_figReplacedTextRevTableRev.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/BrookingsCEPM_Polarized_figReplacedTextRevTableRev.pdf) [<https://perma.cc/4XT5-GNPQ>] (noting two of many methods to measure congressional outcomes: (1) the ratio of failed measures to all issues on the agenda of each Congress, which measured Lyndon B. Johnson’s Great Society Congress as the most productive; and (2) landmark laws to measure ideological polarization).

<sup>141</sup> Lee Drutman, *America Is Now the Divided Republic the Framers Feared*, ATLANTIC (Jan. 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/two-party-system-broke-constitution/604213/> [<https://perma.cc/3DLK-KU6S>].

<sup>142</sup> PEW RSCH. CTR., *supra* note 3.

<sup>143</sup> *See* Kathleen Ferraiolo, *State Policy Activism via Direct Democracy in Response to Federal Partisan Polarization*, 47 J. FEDERALISM, 378, 382 (2017) (noting that direct democracy historically refers to a response from dissatisfaction with policy outcomes at the state level of government; however, here, Ferraiolo argues that since the 2010s, the direct democracy is a response to the federal legislative process). Even without partisan polarization, there are significant obstacles to legislative enactment at the legislative level. For example, bicameralism and presentment make it difficult for a divided Congress to pass legislation.

<sup>144</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

long while. . . state and local parties were stronger than national parties,” “complicat[ing] unity.”<sup>145</sup> More recently, however, states and local politics have the same interests as the national parties, which intensifies partisanship at both levels of government.<sup>146</sup>

Federalism is not intended to create state governments that operate as an alternative to the federal government. When states develop extreme policy positions that align, without differences, with either the Republican or Democrat party platforms, the country is at risk of having irreconcilable differences.<sup>147</sup> This shift in federalism may indicate that partisan polarization coincides with highly divergent policy responses across the states.

In applying the evolutionary biology framework, the lack of ideological gene flow has led to more polarized, and ultimately speciated, political parties. Unlike the gridlock that exists at the national level, one political party, which is increasingly white and male, dominates state legislatures.<sup>148</sup> Knowing that voters can continue to vote for the party,<sup>149</sup> state leaders can advance more extreme policies without fear of retribution from voters. Rather than having a diversity of ideas within a state, states are politically isolated as either Republican or Democrat, hindering gene flow.<sup>150</sup>

Without the healthy gene flow of ideas within states and throughout the country, states have an increasingly unfettered ability to advance more extreme policy platforms, as seen in state abortion laws and state gun laws. Each policy issue is addressed below.

### 1. *State Abortion Laws*

Abortion politics are an example of one trait that stems from the lack of ideological gene flow between Republicans and Democrats. At the federal level, almost all Democrats in the U.S. Senate and House of Representatives align with their party’s view supporting abortion rights.<sup>151</sup>

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<sup>145</sup> Drutman, *supra* note 141.

<sup>146</sup> *See id.*

<sup>147</sup> *Id.*

<sup>148</sup> *See supra* Section IV.C.2 (Lack of Diverse Gender and Racial Representation at the State Level).

<sup>149</sup> Drutman, *supra* note 141.

<sup>150</sup> *See* Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL’Y REV. 187, 217 (1996). Professor Gordon posited that the U.S. has “maintain[ed] stability even in an era of robust individual rights precisely because the divisions that define our political structure (i.e., states) do not coincide with the divisions that define our social and cultural structure (e.g., racial and ethnic groups and economic and national interests.” *Id.* This Article elaborates on Gordon’s conclusion that the “political divisions” that exist allow the U.S. “to expand individual rights and freedom while still maintaining union and stability.” *Id.* at 217–18. However, this Article contends that federalism no longer operates in this capacity.

<sup>151</sup> Jeff Diamant, *Three-in-Ten or More Democrats and Republicans Don’t Agree with Their Party on Abortion*, PEW RSCH. CTR. (June 18, 2020), <https://www.pewresearch.org/fact-tank/2020/06/18/three-in-ten-or-more-democrats-and-republicans-dont-agree-with-their-party-on-abortion/> [<https://perma.cc/5EEU-2HN4>].

Conversely, almost all Republicans support their party's position against abortion rights.<sup>152</sup>

Republicans and Democrats are increasingly polarized in their views on abortion rights and restrictions.<sup>153</sup> Compared to the 1970s, where states primarily differed in Medicaid coverage for abortion and other minor regulations, by 2014, the most restrictive states “mandate[d] waiting periods, parental notification, counseling, licensed physicians, a twenty-week gestation limit, and restricted insurance coverage for abortion.”<sup>154</sup> The year 2021 was no different, and it showed an intensified polarization between states run by Republicans and Democrats with regard to abortion. States enacted 108 abortion restrictions in 2021.<sup>155</sup> This is the highest number of restrictions passed since *Roe v. Wade*, and they have greatly surpassed the previous record of eighty-nine restrictions in 2011.<sup>156</sup>

#### *a. Historical Context of Roe v. Wade*

Abortion politics should be analyzed within the historical context of the U.S.<sup>157</sup> Before the Court decided *Roe v. Wade*, abortion did not

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<sup>152</sup> *Id.*

<sup>153</sup> See Carrie Blazina, *Key Facts About the Abortion Debate in America*, PEW RSCH. CTR. (June 17, 2021), <https://www.pewresearch.org/fact-tank/2021/06/17/key-facts-about-the-abortion-debate-in-america/> [<https://perma.cc/9RAN-PHKP>] (“While Republicans’ and Democrats’ views on the legality of abortion have long differed, the 46-percentage-point partisan gap today is considerably larger than it was in the recent past, according to the survey conducted after the court’s ruling. The wider gap has been largely driven by Democrats: Today, 84% of Democrats say abortion should be legal in all or most cases, up from 72% in 2016 and 63% in 2007. Republicans’ views have shown far less change over time: Currently, 38% of Republicans say abortion should be legal in all or most cases, nearly identical to the 39% who said this in 2007.”).

<sup>154</sup> Jacob M. Grumbach, *From Backwaters to Major Policymakers: Policy Polarization in the States, 1970–2014*, 16 PERSP. ON POL. 416, 422 (2018).

<sup>155</sup> Elizabeth Nash, *State Policy Trends 2021: The Worst Year for Abortion Rights in Almost Half a Century*, GUTTMACHER INST. (Jan. 5, 2022), <https://www.guttmacher.org/article/2021/12/state-policy-trends-2021-worst-year-abortion-rights-almost-half-century#:~:text=The%20108%20abortion%20restrictions%20enacted,in%20the%20past%20decade%20alone> [<https://perma.cc/C3ZS-BNX9>].

<sup>156</sup> From January 2021 to April 2021, forty-seven states have enacted approximately 561 abortion restrictions and 165 abortion bans designed to challenge *Roe v. Wade*. Elizabeth Nash & Lauren Cross, *2021 Is on Track to Become the Most Devastating Antiabortion State Legislative Session in Decades*, GUTTMACHER INST. (June 14, 2021), <https://www.guttmacher.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades> [<https://perma.cc/8YM7-H3JU>] (“The 2021 abortion restrictions largely build on earlier ones, as each additional restriction increases patients’ logistical, financial and legal barriers to care, especially where entire clusters of states are hostile to abortion.”).

<sup>157</sup> A complete overview of abortion rights and restrictions is beyond the scope of this Article.

intensely divide Republicans and Democrats.<sup>158</sup> A public opinion poll<sup>159</sup> taken before *Roe* showed that abortion policies did not divide Republicans and Democrats.<sup>160</sup> The summer before *Roe*, a Gallup poll reported that sixty-four percent of Americans agreed with the statement that “the decision to have an abortion should be made solely by a woman and her physician,” compared to Democrats (fifty-nine percent).<sup>161</sup>

In *Roe v. Wade*, the U.S. Supreme Court<sup>162</sup> held that a fundamental “right to privacy” exists within the Fourteenth Amendment, and it protects a pregnant woman’s choice on whether she could have an abortion.<sup>163</sup> The Court concluded that the state has a legitimate interest in both protecting the life of the pregnant woman and the “potential[ity of human] life.”<sup>164</sup> However, the Court recognized that each of these interests will vary throughout the course of the woman’s pregnancy, and at different points in the pregnancy, each interest becomes “compelling.”<sup>165</sup> The majority opinion created a trimester approach to abortion: (1) before the end of the first trimester, the abortion decision must be left to the medical judgment of the pregnant woman’s physician; (2) before the end of approximately the second trimester, the state may regulate the abortion procedure in a manner reasonably related to the woman’s health; and (3) after viability of the fetus, the state may regulate and ban an abortion, except when medically necessary to preserve the mother’s life or health.<sup>166</sup>

At the time the Court decided *Roe*, Republicans had not yet made abortion part of their political agenda. This agenda, however, quickly changed in the years following *Roe*.

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<sup>158</sup> Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. R. 935, 947 (2016) [hereinafter *Rethinking Judicial Minimalism*].

<sup>159</sup> Importantly, issue polling can be “deeply flawed” because people must take nuanced ideas and put them into a category, such as “strongly disagree” and “agree.” Sarah Isgur, *Why Republicans Are Scared of Texas’ New Abortion Ban*, POLITICO (Sept. 17, 2021), <https://www.politico.com/news/magazine/2021/09/17/why-republicans-scared-texas-abortion-512554> [https://perma.cc/MK82-P5K2]. Abortion is “uniquely poorly polled” because the polls only look at “pro-life” and “pro-choice” without acknowledging the vast array of potential restrictions. *Id.* That said, this Article uses issue polls to show general public opinion, but these results should not be viewed as conclusive on the issue.

<sup>160</sup> *Rethinking Judicial Minimalism*, *supra* note 158, at 948.

<sup>161</sup> See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY 91 (2005) (explaining that Justice Blackmun saved the Gallup poll in his *Roe* case file); Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2031 (2011).

<sup>162</sup> Seven of the nine Justices were in the majority opinion: Justices Burger, Douglas, Brennan, Stewart, Marshall, Blackmun, and Powell. Of the seven, a Republican president appointed five. See *Supreme Court Nominations*, *supra* note 118 (noting a Republican president appointed Justices Burger, Brennan, Stewart, Blackmun, and Powell).

<sup>163</sup> *Roe v. Wade*, 410 U.S. 113, 152–62 (1973).

<sup>164</sup> *Id.* at 154.

<sup>165</sup> *Id.* at 162–63.

<sup>166</sup> *Id.* at 164–65.

*b. Abortion Politics Following Roe v. Wade*

Since the Court's 1973 *Roe* opinion, state and federal Republican Party platforms have tried to retract *Roe's* holding that granted women the right to an abortion before fetus viability. Once the national Republican Party realized that it could garner religious voters who primarily supported abortion restrictions, the abortion issue quickly became a political issue.<sup>167</sup>

Throughout the late 1970s, the Republican Party welcomed Protestant evangelicals, who opposed abortion.<sup>168</sup> Republican strategists emphasized that abortion could divide Democrats and encouraged voters to join the Republican Party, thus developing new Republican coalitions.<sup>169</sup> Consequently, instead of having voters pressure party leaders to adopt a party platform, the Republican Party leaders' efforts drove diverged abortion policies.<sup>170</sup> President Richard Nixon's policy focus on abortion was intentional; his policies concerning abortion were used to divide Democrats and get support from Catholics and social conservatives.<sup>171</sup> Later, President Ronald Reagan mobilized his presidential campaign around abortion.<sup>172</sup> In addition to securing Catholic votes, Republican strategists reframed the conversation around abortion being not just a religious issue, but also a social issue.<sup>173</sup>

Furthermore, in the 1980s, Republican Presidents increasingly focused on appointing Supreme Court Justices whose views seemed to align with a more conservative Court that would ultimately limit *Roe's* application.<sup>174</sup> Before President Reagan left office, he stated that he would "never 'leave the battle' to reshape Federal [sic] policy on abortion . . .," which came to stand for conservative politics.<sup>175</sup> Thus, the bifurcated party

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<sup>167</sup> Greenhouse & Siegel, *supra* note 161 at 2028 ("Evidence from the post-*Roe* period suggests that it was party realignment that helped escalate and shape conflict over *Roe* in the ensuing decades.").

<sup>168</sup> *Id.* at 2065.

<sup>169</sup> *Id.* at 2067. It was at this point that the Republican Party began to run its platform based on "traditional family values." *Id.*

<sup>170</sup> *Id.* at 2071.

<sup>171</sup> *Id.* at 2054. Linda Greenhouse suggests that the Republican Party "encouraged President Nixon to begin attacking abortion as a way (1) to attract Catholic voters . . . (2) to attract social conservatives, by tarring George McGovern, Nixon's opponent in the 1972 presidential election, as a radical for his associations with youth movements, including feminists seeking ratification of the Equal Rights Amendments (ERA) and 'abortion on demand.'" *Id.* at 2033.

<sup>172</sup> See Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and Roe v. Wade*, 71 WASH. & LEE L. REV. 969, 1005 (2014).

<sup>173</sup> Greenhouse & Siegel, *supra* note 161, at 2046-47.

<sup>174</sup> Alan I. Bigel, *Planned Parenthood of Southeastern Pennsylvania v. Casey: Constitutional Principles & Political Turbulence*, 18 U. DAYTON L. REV. 733, 736 (1993) (stating that Justice Rehnquist's move to the Chief Justice position and the appointments of Justices Scalia and Kennedy "increased the hopes of the pro-life movement").

<sup>175</sup> Julie Johnson, *Reagan Vows to Continue Battle on Abortion*, N.Y. TIMES (Jan. 14, 1989), <https://www.nytimes.com/1989/01/14/us/reagan-vows-to-continue-battle-on-abortion.html> [https://perma.cc/5BDJ-QD42].



platforms stemmed from intentional political agendas developed during the post-*Roe* period.

*c. Subsequent Decisions Restricting Roe v. Wade and the Effect on State Governments*

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court upheld the constitutional right to abortion.<sup>176</sup> Yet, the Court rejected the three-trimester test and created an “undue burden” standard.<sup>177</sup> This standard asks whether a state abortion restriction has “the purpose or effect” of imposing an “undue burden.”<sup>178</sup> In this holding, the Court gave states considerable flexibility in determining how they regulated abortion.<sup>179</sup>

Even though the Court created a more flexible standard than the original three-trimester framework in *Roe*, Supreme Court precedent maintained the “undue burden” standard. The Republican Party, therefore, could focus its efforts on advancing highly restrictive abortion legislation, but nothing would happen because courts would enjoin the legislation before it ever took effect.<sup>180</sup> Consequently, since *Casey*, state laws continue to push the boundaries on which regulations constitute an undue burden for women seeking an abortion.<sup>181</sup>

Before the Court’s decision in *Dobbs*, two states—Texas<sup>182</sup> and Mississippi—<sup>183</sup> passed legislation that pushed the boundary of U.S. Supreme

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<sup>176</sup> 505 U.S. 833, 874 (1992).

<sup>177</sup> *Id.* at 877 (holding, in part, that a twenty-four-hour waiting period for an abortion is constitutional because no undue burden exists to a large enough fraction of women within the jurisdiction as a whole). *Casey* also held that it was unconstitutional to require a woman to notify her spouse that she would have an abortion. *Id.* at 893 (recognizing an undue burden existed because the spousal notification requirement was likely to prevent a significant number of women from obtaining an abortion).

<sup>178</sup> *Id.* at 878 (defining “undue burden” as “a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability”).

<sup>179</sup> Christina B. Whitman, *Looking Back on Planned Parenthood v. Casey*, 100 MICH. L. REV. 1980, 1985 (2002) (noting that *Casey* “marked the outer boundaries of a compromise that will protect women only from the most overwhelming and total coercion”).

<sup>180</sup> Isgur, *supra* note 159; see Abigail Adams, *Here’s How Conservatives Are Using Civil Rights Law to Restrict Abortion*, TIME (Jan. 1, 2020), <https://time.com/5753300/heartbeat-bill-civil-rights-law/> [<https://perma.cc/CG2V-ZVD4>] (stating that in 2019, six states passed laws that banned abortions once a fetal heartbeat was detected, but that these news laws were challenged in court and temporarily blocked).

<sup>181</sup> See, e.g., *Casey*, 505 U.S. at 873; *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding the federal Partial Birth Abortion Ban Act); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). *But see generally* *Whole Women’s Health v. Hellerstedt*, 579 U.S. 582 (2016) (holding that a requirement that all abortion clinics must comply with building, equipment, and staffing regulations that are imposed on same-day and outpatient surgical centers was unconstitutional because it imposed an undue burden).

<sup>182</sup> S.B. 8, 87th Leg. (Tex. 2021) (banning most abortions after six weeks of pregnancy) (enacted). This was the first law to be enacted that successfully imposes a six-week abortion ban since *Roe v. Wade*.

<sup>183</sup> *Dobbs v. Jackson Women’s Health Org.*, 945 F.3d 265 (2019) *cert. granted in part*, 141 S. Ct. 2619 (2021).

Court precedent on abortion.<sup>184</sup> On December 1, 2021, the U.S. Supreme Court heard oral arguments on *Dobbs v. Jackson Women’s Health Organization*.<sup>185</sup> The primary issue in *Dobbs* was whether states could ban elective abortions before viability.<sup>186</sup> In Mississippi, the Republicans control the legislature and governorship.<sup>187</sup> As a result of polarized politics within the state that mimic the national Republican Party’s agenda, Mississippi could pass boundary-pushing legislation disregarding Supreme Court precedent.

The Court in *Dobbs* held that the Constitution does not provide a right to an abortion, and it stated that “[i]t is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.”<sup>188</sup> Now, in the months after *Dobbs*, many Republican-controlled states moved quickly to ban abortion access. Some states relied on their state’s “trigger laws,” which would effectively ban abortions as soon as the Court overturned *Roe v. Wade*.<sup>189</sup> As of the writing of this Article, in the states that have banned abortion, Republicans control the legislatures.<sup>190</sup> Conversely, in the states where abortion remains legal, Democrats control all but two states (Alaska and Minnesota).<sup>191</sup>

In sum, an evolutionary framework explains this shift. Republican legislators initially used abortion restrictions to draw voters, such as certain groups of evangelical voters, to their party. These issues, in conjunction with an increasingly Republican presidential agenda to overturn *Roe*, created the current environment in which states continue to pass increasingly polarized laws surrounding abortion. Now, in 2022, because partisan divisions at the state level reflect the national level, and partisan ideology surrounding abortion aligns with one-party state control, it has created a federalist system that fails to maintain its goal of “unity” surrounding abortion.<sup>192</sup>

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<sup>184</sup> See Nina Totenberg, *The Supreme Court Sets a Date for Arguments in Case That Could Challenge Roe v. Wade*, NPR (Sept. 20, 2021), <https://www.npr.org/2021/09/20/1038972266/supreme-court-date-roe-wade-dobbs-jackson-womens> [https://perma.cc/B6HF-CLUZ].

<sup>185</sup> Amy Howe, *Major Abortion Case Set for Argument on Dec. 1*, SCOTUSBLOG (Sept. 20, 2021), <https://www.scotusblog.com/2021/09/major-abortion-case-set-for-argument-on-dec-1/> [https://perma.cc/8ZB7-TKES].

<sup>186</sup> *Dobbs*, 945 F.3d at 265.

<sup>187</sup> *State Partisan Composition*, *supra* note 1.

<sup>188</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022).

<sup>189</sup> Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans—Here’s What Happens When Roe Is Overturned*, GUTTMACHER INST. (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned> [https://perma.cc/T2PN-U7ZP].

<sup>190</sup> *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Oct. 7, 2022), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [https://perma.cc/TA5H-4LBV].

<sup>191</sup> *Id.*

<sup>192</sup> See Gordon, *supra* note 150 and accompanying text.

## 2. *State Gun Rights*

### a. *Individual Right to Bear Arms*

The debate concerning whether an individual has the right to keep and bear arms is another trait stemming from the lack of gene flow between Republicans and Democrats. The Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008), which held that the Second Amendment gave individuals the right to keep and bear arms, and Congressional gridlock surrounding gun control have given states significant discretion in gun legislation, thus leading to highly divergent policies between Republican- and Democrat-controlled states.

The Constitution does not clearly indicate whether an individual has the right to keep and carry a firearm.<sup>193</sup> The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>194</sup> For around 200 years, the Second Amendment played little role in politics.<sup>195</sup> Yet, in more recent years, the Second Amendment has, to the general American public, become "nearly synonymous with gun culture in the United States."<sup>196</sup>

For much of the twentieth century, the Court followed precedent set forth in *United States v. Miller*, which held that the Second Amendment only protected members of the militia who had the right to bear arms.<sup>197</sup> The Court upheld some gun restrictions, such as the Gun Control Act of 1968<sup>198</sup> and the Brady Handgun Violence Prevention Act,<sup>199</sup> throughout this time period. In 2008, however, the Court—for the first time—changed course. The Court held in *Heller* that the Constitution gave the right to individuals to possess a firearm outside of service in the militia for lawful, personal use.<sup>200</sup> *Heller* has ushered in a new era of Constitutional law, and the courts

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<sup>193</sup> See generally MICHAEL WALDMAN, *THE SECOND AMENDMENT: A BIOGRAPHY*, at xi–xii (1st ed. 2014).

<sup>194</sup> U.S. CONST. amend. II.

<sup>195</sup> WALDMAN, *supra* note 193, at xi–xii.

<sup>196</sup> *Id.*

<sup>197</sup> *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding the Second Amendment did not guarantee an individual the right to keep and bear a sawed-off double-barrel shotgun because it was not reasonably related to "the preservation of efficiency of a well regulated militia . . .").

<sup>198</sup> Gun Control Act of 1968, 18 U.S.C. 924 (2018). The Gun Control Act of 1968 had three purposes: (1) eliminate interstate traffic in firearms and ammunition; (2) deny access to firearms to certain groups, such as minors, convicted felons, or people committed to mental institutions; and (3) end the importation of all surplus military firearms. *Id.*

<sup>199</sup> The Brady Handgun Violence Prevention Act amended the Gun Control Act of 1968, and it imposed a five-day waiting period before a seller could sell, deliver, or transfer a handgun. Brady Law, DEPT' JUST. BUR. ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, [www.atf.gov/rules-and-regulations/brady-law](https://perma.cc/JKQ4-24GX) [https://perma.cc/JKQ4-24GX]. The Gun Control Act also created the National Instant Criminal Background Check System. *Id.*

<sup>200</sup> 554 U.S. at 570, 595 (interpreting the Second Amendment in its plain meaning as a reader would have understood it at the time it was written). The dissent, on the other hand,

have yet to set firm boundaries.<sup>201</sup> Since the Court decided *Heller*, there have been over one thousand lower court challenges testing the “boundaries and strength of the [Second Amendment] right.”<sup>202</sup>

*b. Political Context of the Second Amendment*

The political context and reality underlying the Second Amendment provides guidance surrounding polarization. The differences between Republicans and Democrats have progressively widened in the last twenty years.<sup>203</sup> Now, voters’ positions on gun control generally align with their partisan views.<sup>204</sup> With the exception of background checks, Republicans and Democrats remain deeply divided on gun control.<sup>205</sup> Democrats favor stricter gun laws.<sup>206</sup> Even though national polls show general support for an assault weapons ban, Republicans are approximately four times more likely than Democrats to claim protecting gun rights is more important than regulating guns.<sup>207</sup>

Moreover, congressional inaction surrounding gun control gave states an ability to decide how to regulate guns. Even after mass shootings—the school shooting in Parkland, Florida, in 2018, the shooting at a grocery store in Boulder, Colorado, in 2021, and the gunman who opened fire in Atlanta, Georgia, in 2021—Congress has not passed significant gun reform. Deeply held partisan beliefs and political posturing make the conversation

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concluded that the Second Amendment did not create an individual right to bear arms, but instead it was “adopted to protect the right of the people of each of the several States to maintain a well-regulated militia.” *Id.* at 636 (Stevens, J., dissenting). As of the writing of this Article, the Supreme Court held oral arguments on November 3, 2021, on another case involving gun control, *New York State Rifle & Pistol Association Inc. v. Bruen*, 142 S. Ct. 2111 (2022), and whether New York’s law requiring that applicants for unrestricted concealed-carry licenses demonstrate a special need for self-defense violates the Second Amendment. The Court “held that the Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense outside the home.” *Id.* at 2122.

<sup>201</sup> Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1439 (2018).

<sup>202</sup> *Id.*

<sup>203</sup> Katherine Schaeffer, *Share of Americans Who Favor Stricter Gun Laws Has Increased Since 2017*, PEW CHARITABLE TR. (Oct. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/10/16/share-of-americans-who-favor-stricter-gun-laws-has-increased-since-2017/> [https://perma.cc/2RL9-3KY6].

<sup>204</sup> *Amid a Series of Mass Shootings in the U.S., Gun Policy Remains Deeply Divided*, PEW CHARITABLE TR. (Apr. 20, 2021), <https://www.pewresearch.org/politics/2021/04/20/amid-a-series-of-mass-shootings-in-the-u-s-gun-policy-remains-deeply-divisive/> [https://perma.cc/Et5V-HMNK].

Other factors, such as geographic location, race and ethnicity, and level of education also play a role in whether a voter favors more or less restrictive gun laws. *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> Schaeffer, *supra* note 203.

between Republicans and Democrats at the federal level nearly impossible.<sup>208</sup>

For example, a Republican legislator generally avoids discussing gun control because, even if local constituents support gun control, backing gun restrictions generally looks bad for re-election prospects.<sup>209</sup> Also, those voters who do favor looser gun control are generally more willing to turn out to vote on the issue and are more vocal in support of the issue while those who favor stronger gun control are less willing to do so.<sup>210</sup> With consistent federal inaction, therefore, individual states fill the void and pass their own laws, either to restrict or expand gun rights.

### *c. Divergent State Laws*

The public's divided attitude toward guns, in conjunction with the uncertainty surrounding the Court's ruling in *Heller*,<sup>211</sup> allowed states to continue to press for different policies surrounding legal rights to purchase, own, or carry a firearm. For example, in 1970, the "least strict states allowed open carry and the strictest states required dealer licenses and purchaser background checks."<sup>212</sup> Then, "[b]y 2014, the least strict states had added Stand Your Ground laws,<sup>213</sup> while the strict states banned assault weapons and mandated registration and waiting periods for [firearm] purchases."<sup>214</sup> Similarly, because the federal government has not regulated concealed or open-carry permits, states have the discretion to determine the boundaries of these permits. For example: "Three states (California, Florida, and Illinois) and the District of Columbia generally prohibit people from openly carrying firearms in public."<sup>215</sup> Two states (New York and South Carolina) prohibit openly carrying handguns, but not long guns, and another three states (Massachusetts, Minnesota, and New Jersey) prohibit openly carrying long guns but not handguns.<sup>216</sup>

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<sup>208</sup> See Catie Edmondson, *House Passes Gun Control Bills to Strengthen Background Checks*, N.Y. TIMES (June 18, 2021), <https://www.nytimes.com/2021/03/11/us/politics/biden-gun-control-bill.html> [https://perma.cc/P78N-7QCL].

<sup>209</sup> Sarah Binder, *Three Reasons You Should Expect Congressional Gridlock on Gun Control*, WASH. POST (Feb. 27, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/27/yes-you-can-expect-congressional-gridlock-on-gun-regulations-these-are-the-3-biggest-barriers-to-action/> [https://perma.cc/8Vfy-TJSB].

<sup>210</sup> Harry Enten, *Why Republicans Aren't Likely to Budge on Gun Control*, CNN POLITICS (Mar. 28, 2021), <https://www.cnn.com/2021/03/28/politics/republicans-gun-control-analysis/index.html> [https://perma.cc/E3RD-H4DB].

<sup>211</sup> See Ruben & Blocher, *supra* note 201.

<sup>212</sup> Grumbach, *supra* note 154, at 422.

<sup>213</sup> Stand Your Ground laws "allow a person to use deadly force in public, even if they could safely" retreat from the situation. *Stand Your Ground*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/stand-your-ground-laws/> [https://perma.cc/H8MQ-ABX4].

<sup>214</sup> Grumbach, *supra* note 154, at 422-23.

<sup>215</sup> *Open Carry*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/open-carry/> [https://perma.cc/R67K-THYJ].

<sup>216</sup> *Id.*

The highly polarized nature of gun regulations and rights and congressional inaction surrounding the boundaries of the Second Amendment have allowed the states to move in different directions based on the political leaning of the state. As a result of the lack of ideological gene flow at the state and federal levels regarding gun laws, the Democratic and Republican parties continue to cement their divergent policy views.

*C. Alternatively, Highly Divergent Policy Issues at the State Level Show Federalism Working as Intended*

Some may argue that the highly divergent issues at the state level show federalism working as intended and demonstrate that the federalist system is not unravelling. The power relationship between state and federal governments has never been clearly detailed.<sup>217</sup> Historically, states have had increased control over matters involving the health and morality of its citizens.<sup>218</sup> When the national level gridlocks, it struggles to pass bipartisan legislation. Allowing divergent state policies that are aligned with political parties as a response to the federal government's inability to agree on national solutions allows states to take a more activist role. As a result, some scholars argue that polarization is better for the states because it allows them to handle divisive issues that the federal government cannot quickly resolve.<sup>219</sup>

On the other hand, this argument may incorrectly characterize the intended meaning of federalism. Federalism, which is a “decentralized federalist system with vertical differences across levels and horizontal differences across regions,” now operates as a “single arena of partisan combat over public policy.”<sup>220</sup> Applying the evolutionary metaphor, the lack of gene flow has created states that perfectly align with the national political parties on key issues, like abortion and gun control. Consequently, the states now mirror the polarized partisan ideology that has come to embody much of American politics.<sup>221</sup> Thus, federalism does not have the necessary cross-cutting differences, or gene flow, across the state and federal levels, resulting in a federalist system that fails to “maintain union and stability.”<sup>222</sup>

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<sup>217</sup> See Robert Delahunty, *Federalism and Polarization*, 1 U. ST. THOMAS J.L. & PUB. POL'Y 63, 68 (2007). For example, the Court has debated the appropriate use of the Commerce Clause, which gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” U.S. CONST. art. I, § 8, cl. 3. Compare *Wickard v. Filburn*, 317 U.S. 111 (1942) (expanding federal government's powers under the Commerce Clause), with *United States v. Lopez*, 514 U.S. 549 (1995) (restricting federal government's powers under the Commerce Clause).

<sup>218</sup> Delahunty, *supra* note 217, at 78.

<sup>219</sup> Margaret Lemos & Ernest Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 55 (2018) (noting that “[f]ederalism can operate as an important safety valve in polarized times, lowering the temperature on contentious national policy debates and creating opportunities for policymaking that may be impossible at the national level”).

<sup>220</sup> Grumbach, *supra* note 154, at 417.

<sup>221</sup> See Gordon, *supra* note 150, at 217.

<sup>222</sup> *Id.* at 218.

## VI. RECOMMENDATION

This Article recommends that the U.S. embrace a different electoral method at both state and federal levels,<sup>223</sup> allowing multiple political parties to flourish. These recommendations increase gene flow and mitigate the harmful effects of partisan and ideological speciation. Returning to the evolutionary metaphor, once speciation occurs and results in two bifurcated species, reverse speciation, in which the two species reconcile, can occur.<sup>224</sup> Rather than detailing the scientific nuances of reverse speciation, this Article focuses on the long-term positive outcomes of introducing diversity into the gene pool. Importantly, the U.S. should consider having more than two major political parties because it increases ideological viewpoints, encourages candidates to consider multiple party platforms that extend across state lines, and breaks down the nationalized politics at the federal level. This section will first identify the need for more political parties and then explain two potential methods that facilitate a multi-party democracy.

*A. More Political Parties Increase the Gene Flow Across Individual States and Throughout the U.S. and Mitigate the Harmful Effects of Speciation*

A multi-party democracy at the state and federal levels seems feasible, although unconventional, in the U.S. Historically, third-party candidates, such as the Green Party and Libertarians, have not fared well in the current “winner-take-all system.”<sup>225</sup> Yet, American political opinion seems to support the idea of multiple parties. In 2020, approximately fifty-seven percent of Americans believed that the U.S. needs a major third party.<sup>226</sup> The 2020 election demonstrated that two parties existed within both the Republican and Democratic parties: The Republican groups split into “Trump Republican” and “Party Republican,” while the Democratic groups split into “Biden Democrat” and “Sanders-Warren Democrat.”<sup>227</sup> Importantly:

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<sup>223</sup> This Article does not analyze whether proportional representation is more appropriate in the U.S. Senate, House of Representatives, or at the state level. Rather, it provides a general overview as to how proportional representation adds value to the ideological gene pool and allows different partisan ideas to cross geographic boundaries.

<sup>224</sup> Anna Kearns et al., *Genomic Evidence of Speciation Reversal in Ravens*, 9 NATURE COMM'N 1, 1 (2018).

<sup>225</sup> See Christopher Klein, *Here's How Third-Party Candidates Have Changed Elections*, HISTORY (Nov. 11, 2019), <https://www.history.com/news/third-party-candidates-election-influence-facts> [<https://perma.cc/4A7C-RPX4>] (noting that Independent Ross Perot played a role in the 1992 election, and Green Party Ralph Nader was involved in the 2000 election).

<sup>226</sup> Jeffrey Jones, *Democrats Regain Favorability Edge Over GOP*, GALLUP (Sept. 25, 2020), <https://news.gallup.com/poll/320804/democrats-regain-favorability-edge-gop.aspx> [<https://perma.cc/KS6F-JFRQ>].

<sup>227</sup> Geoffrey Skelley, *Why a Trump-Led Third Party Is Unlikely*, FIVETHIRTYEIGHT (Feb. 11, 2021), <https://fivethirtyeight.com/features/why-a-trump-led-third-party-is-unlikely/> [<https://perma.cc/C34V-LCEU>] (noting that former President Trump may attempt to run

All societies have some social divisions—across religion, geography, education, class, and so on. When some of those identities point in one political direction and some point in other directions, we are less likely to approach politics in us-versus-them terms and more likely to be broadly tolerant of the other side(s). But when the major social identities all line up with one big partisan division, partisan conflict reduces all issues into a single us-against-them dimension.<sup>228</sup>

The need for different political parties, where the members have different interests, reflects James Madison’s embrace of pluralism in Federalist Number 10:

Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.<sup>229</sup>

Changing the two-party political structure challenges long-standing American tradition. The two-party political system is firmly entrenched in American life and political systems. Voters strongly attach to the two major political parties.<sup>230</sup> Financial donors control these parties.<sup>231</sup> Change will undoubtedly take time.

Nevertheless, without a change, the U.S. will continue its two-party path toward increased polarization and speciation. Currently, the House of Representatives has proposed the Fair Representation Act, which changes the House of Representatives’ “elections from single-member to larger, multi-member districts with ranked choice voting.”<sup>232</sup> Yet, in order to create

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under a “Make America Great Again” political party); *see also* Lee Drutman, *Quiz: If America Had Six Parties, Which Would You Belong To?*, N.Y. TIMES (Sept. 8, 2021), <https://www.nytimes.com/interactive/2021/09/08/opinion/republicans-democrats-parties.html> [<https://perma.cc/4PQJ-HL2H>] (explaining that within the six parties, there is no “center” party, and the six parties represent the factions that exist within the U.S.).

<sup>228</sup> Lee Drutman, *The Case for Multiparty Democracy*, NEW AMERICA (Jan. 23, 2020) (excerpt adapted from *Breaking the Two-Party Doom Loop: The Case for Multiparty Democracy in America*), <https://www.newamerica.org/weekly/case-multiparty-democracy/> [<https://perma.cc/ZRC6-GK48>].

<sup>229</sup> THE FEDERALIST NO. 10 (James Madison).

<sup>230</sup> Skelley, *supra* note 227.

<sup>231</sup> Kristina Nwazota, *Third Parties in the U.S. Political Process*, PBS (Sept. 20, 2021), [https://www.pbs.org/newshour/politics/politics-july-dec04-third\\_parties](https://www.pbs.org/newshour/politics/politics-july-dec04-third_parties) [<https://perma.cc/M87D-T7ME>].

<sup>232</sup> *Id.*; *see also* *The Fair Representation Act*, FAIRVOTE, [https://www.fairvote.org/fair\\_rep\\_in\\_congress#why\\_we\\_need\\_the\\_fair\\_representation\\_act](https://www.fairvote.org/fair_rep_in_congress#why_we_need_the_fair_representation_act) [<https://perma.cc/PA4G-DWP3>] (noting that the Fair Representation Act, HR 3863, addresses the issue with single-winner districts, which “no longer work well for American democracy”).



political parties that extend beyond the traditional two parties, the country should explore in greater depth what it means to create electoral diversity in state and federal elections.

*B. Two Methods to Diversify Gene Flow and Mitigate Speciation*

Two voting methods help facilitate a multi-party democracy: proportional representation and ranked-choice voting (RCV). Returning to the evolutionary metaphor, introducing diversity encourages ideological gene flow, both within the state and across state boundaries. Similarly, proportional representation and RCV eliminate the “winner-take-all” system and encourage a variety of different interest groups to enter the political ecosystem.

First, proportional representation introduces ideological and partisan diversity because it allows different parties to have representation, even if they do not win all the seats. Specifically, proportional representation “awards legislative seats in proportion to the votes earned by candidates or parties.”<sup>233</sup> For example, “in a five-winner district with proportional representation, if Party A received [forty] percent of the vote and party B received [sixty] percent of the vote, party A would win two seats and party B would win three seats.”<sup>234</sup>

Evidence demonstrates that countries with proportional representation, such as those in Western Europe,<sup>235</sup> are more advantageous to democracy than the U.S.’s current system—these governments “do a better job of representing the median voter, and politics is generally more stable; voting rates are higher, and support for democracy is higher; and it is easier to marginalize extremism.”<sup>236</sup> Unlike the U.S.’ plurality system, where voters have only two choices, governments with proportional representation have a more diverse range of policies to vote on, thereby increasing the partisan and ideological gene flow.

Second, RCV encourages multiple parties to run for office at both the state and federal levels. RCV is an electoral system where voters rank

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<sup>233</sup> *Research on Proportional Representation*, FAIRVOTE, <https://fairvote.org/resources/data-on-rcv/#research-on-proportional-representation> [<https://perma.cc/7ZD3-7U75>].

<sup>234</sup> *Proportional Representation*, BALLOTPEDIA, [https://ballotpedia.org/Proportional\\_representation](https://ballotpedia.org/Proportional_representation) [<https://perma.cc/3ES4-TMY8>]. There are various systems of proportionality. For example, in the party-list system, the elector votes for a party’s list of candidates, and each party will receive a share of the seats “proportional to the share of votes it received.” *Id.* The single-transferable vote system “voters rank their choice of candidates on the ballot instead of voting for just one candidate.” *Id.*

<sup>235</sup> The United Kingdom is one of the only Western European countries to use the “winner-take-all” plurality system. Michaela Palese, *Which European Countries Use Proportional Representation?*, ELECTORAL REFORM SOC’Y (Dec. 2018), <https://www.electoral-reform.org.uk/which-european-countries-use-proportional-representation/> [<https://perma.cc/U4SP-3SAD>].

<sup>236</sup> Lee Drutman, *The Case for Proportional Voting*, NAT’L AFFAIRS, <https://www.nationalaffairs.com/publications/detail/the-case-for-proportional-voting> [<https://perma.cc/6V7H-UU97>].

their choice of candidates in order of choice.<sup>237</sup> If one candidate receives more than fifty percent of the first-choice votes, then that candidate wins the election.<sup>238</sup> However, if no candidate gets more than fifty percent, then the counting continues based on rounds.<sup>239</sup> As an example:

[I]f your first-choice candidate is eliminated because that candidate had the fewest votes, your vote is transferred to your second-choice candidate. And if your second choice is eliminated in the next round, your vote is transferred to your third choice . . . in each round, your vote will count once, and it will count for the highest-ranked candidate on your ballot that is still viable and has not been eliminated . . . [this] process continues until only two candidates remain. The candidate with the most votes in the final matchup wins the election.<sup>240</sup>

RCV already occurs throughout the U.S. As of November 2021, the State of Maine and more than fifty jurisdictions, including several cities in the State of Minnesota, will use RCV in future elections.<sup>241</sup> Under the current two-party system, where potential candidates may avoid running in the race because their campaign could take away a vote from a similar candidate,<sup>242</sup> RCV is beneficial in *encouraging* two or more candidates to run for an office.<sup>243</sup>

A variety of diverse parties that are not shut out by the current plurality system allow the U.S. to have political and ideological divisions that cut across geographic borders and binary party lines.<sup>244</sup> As a result, ideological gene flow can return and mitigate the detrimental effects of speciation that have resulted in recent decades.

## VII. CONCLUSION

The U.S. has reached a critical juncture in its partisan and ideological polarization. It must decide whether to maintain the status quo and continue along the same path or make a change that increases the diversity of ideas in individual states and across state borders.

Evolutionary principles explain why political polarization has increased in recent decades. These principles show how polarization impacts both the state and federal systems of governance. Geography,

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<sup>237</sup> *Ranked Choice Voting*, FAIRVOTE, [https://www.fairvote.org/rcv#where\\_is\\_ranked\\_choice\\_voting\\_used](https://www.fairvote.org/rcv#where_is_ranked_choice_voting_used) [https://perma.cc/Z5B6-PRDK].

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* This issue is particularly likely to happen with candidates of color and women. See *supra* Section IV.C (noting gene flow homogeneity in state legislatures thwarts gene flow).

<sup>243</sup> *Id.*

<sup>244</sup> See Gordon, *supra* note 150, at 217 and accompanying text.

systemic racism and sexism, and technology, three factors that contributed to the lack of ideological and partisan “gene flow,” thwarted productive interaction between the Republican and Democratic parties. As a result, the country “speciated” into two factions, Republican and Democrat. Two traits stem from the lack of gene flow: a more partisan U.S. Supreme Court and a hindered federalist system.

Importantly, the U.S. does not have to continue along the same path leading to irreconcilable political differences. Rather, the U.S. can increase gene flow and reintroduce diversity into the political ecosystem by moving away from the two-party, “winner-take-all” electoral system to a multi-party democracy that embraces proportional representation at the state and federal levels. Making this change allows the country to mitigate the harmful effects of speciation plaguing the current system.