SELF-DISTRICTING:
THE ULTIMATE ANTIDOTE TO GERRYMANDERING

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ABSTRACT

It is possible to end gerrymandering by removing the power to draw district lines from government officials and giving this power to the voters themselves. In a self-districting system, as described herein, each voter chooses which constituency the voter wants to join for purposes of legislative representation. These constituencies can be geographically based as in traditional districting systems, but they also can be based on other attributes—whatever associational communities the voters themselves wish to form. If enough voters join a constituency to form more than one district based on the constitutional principle of equally populated districts, then this constituency can be subdivided into districts based on strict computer-implemented geographical criteria without any possibility for gerrymandering. This self-districting system not only complies with the U.S. Constitution; it is also consistent with the Act of Congress that requires single-member districts. Thus, there is no federal law obstacle to prevent states from adopting a self-districting system for both their congressional delegation and their own legislative chambers. In fact, self-districting is a way to avoid the problem of minority vote dilution, a task likely to become more difficult given anticipated changes in the U.S. Supreme Court's jurisprudence on the topic. Because of the increasingly pernicious nature of gerrymandered districts, which cause voters—and most especially minority voters—serious representational harms, the alternative of self-districting, where voters are empowered to make these representational decisions for themselves, deserves serious consideration.

INTRODUCTION

It's an understatement to say that redistricting is a mess. Partisan gerrymandering is as virulent as ever. In Ohio, the persistent defiance of the state's supreme court by partisan mapmakers was a major defeat for both democracy and the rule of law and a new low in the nation's descent into an anti-majoritarian abyss.

The U.S. Supreme Court, moreover, is poised to eliminate the possibility of drawing majority-minority districts in order to avoid the dilution of minority voting power as a consequence of racially polarized politics. In a case concerning Alabama's seven congressional districts, after the legislature drew the new post-2020 map to include only one majority-black district, plaintiffs brought a suit claiming that the Voting Rights Act required a second majority-black district. African-Americans, after all, constitute 27% of Alabama's population. Therefore, only one of seven districts (or 14%) would amount to significant underrepresentation of minority voters. Moreover, given Alabama's geography, it would not be difficult for a mapmaker to create a second majority-black district to cure that underrepresentation. This claim prevailed in the federal court, but the state appealed, and the Supreme Court seems likely to rule for the state, thereby potentially rendering the effort to achieve fair representation for racial minorities essentially impossible.

It's time to rethink the entire enterprise of redistricting. Instead of having state governments draw district lines—a process that is inherently fraught with the

prospect of partisan abuse—voters should decide for themselves what district they would like to join. To make this work, it would be necessary to relax (although not entirely sever) the connection between a district and geography. Voters could decide to join a district based on attributes other than the specific location in the state where they lived. For example, voters could choose to join a district defined in terms of occupation (farmer), age (millennial) or social identity (voters of color). Self-districting thus would enable minorities to be represented if they—and not a government mapmaker—decided that they wished to be represented as minorities. This means of avoiding minority vote dilution would not run afoul of a Supreme Court prohibition on race-based redistricting by the state, because the state would not be making the redistricting decision at all; the voters themselves would be doing this.

There are details to discuss on exactly how this self-districting would work, including how it complies with the constitutional requirement of equally populated districts. It is also worthwhile to explain the relationship of self-districting to proportional representation (PR). In PR systems, parties receive seats in a legislature in proportion to their share of votes. A party with 20% of the votes, for example, receives (at least roughly) 20% of the seats. Self-districting can be seen as a type of PR system, or a hybrid between PR and district-based systems, insofar as parties would be able to compete for the self-districting decisions that voters make. If 40% of a state's voters, for example, choose to join Democratic districts, then 40% of the state's districts (or at least approximately that percentage based on the applicable rounding formula) would consist of voters choosing to be represented in the legislature on the basis of party affiliation as a Democrat.

In this way, self-districting would solve the increasingly acute problem of voters being forced by the state's mapmakers to live in uncompetitive districts. With self-districting, voters would choose—if they wished—to be represented in a politically homogenous district, entirely Democratic or entirely Republican, and for these voters the November election would look more like a partisan primary. The candidates competing in November to win one of these total-D or total-R districts would be telling their politically homogenous voters that they would be the best Democrat or Republican to represent their party in the legislature.

There are advantages to putting the choice of party first and candidate second, as self-districting enables, but before delving into the details of how self-districting works and why it is beneficial, it is necessary to review just how disastrous the current districting system has become and thus why something new is so urgently needed.

I. The Collapse of Government-Controlled Districting

A. Gerrymandering Run Amok: The Egregious Example of Ohio

Redistricting after the 2020 census saw displays of aggressive partisan gerrymandering in various states. In Florida, for example, Governor Ron DeSantis wasn't satisfied by the degree of partisan advantage achieved by his fellow Republicans in the state legislature and demanded a map that would produce more

seats for their party.[2] In New York, Democrats were overzealous in their own partisan greed, and the state's judiciary invalidated their map—a decision that arguably contributed to their party's failure to retain control of the federal House of Representatives.[3] But nowhere was partisan abuse of redistricting more persistent—and pernicious—than in Ohio.

After exceptionally egregious GOP gerrymandering in the Buckeye State in the 2010 redistricting cycle, citizens voted for reform. In two separate ballot measures, one applicable to redistricting for the state's legislature and the other for the state's congressional districts, voters approved plans for procedures that would enable a bipartisan redistricting commission to counteract one party's power to draw maps to maximize its own advantage. Nonetheless, Ohio Republicans managed to defy the will of the voters and to impose their own maps even when the state's supreme court repeatedly ruled that these Republican maps violated the state's new voter-approved constitutional provisions.

Five times the Ohio Supreme Court declared a Republican map for the state's legislature unconstitutional as excessively partisan and ordered the map to be redrawn to satisfy the new standard of partisan fairness adopted as part of the voter-approved reform.[4] Each time Republicans involved in the redistricting process, including Governor Mike DeWine and Secretary of State Frank LeRose, refused to comply with the Ohio Supreme Court's decree. They simply tinkered with the map a bit but essentially resubmitted a map that the court continued to consider as fundamentally unfair for being biased in favor of Republicans.

Ohio's Republicans got away with this defiance. Their unconstitutional map was used for the 2022 elections. A key reason why this defiance worked was that the Ohio Supreme Court lacked the power to draw its own map for the state legislature and needed instead to send the unconstitutional map back for redrawing. (The litigation over the Ohio congressional map was even more complicated—and no more satisfying from the perspective of nonpartisan fair representation of the state's voters.) It is a major defeat for the rule of law when the state's judiciary is unable to secure compliance with its decisions and orders.

The details of what happened in Ohio are complicated, and they reveal multiple weaknesses in the way the state's redistricting reform procedures were drafted. It was not just the failure to give the Ohio Supreme Court authority to draw a map if necessary. It was also the particular design of the redistricting commission, populating it with political insiders from both parties, rather than using the model of an independent redistricting commission populated by ordinary citizens. Ohio's

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[2] Nathaniel Rakich & Tony Chow, *Ron Desantis Drew Florida an Extreme Gerrymander*, FIVETHIRTYEIGHT (July 14, 2022), https://fivethirtyeight.com/videos/ron-desantis-drew-florida-an-extreme-gerrymander/ [https://perma.cc/Z35H-QD55].

[3] Daniel Marans, *New York Democrats May Have Cost Their Party the House. What Happened*, HUFFPOST (Nov. 18, 2022, 1:19 PM), https://www.huffpost.com/entry/new-york-democrats-house-kathy-hochul_n_6377ad06e4b0a97fec7c1537 [https://perma.cc/KJ5N-V3R4].

[4] *See* League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 168 Ohio St.3d 522, 2022-Ohio-1727, 200 N.E.3d 197, ¶¶ 1, 5 (noting fifth-time invalidation of General Assembly maps); *see also* Neiman v. LaRose, 2022-Ohio-2471, ¶¶ 1–3 (noting congressional map unconstitutional for second time).

reform also permitted the state's dominant party to draw a four-year map if the redistricting commission could not achieve enough support from both parties for a ten-year map. Perhaps unsurprisingly, the state's Republicans repeatedly took advantage of their unilateral power to draw a four-year map. Even though a four-year map needed to comply with constitutional standards of partisan fairness—standards the Ohio Supreme Court attempted to enforce—the brute fact that the authority to draw the four-year map remained in one party's control caused a complete breakdown of the reform's objective of avoiding a map that was excessively one-sided.

To make matters worse, not only did Republicans suffer no penalty from their brazen defiance of the Ohio Supreme Court and the rule of law, but because the state's judiciary is elected, they have been able to change the composition of the Ohio Supreme Court in a way that means they will be unlikely to face any obstacles to gerrymandering in the future. All of the court's rulings that the Republican maps were unconstitutional were 4-3 decisions with the then-incumbent Republican chief justice, Maureen O'Connor, defying partisanship to declare the maps invalid. But Chief Justice O'Connor was term-limited, and Republicans replaced her in the 2022 election with one of the three dissenters on the court who consistently ruled in their favor. Moreover, because Governor DeWine gets to appoint a replacement for the vacant seat, every expectation is Republicans now have a secure four-seat majority on the Ohio Supreme Court that will approve whatever partisan map comes their way.[5]

Meanwhile, former chief justice O'Connor has said that she will dedicate her retirement to pursuing a more successful version of redistricting reform and renewal of respect for the rule of law.[6] As she has observed in reflecting upon Ohio's experience, for reform to be successful it is essential to take the power to draw the map away from self-interested political insiders. "You have to take it away from the politicians," she said in one exit interview.[7] Self-districting, as described in this article, does exactly this.

B. The Loss of Competitive Districts—and Its Consequences

Redistricting after the 2020 census was not only characterized by flagrant partisanship. It also accentuated the diminution in the number of competitive seats that had begun in earlier rounds of redistricting. According to an analysis conducted by the Cook Political Report, in 1999—right before redistricting prompted by the 2000 census—there were 164 competitive congressional seats, defined as those for

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[5] Amanda Powers & Douglas Keith, *Key 2022 State Supreme Court Election Results and What They Mean*, BRENNAN CTR. FOR JUST. (Nov. 9, 2022), https://www.brennancenter.org/our-work/analysis-opinion/key-2022-state-supreme-court-election-results-and-what-they-mean [https://perma.cc/FR8D-2J9U].

[6] Laura A. Bischoff, *As She Exits, Ohio Chief Justice Maureen O'Connor Has Plenty to Say*, COLUMBUS DISPATCH (Nov. 21, 2022), https://www.dispatch.com/story/news/politics/2022/11/21/ohio-supreme-court-chief-justice-maureen-oconnor-exits-public-office/69577366007/ [https://perma.cc/C5EE-LFVQ].

[7] *Id.*

which neither party had more than a 5-point advantage.[8] By comparison, in that same year Republicans had more than a 5-point advantage in only 150 seats, and Democrats had more than a 5-point advantage in 121 seats.[9]

In the 2002 elections, as a result of the post-2000 redistricting, the number of competitive districts dropped to 111, far fewer than the number of Republican-advantaged districts, which had climbed to 175, and even the number of Democrat-advantaged districts, which also had climbed to 149.[10] By the 2012 elections, a decade later and after the next round of redistricting, the situation was even worse: there were only 90 competitive seats, whereas 186 were Republican-advantaged and 159 were Democratic-advantaged.[11]

The trend intensified for the 2022 elections, following the most recent round of redistricting. The number of competitive districts dropped to only 82.[12] The number of Republican-advantaged districts increased to 189, and the number of Democrat-leaning districts rose to 164.[13]

This latest reduction in competitive seats was a result of Republicans preferring to consolidate gains achieved through previous gerrymandering, rather than risking losing seats by being excessively greedy in the number of seats they might win. In Texas, for example, the prior GOP-drawn congressional map had 22 Republican-leaning districts, 8 Democrat-leaning districts, and 6 competitive districts.[14] The new Texas map, also GOP-drawn, which had two additional districts because of reapportionment after population shifts among all the states, now has 24 Republican-leaning districts, 13 Democrat-leaning districts, and only a single competitive seat.[15]

The elimination of competitive districts means that for most voters the election is meaningless, with the result foreordained. Cynicism and apathy towards politics rises. Turnout tends to diminish. What's the point of voting if it won't make any difference in who wins?

The lack of competitiveness caused by redistricting is hardly inevitable. In states where *statewide* races are intensely competitive, gerrymandering can cause districted elections to be utterly uncompetitive. In Georgia, for example, where Biden beat Trump in 2020 by only 0.3 points, the average margin between Biden and Trump in the state's congressional districts was a whopping 30.5 points.[16] Similarly, in Wisconsin, where Biden beat Trump by 0.6 points, the average margin between these

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[8] David Wasserman, *Introducing the 2022 Cook Partisan Voting Index (Cook PVI℠)*, COOK POL. REP. (July 13, 2022), https://www.cookpolitical.com/cook-pvi/2022-partisan-voting-index/introducing-2022-cook-partisan-voting-index [https://perma.cc/ZY8B-PQRZ].

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *See What Redistricting Looks Like In Every State*, FIVETHIRTYEIGHT (July 19, 2022, 3:50 PM), https://projects.fivethirtyeight.com/redistricting-2022-maps/texas/ [https://perma.cc/383B-KDWR].

[15] *Id.*

[16] Stef W. Kight, *First Look: Battleground Imbalance*, AXIOS (July 25, 2021), https://www.axios.com/2021/07/25/competitive-state-redistricting-gerrymandering-2022-election [https://perma.cc/FAP2-8XSR].

two presidential candidates in the state's congressional districts was 21.1 points.[17] Districts, in other words, are drawn to secure victories in advance, so that results are not up for grabs in the way that Senate seat in the same state might be.

Many have commented upon the dysfunctionality of the current federal House of Representatives, especially in terms of its incapacity to compromise in the interest of governance on behalf of the American people. The tribalism and toxicity of the hyper-polarization that characterizes the House, especially in comparison with the Senate, is a consequence (at least in part) of elections to the chamber being so immune from the salutary effects of electoral competition. No need for moderation or reasonableness. In safe seats, after winning a partisan primary, the party's nominee can remain as rigidly partisan as they wish without fear of suffering any electoral retribution in November. No wonder conditions in Congress are such a mess.

A system of self-districting, as we shall see, would dramatically alter the electoral incentives and cause a need for winning candidates to form legislative coalitions across party lines in order to achieve governing majorities able to enact policies into law.

C. The Imminent Impossibility of Minority-Majority Districting

Single-member legislative districts, of the kind used for seats in the federal House of Representatives as well as in most state legislative chambers in the U.S., run the risk of causing racially discriminatory vote dilution. This risk is due to the fact that district lines might be drawn so that voters belonging to racial minority groups are in the minority in every district in a state, or at least a percentage of districts larger than the group's share of the state's total population. By contrast, given residential patterns within the state as a whole, it may be possible to draw district lines so that voters belonging to racial minority groups are a majority of voters in a number of districts proportional to the minority group's percentage of the state's overall population.

In 1982, Congress amended the Voting Rights Act of 1965 to clarify that this kind of racially discriminatory vote dilution is unlawful even if unintended by those who draw legislative districts. Four years later, in the landmark case of *Thornburg v. Gingles*,[18] the Supreme Court devised a test to determine whether a legislative map causes racially discriminatory vote dilution in violation of the amended VRA. This *Gingles* test has two parts: first, a set of threshold prerequisites that must be satisfied in order for liability to be established; and second, a "totality of the circumstances" analysis to determine whether liability is warranted in light of all relevant considerations.[19] The *Gingles* prerequisites essentially require a showing of two conditions: (1) the existence of racially polarized voting, in which both majority and minority groups vote cohesively as a bloc, thereby effectively rendering the minority group politically powerless given the existing legislative map; and (2) the possibility of drawing geographically appropriate districts in which the currently powerless

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[17] *Id.*
[18] Thornburg v. Gingles, 478 U.S. 30 (1986).
[19] *Id.* at 50–51, 79.

racial minority group would be in the majority and thus able to elect a candidate of their choice in the newly drawn district.[20]

Currently, the Court is considering a new case, *Merrill v. Milligan*, which has the potential to radically revise—or even eradicate—the ability to establish the existence of racially discriminatory vote dilution under the *Gingles* test. Applying that test, the federal district court ordered Alabama to create a second majority-black district.[21] Although blacks are 27% of the state's voting age population, and thus having two of the state's seven congressional districts would be roughly proportional (2 of 7 being 28.57%), the state's new congressional map after the 2020 census (like previous congressional maps for the state) contained only one majority-black district.[22] The district court found the existence of racially polarized voting in the state and, crucially, the possibility of creating a geographically suitable second majority-black district.[23] Therefore, having established the *Gingles* prerequisites, the district court moved on to the totality of circumstances and conducting that analysis found the creation of the second majority-black district to be warranted.[24]

Alabama appealed the district court's decision to the Supreme Court. Alabama's main argument on appeal would essentially render *Gingles* a nullity. Alabama contends that as long as computers randomly drawing thousands of maps using racially neutral districting criteria would tend to draw only one majority-black district rather than two, then there would be no obligation for the state to draw a second majority-black district.[25] In other words, rather than looking to see if an additional majority-black district is geographically *possible*, as the *Gingles* test currently does, Alabama would require that the threshold inquiry be converted to examining whether an additional majority-black district would be geographically *necessary*. Alabama makes this argument not primarily on the basis of statutory interpretation, but instead on the ground that the VRA is unconstitutional otherwise.[26] Alabama contends that requiring the creation of a majority-black district in order to avoid vote dilution in circumstances where it is geographically discretionary, rather than imperative, would cause mapmakers to make race the motivating factor in drawing district lines and that this kind of racially motivated redistricting when there is no geographical compulsion violates the equal protection clause of the Fourteenth Amendment, as interpreted by a previous line of Supreme Court precedents starting with *Shaw v. Reno*.[27]

The Court heard oral argument in *Merrill v. Milligan* on October 4, 2022. Given the questions the justices asked, it seems as if the Court is unlikely to embrace the most aggressive form of Alabama's argument. But it also seemed as if a majority of the Court may be sympathetic to at least some form of the state's contention that the *Gingles* test should be curtailed so that a state is not obligated to defend against a

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[20] *Id.* at 50–51.

[21] Merrill v. Milligan, 582 F. Supp. 3d 924, 936 (2022).

[22] *See id.* at 935–36.

[23] *Id.* at 936.

[24] *Id.* at 1018.

[25] Brief for Appellants, Merrill v. Milligan, Nos. 21-1086, 21-1087 (Feb. 2022).

[26] *Id.*

[27] Shaw v. Reno, 509 U.S. 630, 658 (1993).

vote dilution claim under the totality of circumstances analysis whenever racially polarized voting exists and it is geographically possible to draw an additional majority-minority district.[28] Whatever way the Court rules for Alabama in this case, assuming the Court does, would likely have the effect of severely diminishing the capacity of the Voting Rights Act to protect against vote dilution.

Self-districting, by contrast, would avoid this problem altogether. Because voters rather than government officials would choose their own districts, there would be no basis for arguing that the government excessively considered race in drawing districts. Thus, there would be no ground for contending that self-districting violated equal protection under the doctrine of *Shaw v. Reno* and its progeny. Self-districting thus permits minority voters to protect themselves against vote dilution without relying on either government officials or the courts to draw districts to avoid vote dilution. Self-districting is thus the best possible protection against whatever the Court might decide in *Merrill v. Milligan* (or similar future cases).

II. SELF-DISTRICTING: HOW IT WOULD WORK

Self-districting would involve a two-stage voting process, comparable to the current two-stage process of primaries and general elections, except that the two stages in the self-districting system would be very different from what they currently are.

Self-districting could be adopted for seats in the U.S. House of Representatives or for seats in state legislatures, or both. (Self-districting obviously could not apply to U.S. Senate elections since they are all statewide.) Congress could mandate a self-districting system for congressional districts used to elect House members, given the constitutional authority of Congress to determine the "Times, Places, and Manner" of congressional elections.[29] But absent that congressional mandate, state legislatures currently have the power to enact a self-districting system to elect their congressional delegations to the House. Current federal law, codified at 2 U.S.C. § 2c, requires states to adopt single-member congressional districts: "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative."[30] Self-districting would comply with this requirement: each district created by the self-districting process would elect only one Representative, and no state with a self-districting system would elect any additional Representatives other than through the self-districting process.[31]

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[28] Adam Liptak, *Supreme Court Leans Toward Alabama in Voting Rights Dispute*, N.Y. TIMES (Oct. 4, 2022, 12:05 PM), https://www.nytimes.com/2022/10/04/us/alabama-supreme-court-voting-rights-act.html [https://perma.cc/9897-4PGU]; Brief for Appellants, Merrill v. Milligan, Nos. 21-1086, 21-1087 (Feb. 2022).

[29] U.S. CONST. art. I, § 4.

[30] 2 U.S.C. § 2c.

[31] Previously, Congress imposed specific geographic requirements, like contiguity and compactness, in addition to its single-member district requirement. But those geographical requirements lapsed when Congress failed to reenact them after the 1920 census. When Congress in 1967 adopted its new version of the single-member district requirement, it no longer included any geographical requirements, including contiguity. *See*

Self-districting would not apply to those states, like Wyoming, that have a single congressional seat because of their low population (just as self-districting would not apply to the U.S. Senate). Indeed, the federal statutory requirement in 2 U.S.C. § 2c for states to create single-member districts applies only to those states with "more than one Representative."[32] Moreover, the representational benefits of self-districting increase with larger numbers of districts to be created through the self-selection system. States with only two congressional seats, like Idaho, would get only a very limited benefit from self-districting. The most benefit, therefore, could occur in using self-districting to determine seats in a state legislative chamber, like Virginia's 100-seat House of Delegates.[33]

Nonetheless, given the obvious national interest in congressional districting, and especially the fear that the Supreme Court's decision in the pending Alabama case will eliminate the possibility of fair congressional representation for minority voters, it is useful to illustrate how self-districting would work with a congressional example.

A. Self-districting Stage One: The Choice of Districts by Voters

For sake of simplicity, consider a hypothetical state with ten congressional districts, and a citizen voting age population of 5 million. In light of the principle of one-person-one-vote, each of the state's ten districts would have a target population of 500,000 voters.

The first step of the process would be for self-organized groups to register with the state's government, presumably the secretary of state's office. These groups would advertise themselves as "communities" or "constituencies" or "associations"—using whichever term one prefers—aiming to attract voters to join them so that they are large enough to form one or more of the state's ten congressional districts. These groups could define themselves however they wish. They could do so on the basis of geography. Join the "Urban" community, one might advertise, while another markets itself as "Rural" voters.[34]

The 1967 Single-Member District Mandate, FAIRVOTE, http://archive.fairvote.org/library/history/flores/district.htm [https://perma.cc/T2H4-CPFK]. Thus, it would be permissible under current federal law for a state to have noncontiguous or overlapping districts as part of a self-districting system, as long as those districts elected a single member of Congress and comply with applicable equal population requirements of the Constitution.

[32] § 2c.

[33] VA. PUB. ACCESS PROJECT, https://www.vpap.org/elections/house/ [https://perma.cc/U8LL-8J99].

[34] Redistricting law and literature currently employ the term "communities of interest" to denote various ways voters might affiliate demographically. The terminology used here—whether "communities" or another descriptor for political "groups"—is intended to be broad enough to encompass the traditional redistricting concept of "communities of interest" and at the same time also have sufficient breadth to embrace even wider ways that voters might sort themselves into politically salient categories. Insofar as it might be argued that a voter belongs to a "community of interest" that is more politically significant than the group the voter would choose to join in a self-districting system, the very nature of self-districting would reject that argument or at least deem it irrelevant. The whole purpose of self-districting, after all, is to let voters choose for themselves which group they wish to join for redistricting purposes. For someone other than the voter to say that the voter made the wrong choice, or made a choice based on a less important personal characteristic or trait, would be at odds with the voluntaristic premise of the self-districting system.

Groups catering to city dwellers might attempt to define themselves based on the particular city rather than just being "urban" generally. In Tennessee, for example, there might be different groups trying to recruit Memphis and Nashville voters. But because a group that recruits twice as many voters would be presumably entitled to twice as many seats given the one-person-one-vote principle, it might be strategically advantageous for a single "Urban" group to recruit all city-dwelling voters in the state, and then subdivide itself into as many districts as it obtains based on the total number of voters it recruits, rather than risk not qualifying for any district if it segments itself in advance among too many different self-defined groups.

Groups would not need to define themselves in terms of geography. They could define themselves in terms of occupational or economic category: Farmers, Labor, Tech, Green, and so forth. They could define themselves by age cohort if they wished: Boomers, Gen X, Millennials, Gen Z, etc. Or they could define themselves by other attributes of social identity: Latino, Black, Asian, and the like. Strategically, however, it might be advantageous for a single Voters of Color group to recruit self-identifying minority voters, rather than recruit voters separately based on different racial or ethnic categories.

In fact, strategic considerations might cause political parties to recruit voters across a variety of demographic dimensions. The Democratic Party, for example, might recruit city dwellers, union workers, younger voters, and voters of color. The more voters that the Democratic Party was able to recruit from all these categories, the more districts the party would be allocated. For example, if 2 million of the state's 5 million voters self-selected into Democratic districts, then these Democrats would be presumptively entitled to four of the state's ten districts.

Indeed, it would be possible to design a self-districting system so that it was limited solely to political parties registered with the state, rather than to any self-defined affinity group that sought official registration status. As a practical matter, however, limiting the self-districting system to political parties in this way might not meaningfully constrain the number and nature of the groups qualifying to participate in the electoral competition among voters who select which group to join. After all, the state would need to specify the conditions that would entitle a group to be recognized as a political party for this purpose, and consistent with the First Amendment, those conditions would need to be neutral with respect to the group's political ideology. There could be a Labor Party devoted to the interests of workers—as indeed there is a Labor Party in Britain. There could be a Farmers Party, as there has been historically in the United States. There could also be a Women's Party or a Christian Party or a Rainbow Coalition Party, each devoted to advancing the interests of its self-identified characteristics.[35]

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[35] During the women's suffrage movement, there was a National Woman's Party. *See* CHRISTINE A. LUNARDINI, FROM EQUAL SUFFRAGE TO EQUAL RIGHTS: ALICE PAUL AND THE NATIONAL WOMAN'S PARTY, 1910–1928, at 87 (1986). Many countries have self-identified Christian parties, with Germany's Christian Democrats a leading example. *See* Sudha David-Wilp, *Germany's Christian Democrats Are on a Comeback Mission*, FOREIGN POL'Y (May 24, 2022, 6:00 AM), https://foreignpolicy.com/2022/05/24/germany-state-elections-schleswig-holstein-north-rhine-westphalia-cdu-greens-spd/ [https://perma.cc/PF4V-A9QD] (explaining the recent success of Germany's Christian Democratic Union). The Rainbow Coalition, which grew out of the Black Panther Party in Chicago and eventually was transformed into a broader multiracial and

As long as the process of competing for the allegiance of voters remains open, without ideological constraints (as must be the case under the First Amendment), then the question of which groups establish themselves as successful competitors depends upon the preferences of voters in particular states at any given time. In some situations, it might be possible for a group defined relatively narrowly to compete successfully for at least one seat in a self-districting system. For example, if California adopted self-districting for its 52 congressional seats, it is conceivable that a group—or political party—defined specifically to advance the interests of Latino Californians could secure sufficient support for one or more seats. While the California Democratic Party likely would attempt to persuade Latino Californians that their political power would be more effective if they joined the broader coalition that the Democratic Party purported to represent, it is possible that enough Latino Californians would see their interests better represented if they joined a Latino-specific district rather than a more generic Democratic district.

In Utah, by contrast, which has only four congressional seats, and where Latinos are only 15% of the population, Latino voters might see it in their interest to join forces with Utah Democrats so as to increase their chances of electing a favorable candidate in at least one of the state's four congressional districts. Thus, the dynamics of what groups or political parties form to compete for the allegiance of voters, and how the voters respond to the recruitment messaging from those groups or parties depends on the interplay of various factors concerning the size, demographics, and political culture of a state at any particular time. It matters less whether or not these groups are defined or understood to be, as a formal matter, political parties as opposed to non-party political associations.

B. Details of Implementation

There needs to be at least one district for voters in the state who choose not to participate in the self-districting process. The same point applies to voters who do choose to join one of the available groups, but there are not enough likeminded voters to reach the threshold level for forming even one district. Even with respect to those groups that reach this threshold, there needs to be a procedure—or rounding formula—for determining how many districts each of these groups obtains, since the number of voters who join each of these groups will not be exact multiples of the target district size, which in our hypothetical case is 500,000.

There are different particular ways to do this, akin to the different methods available for apportioning seats in Congress among the fifty states.[36] Here is one such method, which aims to (1) be as simple as possible and (2) achieve equally sized districts. It is easiest to explain how this method works with an example.

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multicultural movement under the leadership of Jesse Jackson, is an example of a political movement organized in terms of demographic identity. *See* JAKOBI WILLIAMS, FROM THE BULLET TO THE BALLOT: THE ILLINOIS CHAPTER OF THE BLACK PANTHER PARTY AND RACIAL COALITION POLITICS IN CHICAGO 126, 200–02, 204 (2013).

[36] A useful introductory description of the alternative rounding methods for congressional apportionment may be found in GEORGE G. SZPIRO, NUMBERS RULE: THE VEXING MATHEMATICS OF DEMOCRACY, FROM PLATO TO THE PRESENT at ix-x (2010).

Suppose that after being offered the opportunity to join one of the self-districting groups, these are the results of that preliminary election:

Group	Number of Voters (000s)	Percentage of Voters
Democrats	1050	21
MAGA Patriots	1600	32
Social Progressives	550	11
Constitutional Conservatives	700	14
Libertarian	100	2
Green	50	1
No self-districting choice	950	19
TOTAL	5,000	100

The next step is to allocate districts to these self-districting groups. The simplest method is to "round down"—meaning that a group is allocated a district for each multiple of 500,000 voters who elect to join that group. This procedure yields this allocation of districts:

Group	Number of Districts
Democrats	2
MAGA Patriots	3
Social Progressives	1
Constitutional Conservatives	1
Unaffiliated	3

Given the "rounding down" method, neither the Green nor Libertarian group received enough votes to achieve even one district. As a result, after the "rounding down" process is complete, three districts remain unallocated to any self-districting group.[37]

There still is the task of assigning individual voters to specific districts. In order to achieve districts with the same number of voters, it is necessary to randomly assign some of the voters who selected one of the self-districting groups to one of the

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[37] It would be possible to use a form of Ranked Choice Voting to enable voters to list in order of preference more than one group they would join for districting purposes. If not enough voters shared a particular voter's first-choice preference to form even one district, then that particular voter could be included within the voter's second-choice preference if enough other voters also joined that group to form at least one district. For example, if a voter ranked Greens first and Democrats second, and there were not enough voters to form a Greens district, then that voter would be included with the Democrats, who cleared the threshold for at least one district. Only if a voter did not rank any group that cleared the threshold for forming at least one district would the voter need to be considered as equivalent to not joining any group at all. Enabling voters to rank preferences in this way is normatively desirable from the perspective of maximizing voter choice. Whether its additional element of complexity is more than manageable for voters without previous familiarity with self-districting would be a separate normative question to consider at the point when any state seriously undertook the possibility of adopting a self-districting system. (I'm grateful to Doug Spencer for flagging this particular point.)

unaffiliated districts. For example, 1,050,000 individuals selected the Democrats group. But because the Democrats are allocated only two districts, in order to achieve equally sized districts, only 500,000 voters can be placed into each of these two districts for a total of 1 million voters, leaving 50,000 voters who selected the Democrats group to be randomly reassigned to one of the three unaffiliated districts.

The same random reassignment to an unaffiliated district happens to 100,000 of the voters who selected the MAGA Patriots group. This group is allocated 3 districts and can populate each of them with 500,000 of its self-selected voters. But that still leaves 100,000 of the group's 1.6 million voters unable to "fit into" one of the group's three districts, and thus 100,000 of these MAGA Patriots voters must be randomly reassigned to the unaffiliated districts. Once all of these random reassignments occur, the three unaffiliated districts collectively include: 50,000 Democrats; 100,000 MAGA Patriots; 50,000 Social Progressives; 200,000 Constitutional Conservatives; as well as 100,000 Libertarians and 50,000 Greens, along with the 950,000 who did not affiliate with any group.[38]

But how do groups with more than one district—including the Democrats with two districts, and even the "unaffiliated group" with its three districts—subdivide its voters into its specific districts? There are multiple possible approaches, but reliance on geography would make the self-districting system most similar to existing geography-based districting. Thus, for the 1 million voters assigned to the Democrats' two districts, half would be assigned to one and half to the other based on computer-generated districts created according to strict geographical criteria.[39] For example, the computer could be instructed to minimize the number of county and municipality splits in order to keep these geographical communities intact. If multiple computer-generated maps are possible that comply with this minimal-splits instruction, the computer could be further instructed to draw the two Democrats districts so that they are as geographically compact as possible, measured by one or

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[38] The hypothetical example used to illustrate this self-districting system assumes that most, although by no means all, voters will want to participate in the process of selecting a group to join for districting purposes. In the example, only 19% of voters (950,000 out of 5 million) decline to make a self-districting choice. If, however, this participation rate was much lower—say, the situation was reversed and only 19% chose to select a group to join—then the self-districting system would be much less distinctive in comparison to the existing government-based system of redistricting. Obviously, until a self-districting system were implemented in practice, one can only surmise what the actual participation rate would be. Meanwhile, additional ways could be considered to facilitate participation, including the voting methods used by which voters would declare their preferences. Because voters would not be choosing specific candidates, but instead declaring group affiliations—which necessarily would be a matter of public record for districting purposes—there would be no need for a secret ballot. Thus, this initial stage of the districting process could be conducted electronically, over the internet, in the same way that voter registration is in many states, thereby making the process much more convenient to voters and thereby likely maximizing voter participation rates.

[39] If one wished to avoid any geographic-based districting, one could simply assign voters randomly. In the case of the two Democratic districts, half the voters would be randomly assigned to each. (This would be permissible under current federal law, which only requires single-member districts and does not require that these districts be drawn in any way geographically.) But because the task is to subdivide these self-selected Democratic voters into two districts, there would no reason to be concerned with the risks of gerrymandering associated with dividing them geographically. Moreover, insofar as the self-districting law strictly limited the geographical considerations to clearly specified formulas, there would be an inability for politicians to manipulate the secondary geographical component of the districting process.

more well-recognized compactness scores. If after exhausting all the computer-instructed geographic criteria, there are still multiple maps that are equally compliant, the computer would randomly generate one of these in order to produce the two geographically determined Democrats districts.

The same process would apply to create the three MAGA Patriots districts. Obviously, the single Social Progressives and Constitutional Conservatives districts would not need any additional geographic specification, but instead would extend statewide encompassing all of the Social Progressives or Constitutional Conservatives assigned to this group-specific district based on their own self-selection (in other words, those not randomly reassigned to an unaffiliated district). The three unaffiliated districts would be geographically determined in the same computer-generated way as the three MAGA Patriots districts: in subdividing the 1.5 million voters assigned to this unaffiliated category, the priority would be to minimize county and municipality splits, then to maximize the compactness of the three districts, and, if necessary, randomly select among alternatives that are equally valid in terms of geography.[40]

These three unaffiliated districts, of all ten districts generated by this self-districting process, would look most like traditional districts under existing districting procedures used by state governments. Each of these unaffiliated districts would include voters with various partisan and ideological leanings, including those voters who selected one of the self-districting groups but who were randomly reassigned in order to keep the districts equally sized. A map showing just these three unaffiliated districts would look similar to traditional districting maps. So too would be the map showing just the three geographically determined MAGA Patriots districts, or the map showing just the two geographically determined Democrats districts. What's distinctive about the self-districting system is the "overlay" that occurs with multiple geographically determined maps, as the two Democrats districts "sit on top" of the three MAGA Patriots districts, and all of the group-based districts "sit on top" of the three unaffiliated districts.[41]

The idea that citizens inhabiting the same geographical territory would be represented by multiple members of the same legislative chamber is not alien. After

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[40] A concern has been expressed that there would be temptation to gerrymander the unaffiliated districts. This concern can be addressed by eliminating all discretion within the geographical drawing of the unaffiliated districts. The problem of gerrymandering occurs because politicians are able to make choices about where to draw district lines. But if computers subdivide the unaffiliated group into geographic districts according to strict mathematically defined criteria, or otherwise assign unaffiliated voters to districts randomly, then there is no capacity within the system for politicians to draw these districts to achieve partisan advantage. Moreover, there is no need to worry about minority vote dilution with respect to the subdivision of unaffiliated voters into geographic districts, because minority voters wishing to protect themselves from vote dilution would have been able to self-district themselves into a district of affiliated voters where collectively they would be able to exercise electoral power to assure representation by a candidate attentive to their interests.

[41] New Zealand uses a similar system, insofar as legislative representation is based upon two distinct sets of geographically drawn districts: one set of districts is specifically designated for Māori citizens, to ensure their adequate representation in the legislature, and the other set of districts is for all New Zealanders. (Māori citizens can choose which of the two sets of districts they wish to vote in, in a process of self-selection similar to the self-districting system described here.) LISA HANDLEY, THE OXFORD HANDBOOK OF ELECTORAL SYSTEMS 523 (Erik S. Herron, Robert J. Pekkanen & Matthew S. Shugart, eds. 2018).

all, currently each state has two Senators in the U.S. Senate. To be sure, a state's two Senators are not elected by entirely different constituencies within the same state, whereas in the self-districting system the statewide representative elected in the single Social Progressives district would have an entirely different set of voters than the statewide representative elected in the single Constitutional Conservatives district. Still, the constituencies that elect each of a state's two Senators are not identical: because Senate terms are staggered, the group of voters eligible to elect one of the state's Senators necessarily differs to some degree from the group of voters eligible to elect the state's other Senator. Nonetheless, both Senators can represent the same geographical territory—the entire state—in the Senate at the same time. Both Senators, in other words, can perform constituency services and all of the other functions of legislative representation even though both Senators share the same geographic territory for these representational purposes.

Other examples of simultaneous legislative representation exist in the United States. New Hampshire, for example, has "floterial" districts that "sit on top" of the state's regular legislative districts.[42] Members elected from both types of geographically overlapping districts sit together in the same legislative chamber and thus represent the same residents of their shared territory simultaneously. The self-districting system described here simply expands upon this same basic concept of simultaneous legislative representation.

C. Self-districting Stage Two:
Electing a Winning Candidate in Each District

After the districts are set, voters are notified of their district. (They can also look up this publicly available information on a website operated by the state's department of elections.) Candidates then sign up to run in each district. Appropriate ballot access rules would limit the number of candidates on the ballot in each district. For example, candidates could be required to collect signatures from 5, or even 10, percent of the district's voters in order to appear on the ballot. These signatures could be collected electronically through a government-run website that both voters and candidates could access, although old-fashioned paper-based signatures could also be possible for voters for whom internet access is an obstacle.[43]

For group-based districts, the choice among candidates on the ballots would look like a conventional partisan primary. For example, in either of the two Democrats districts, all of the candidates would be self-identified Democrats, and they would be endeavoring to earn the support of voters who all chose to affiliate with the Democrats. The same would be true of all three MAGA Patriots districts: the candidates would all self-identify as belonging to this group, as would all of the voters in each of these three districts. Likewise, for the single Social Progressives and Constitutional Conservatives districts: the second-stage vote in each of these

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[42] OPEN DEMOCRACY, https://www.opendemocracynh.org/about_nh_s_floterial_voting_districts [https://perma.cc/3Y72-5RZF].

[43] A candidate could run for no more than one seat. (This constraint, although arguably implied by the concept of single-member districts, could be made explicit as part of the system.)

districts would resemble party primaries for these smaller self-selected political groups.

But the second stage vote in each of these group-based districts would not, in fact, be a party primary. Instead, it would be the general election, still in November for as long as Congress so chooses pursuant to its power to set the date for congressional elections, and the winner of these November elections in each district would be the Representative-elect for that district, to sit in the new Congress that begins in the following January.

For the three unaffiliated districts, the November vote would look more like a typical general election. The voters in each district would be heterogeneous in their partisan and ideological leanings. There would be some self-identified Democrats, MAGA Patriots, Social Progressives, and Constitutional Conservatives, all in this district after being randomly (and, as necessary, geographically) assigned there to maintain equally sized districts. There would also be Greens and Libertarians, as well as a substantial number of voters who chose not to affiliate with any of the self-organized political groups. Given this diverse mix of voters, one would also expect a comparably diverse mix of candidates competing to win the support of voters in each of these three unaffiliated districts. Thus, on the ballot in each of these districts could be a Democrat, a MAGA Patriot, a Social Progressive, a Constitutional Conservative, as well as self-described unaffiliated or "independent" candidates.

Because in each of the state's ten districts, whether a group-based or unaffiliated one, there could be multiple candidates qualifying for the ballot, it would make sense to use Ranked Choice Voting to elect the winning candidate. In an unaffiliated district, a voter, for example, could rank a Democrat first, and a Social Progressive second, and a Constitutional Conservative third. In one of the two Democrats-specific districts, by contrast, voters would be ranking in order of preference the several Democrats vying to represent in Congress that Democrats-designated district. (It would be possible to use conventional plurality-winner ballots, in which voters indicate a preference for a single candidate, but in a multiple-candidate election Ranked Choice Voting is better able to identify which candidate a majority of voters prefer than a single-choice plurality-winner ballot.[44])

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[44] It is possible also for a state to use Ranked Choice Voting (RCV) without employing a self-districting system, as Maine currently does for its two congressional districts and Alaska does for the seats in both chambers of its state legislature. But the use of RCV without self-districting, while improving elections in other respects, cannot achieve the benefits of self-districting or avoid the gerrymandering and other redistricting harms that self-districting counteracts. To see this, consider the possibility of adopting RCV without self-districting in Ohio, Georgia, and Alabama. In Ohio, even with RCV in use, elections would be plagued by the extreme partisan gerrymandering that Republicans perpetrated in defiance of the Ohio Supreme Court, as described above in Part I.A. In Georgia, even with RCV, the current congressional maps would have only one seat that mirrors the political competitiveness of the state as a whole—whereas the state's 13 other congressional districts would be solidly red or blue, but not because the voters themselves chose these lopsidedly uncompetitive districts, but because these lopsidedly uncompetitive districts were imposed upon them by the government's mapmaker. Even worse, in Alabama, RCV would not undo the disproportional denial of a second majority-black district, whereas self-districting would enable the state's black voters to remedy this disproportionality.

Obviously, the specific results of the November election in this self-districting system would depend on the choice of the voters. The unaffiliated districts would be most "up for grabs" in terms of which political party, if any, would win the election in each of those districts. Depending on voter preferences among the specific candidates on the ballot, a Democrat or a MAGA Patriot or a candidate associated with some other party, or perhaps even an independent candidate, might win that district.

In the group-based districts, the partisan affiliation of the winning candidate would be a foregone conclusion. A Democrat would be certain to win in each of the two Democrats districts, a MAGA Patriot certain to win in each of the three MAGA Patriots districts, and so forth. These group-based districts would be "uncompetitive" in conventional terms. But at least the voters themselves would have chosen how many "uncompetitive" districts would be allocated to the Democrats, the MAGA Patriots, and each other self-defined political party. It would not be a government mapmaker, beholden to partisan politicians, who would be determining each political party's share of "uncompetitive" districts.

Moreover, each party-based district would be robustly competitive in terms of which candidate affiliated with the party would get to represent that district. Unlike conventional partisan primaries, which are plagued by low voter turnout and tend to cause candidates to skew towards each party's most ardent "base" voters, the party-specific choice of which candidate would win the district's seat in this self-districting system would occur in the November general election, where turnout is traditionally higher. Indeed, because the November general election would continue to determine which candidate goes to Congress, and because in a party-based district, all the voters would have turned out for the first stage of the process to choose which district to join, in this self-districting system one would expect that the second-stage November vote would continue to have high turnout in all of the party-based districts. In this way, the self-districting system's process of picking a party first and a candidate second would result in a more competitive—and representative—electoral procedure overall.

As envisioned here, both stages of the self-districting electoral process would occur in each election; that's what makes self-districting appear to be an inversion of the current two-stage process of a partisan primary followed by the November general election. But it would be possible to confine the first stage of the self-districting system to a once-in-each-decade event, much like redistricting currently occurs only once every decade. In this alternative version of the self-districting process, voters would be "stuck" with their self-districting choice made at the beginning of the decade for all elections held throughout the decade. In each subsequent election, voters would only vote for the candidates running in their initially self-selected districts. (Voters moving into the state in the middle of a decade would be assigned to one of the unaffiliated districts.) An advantage of this once-a-decade version would be to reduce the number of times a voter would need to "turnout" to declare which district they wished to join. The corresponding disadvantage would be that voters would be unable to switch which group they wished to join except once every decade.

A middle-ground approach would be to make the initial self-districting decision more like voter registration: voters wouldn't need to re-register for their chosen district every election, but they would have the option of doing so if they wished. In other words, voters would make an initial districting selection, and they would remain in their initially selected district unless before the next election (by a specified deadline) they switched their affiliation to a different districting group. Whether or not one prefers this kind of voter registration model for the initial stage of the self-districting process, in comparison to the basic idea that voters self-select the districting group they wish to join for each election, depends upon how important one might think it is for voters to declare their political allegiance in each election. If one views elections as primarily ideological contests between the various groups vying for the allegiance of voters, then one might wish voters to rethink and reassert their allegiances in each election. Conversely, if one views it unduly burdensome for voters to be required to recommit to their chosen affiliation each and every election, then one would prefer the voter registration model. In a federalism-based system of self-districting, different states could make different choices on this implementation issue.[45]

III. THE RELATIONSHIP OF SELF-DISTRICTING TO PROPORTIONAL REPRESENTATION

From the description of self-districting set forth above, it is easy to see its affinity to proportional representation. There is at least a rough proportionality between a group's share of self-districting votes and the group's share of the state's congressional seats. Democrats, for example, received 21% of self-districting votes and, as a result, are allocated 20% of the state's congressional seats. MAGA Patriots receive 32% of the state's self-districting votes and get 30% of the seats. And so forth.

But it would be possible to create a proportional representation system for congressional elections without the specific self-districting details. There are many different proportional representation systems.[46] One worth comparing to self-districting, to show what is distinctive about self-districting in relationship to proportional representation generally, would be to have a state's voters simultaneously vote for both (1) the party they prefer and (2) their preferences among their preferred party's candidates.

We can illustrate this alternative PR system using our same hypothetical state with ten congressional districts. Each political party competing for the state's ten seats would field a slate of ten candidates for those seats. The number of seats each party would get to fill would depend upon that party's share of voters who cast their

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[45] It has been suggested that computer simulations could help determine how various forms of a self-districting system might operate in practice. To the extent that the preliminary description of the self-districting concept as set forth here might spark interest among political scientists with the methodological skills to conduct such computer simulations, their desire to do so would be a most welcome development.

[46] *See* ANDREW REYNOLDS, BEN REILLY & ANDREW ELLIS, ELECTORAL SYSTEM DESIGN: THE NEW INTERNATIONAL IDEA HANDBOOK at 3 (2005), https://www.idea.int/publications/catalogue/electoral-system-design-new-international-idea-handbook [https://perma.cc/9Z5U-CEPT].

party-preference vote for that party. A party would need to receive at least 10% of all party-preferences votes to earn one seat.

As with the self-districting system, a rounding formula is necessary to determine the exact number of seats each party that passes the 10% threshold receives. There are many different possible rounding formulas. One simple formula, which we can employ for illustration, is a "largest remainder" method, sometimes called the Hamilton method after Alexander Hamilton, who proposed it.[47]

Suppose the vote shares for each party is as follows:

Party	%
MAGA Patriots	38
Democrats	27
Constitutional Conservatives	16
Social Progressives	14
Other	5
Total	100

Given these results, each of the four parties above the 10% threshold initially receive one seat for each 10% of the total vote they receive, not counting at this stage fractions of each 10%. Based on this calculation, MAGA Patriots get 3 seats, Democrats 2, and Constitutional Conservatives and Social Progressives each get 1. This initial allocation of seats leaves 3 seats unallocated. The allocation of these three seats is based on the size of each party's fractional share that remains unfilled. The fractional shares are:

MAGA Patriots	8
Democrats	7
Constitutional Conservatives	6
Social Progressives	4

Thus, the MAGA Patriots, Democrats, and Constitutional Conservatives each get one additional seat, while the Social Progressives do not. The final allocation of seats for each party is:

Party	Seats
MAGA Patriots	4
Democrats	3
Constitutional Conservatives	2
Social Progressives	1
Total	10

Given this allocation of seats among the four parties, the next step is to fill the seats with the requisite number of candidates from each party. Once again, Ranked Choice Voting can be used for this purpose. For the MAGA Patriots party, for example, the

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[47] Eerik Lagerspetz, SOCIAL CHOICE AND DEMOCRATIC VALUES 130 (2016).

voters choosing that party can rank the party's ten candidates in order of preference, and the party's top four candidates based on all these rankings will fill the party's four seats. The same method can be used to fill each of the other party's allocated seats.

This PR system differs from self-districting in that there are no districts at all. The four candidates elected from the MAGA Patriots party are all elected statewide and do not represent any specific "district" of voters, defined geographically or otherwise. Unlike in the self-districting system, voters in the state are not responsible for electing a single individual member of Congress to represent their particular district. As such, in the PR system, voters cannot say who their individual Representative in Congress is, for constituent services or any other purposes. Indeed, voters who did not vote for any of the four parties that cleared the 10% threshold do not "have" any Representative in Congress that they even participated in voting for. By contrast, in the self-districting system, every voter who casts a ballot in the second-stage November general election participates in the voting that elects the candidate from that district, and the winner is that voter's Representative in Congress—as is true in the current districting system—even if that voter preferred one of that winning candidate's opponents in that second-stage November election. Indeed, even voters who do not turn out for the second-stage November election know what district they are in (or easily can know this by looking it up on the internet), and thus know who their own district's Representative in Congress is even if they did not vote at all in the election that this Representative won. In this way, self-districting is much more similar to the current single-member-district method of electing Representatives to Congress than the alternative PR system is.

Moreover, the single-member-district requirement of existing federal law in 2 U.S.C. § 2c would need to be repealed in order to adopt this alternative PR system. The self-districting system would need no such change to federal law. Any state is free right now to adopt self-districting. Doing so would achieve a substantial degree of proportionality to congressional elections. In this way, it is possible to obtain the essential benefit of proportional representation, including its electoral fairness, without having to adopt PR itself.

Making this move to self-districting is all the more urgent because of the especially egregious gerrymandering that occurred in the most recent round of congressional districting, as well as the elimination of fair representation for minority voters in conventional districting that is likely to occur as a result of the Supreme Court's decision in the pending Alabama case. Perhaps at some point in the future the United States may wish to move to a form of PR itself for congressional elections, and Congress will repeal the single-member-district requirement in order to let that happen. In the meantime, however, states should not wait for Congress to act and instead begin to adopt self-districting on their own.[48]

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[48] Of course, if only some states adopt self-districting for their congressional seats while other states do not, that differential might affect the overall composition of the federal House of Representatives. But that point is true with respect to any state-based policy aimed at redressing congressional gerrymandering. As was made clear in the 2022 midterms, if only blue states eliminate gerrymandering while red states continue to engage in the practice, the nationwide effect will be a greater skew towards the red side of the partisan divide. But for as long as the Constitution gives each state its own set of congressional

Self-districting, like any system that aims for proportional representation of political groups based on their relative share of the electorate as a whole, facilitates multi-party rather than two-party electoral competition. This article is not the place for an extended discussion of the longstanding debate within political science on whether or not European-style multi-party democracy, premised upon electoral mechanisms designed to achieve proportional representation, is preferable to American-style two-party democracy. There is the obvious risk in PR systems, as shown by the experience of European politics, that political parties advocating extremist ideologies will capture legislative seats and may be required to be included within multi-party coalitions in order to form a governing majority in the legislature.[49] On the other hand, recent experience in the United States has shown that its system of two-party politics is not immune from the effects of political extremism.[50] Indeed, in the United States, an extremist faction within one of the two major parties may capture control of that party, and if that party wins control of the government, the extremist faction will wield power within the two-party system. An extremist minority, therefore, may be able to leverage itself into dominance even more effectively in America's current two-party system than in a PR system, where even if the extremist minority faction may be part of the governing majority coalition, its role in that coalition can be kept more easily in check by the other members of the majority coalition.[51]

Without attempting to resolve this debate definitively, it is worth noting recent developments in political science suggesting that America's traditional two-party system may be suffering from particularly acute pathologies at this moment in history. Lee Drutman's influential book, *Breaking the Two-Party Doom Loop*, makes a particularly compelling case why the hyper-tribalism of America's current red-blue divide makes it especially difficult for democratic government to work effectively on behalf of the American people.[52] Opening up the political process to permit the formation of multiple political parties would help to counteract the polarized animosity engendered by the currently intense us-versus-them two-party conflict, where the other side is viewed as dangerous enemies rather than the loyal opposition. For anyone inclined to be sympathetic to Drutman's diagnosis of what ails American politics right now, self-districting offers an available antidote. Drutman's own preferred remedy—a version of proportional representation based on multi-member

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representatives and permits state law to determine the "manner" of electing those state-chosen representatives unless and until that state law is overridden by congressional legislation, then it makes little sense to think of the federal House of Representatives as elected by a single national electorate as a whole. Instead, each state elects its own congressional delegation, and the relevant question is what method is the fairest for each state to do this.

[49] *See* Matt Golder, *Far Right Parties in Europe,* ANNU. REV. OF POLIT. SCI., 19, 477 (2016).

[50] *See supra* text accompanying notes **Error! Bookmark not defined.**–28.

[51] The fight over the vote for Speaker of the House exemplifies the capacity of an extreme faction to exert leverage over a majority party in America's current two-party system even when that extreme faction is numerically very small. *See* Annie Karni, *McCarthy Wins Speakership on 15th Vote After Concessions to Hard Right*, N.Y. TIMES (Jan. 6, 2023, 2:34 PM), https://www.nytimes.com/2023/01/06/us/politics/house-speaker-vote-mccarthy.html [https://perma.cc/Q6Z6-MQKK].

[52] LEE DRUTMAN, BREAKING THE TWO-PARTY DOOM LOOP at 2–3 (2020).

congressional districts[53]—would require repeal of the existing single-member district requirement in 2 U.S.C. § 2c. As that remedy is unlikely to occur in the foreseeable future, whereas self-districting is available now to any state willing to adopt it, self-districting is a more immediately achievable way to achieve the kind of goals that Drutman (among others) has identified.

IV. CONCLUDING OBSERVATIONS

The possibility of a self-districting system, as described herein, invites thinking about the fundamental purposes and nature of electoral representation in a democracy. On the basis of what characteristics should citizens of a polity be divided for the purpose of representing them in the polity's legislature? Obviously, if the entire polity is electing a single officeholder, like the governor of a state, then this question does not arise. All citizens equally participate in the election of that statewide official and do so without regard to any subsidiary characteristics into which they may be divided into groups.

Traditionally, geography has been the basis of dividing citizens for legislative representation, especially in the United States. But geography is by no means the only possible basis, or the only one used historically. The division of pre-revolutionary French legislature into three "estates"—one for clergy, another for nobility, and a third for commoners—demonstrates an alternative way to divide society for representational purposes, even though that particular method would be intolerable according to contemporary egalitarian norms.[54] More recent history shows examples of European legislative assemblies representing citizens on the basis of occupational status, or particular industrial sector, within the polity's economy. Other nations around the world consider it necessary to allocate legislative seats to specific racial, ethnic, religious, or other cultural groups within the society.[55]

Self-districting opens up the possibility of permitting individual voters themselves to determine the specific characteristic upon which they wish to be assigned to a group for purposes of legislative representation. If the traditional criterion of geography is most important to them, then voters can make this choice. But if racial identity, occupational or other economic status, or some other characteristic is a more important basis for their representation in the legislature, then self-districting permits voters to register this alternative choice as well.

This kind of self-districting can be defended on deep philosophical grounds. For example, one might invoke something like John Rawls's theory of justice[56], with its idea of asking what system of government individuals would choose behind a veil of ignorance, to argue that self-districting is the fairest way for all citizens to be represented in the legislature. From behind the Rawlsian veil of ignorance, it would

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[53] *See id.* at 3, 14.

[54] *See* Nicholas Biggs, *The French Revolution*, HISTORY COOPERATIVE (Sept. 28, 2020), https://historycooperative.org/the-french-revolution/ [https://perma.cc/7WLX-E84V].

[55] *See supra* note 41.

[56] JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly ed.) (2001).

be rational to choose a system of legislative representation that would maximize the degree of control each citizen has over how that citizen ends up being represented.[57]

Self-districting can also be defended in less philosophical and more pragmatic ways, as being especially suitable for adoption at this particular moment in American history. As recounted at the outset of this article, the traditional geographical-based method of legislative representation in the United States is suffering from especially acute pathologies right now. Partisan gerrymandering has run amok like never before, as exhibited most egregiously by the utter breakdown of respect for the rule of law by senior officials in Ohio. Gerrymandering has also caused a reduction in the number of competitive congressional districts to a degree never previously seen, thereby making the exercise of voting for a candidate in most government-drawn districts an essentially futile gesture. Most ominously, developments in the Supreme Court's views towards the Voting Rights Act threatens the ability to achieve fair representation for minority voters in a redistricting regime based on traditional geographical considerations.

Self-districting offers a way to redress all these acute pathologies afflicting contemporary redistricting practices in the United States. There may be other means to redress partisan gerrymandering. For example, independent redistricting commissions designed more effectively than the insider-dominated "reform" attempted in Ohio show some promise, based on 2022 results, for curtailing extreme partisanship in drawing districts. But independent redistricting commissions have no power to counteract the effect of potentially damaging Supreme Court decisions on the issue of minority vote dilution: if it is unlawful to consider race in drawing district lines to avoid minority vote dilution, when traditional race-neutral geographical factors would not generate an additional district in which the racial minority group is a majority of the district's voters, then this Supreme Court ruling would constrain independent redistricting commissions as much as it would constrain any other government mapmaker. Thus, self-districting offers the only way to assure the continuing possibility of districting that protects racial minorities from the risk of vote dilution, given a Supreme Court hostile to the use of race as a districting factor by government mapmakers. This reason alone is enough to justify adoption of a self-districting system in current conditions.

Self-districting, moreover, would enable the United States to retain significant elements of its traditional geographic basis for legislative representation. While avoiding minority vote dilution, and sharing significant features of a proportional representation system (as described above), self-districting would not eliminate geography entirely in the drawing of district lines. On the contrary, geography simply would be a secondary consideration, subordinated to the primary characteristics that each voter identified as most important. In this way, a self-districting system could serve as an intermediate step towards a full PR method of legislative representation—thereby giving American voters, unfamiliar with PR, a transition towards a system entirely liberated from geography. Or, alternatively, Americans might decide to stick with self-districting, rather than moving completely to PR, as a hybrid system that suitably combines both proportionality and geography into a

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[57] *See id.*

method of allocating legislative seats in a way that accords with America's historical and cultural commitments to both individual choice and territorial ties.

Whatever the nature of legislative representation in the United States may be in the distant future, self-districting is worth pursuing in the near term.