

HOW THE COURTS CAN IMPROVE STATE AND LOCAL ELECTIONS WITH THE SINGLE TRANSFERABLE VOTE

AIDAN F.T. LANGSTON*

Unlike in most other industrialized democracies, in the United States, most elections—at the federal, state, and local levels—are conducted using the plurality voting system, also known as first-past-the-post (FPTP) voting. As a number of scholars and advocates have argued, there is an alternative voting system, well suited to American democratic traditions, that would provide for proportional representation: the single transferable vote (STV). This Note focuses primarily on state and local elections, arguing that the courts should both endorse the use of STV in these elections as constitutional and adopt STV in state and local elections as a remedy for a variety of legal harms.

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INTRODUCTION

In the November 2022 election, voters in Portland, Oregon, were faced with a stark choice. They could vote to stick with the city's time-tested system for electing its local government, with five city commissioners elected at large (that is, with the entire city acting as a single electoral district).¹ Or, they could choose to make a radical break with the past and adopt a new voting system: the single transferable vote (STV).² Under the newly proposed system, the city would be divided into four districts, each of which would elect three council members, using ranked-choice ballots where voters rank their choices in order

¹ Rebecca Ellis, *Portland Voters Consider Massive Overhaul of City Government on November Ballots*, OPB (Oct. 26, 2022, 8:00 AM), <https://www.opb.org/article/2022/10/26/portland-voters-consider-massive-overhaul-city-government-november-ballot> [<https://perma.cc/89VU-VHMN>].

² *Id.*; see also Claire Rush, *Portland, Ore., Voters OK Drastic Overhaul of City Government*, L.A. TIMES (Nov. 15, 2022, 2:08 PM), <https://www.latimes.com/world-nation/story/2022-11-15/voters-ok-drastic-overhaul-of-city-government-in-portland-oregon> [<https://perma.cc/DY6J-7WMT>].

of preference.³ Proponents of the measure argued that it would make it easier for city residents to access government services and connect to their elected representatives.⁴ They also noted that the city's existing at-large voting system was not working for minority communities, with only five people of color having ever been elected city commissioner.⁵ But media reports described the new proposed system as “complicated” and “unusual” and alluded to fears that its adoption could lead to fringe elements being elected to city government.⁶ In the end, fifty-eight percent of Portland voters chose to make the change.⁷ Beginning with the November 2024 election, STV will be used to elect Portland's city council,⁸ making Portland the largest American city to adopt STV as its voting system.⁹

This Note argues that Portland voters made the right choice—and that not just voters and legislators, but also courts, should take action to increase the use of STV in state and local elections in the United States. At present, and unlike in most other industrialized democracies, most U.S. elections are conducted using the plurality voting system, also known as first-past-the-post (FPTP) voting.¹⁰ As a number of scholars and advocates have argued, the single transferable vote is a better alternative, well-suited to American democratic traditions, that would provide for proportional representation in our elected bodies.¹¹

³ Ellis, *supra* note 1.

⁴ *Id.* (quoting Becca Uherbelau, a member of Portland's charter commission, as asserting that the new system would provide residents “multiple pathways to access services and multiple pathways to ensure that [they] can connect with someone on a policy agenda”).

⁵ COAL. OF CMTYS. OF COLOR, COALITION OF COMMUNITIES OF COLOR AND PARTNER ORGANIZATIONS WORKSHOP REPORT 21 (Nov. 2021), <https://www.portland.gov/omf/charter-review-commission/documents/charter-commission-community-partner-hosted-community/download> [<https://perma.cc/2SWS-WRD6>].

⁶ Ellis, *supra* note 1.

⁷ *Question 26-228 (Vote for 1)*, MULTNOMAH CNTY. OFF. PRECINCT RESULTS (Dec. 5, 2022), https://multco-web7-psh-files-usw2.s3-us-west-2.amazonaws.com/s3fs-public/2022-11_measure_26-228.pdf [<https://perma.cc/3UC5-CBRS>].

⁸ *How Ranked-Choice Voting Works*, PORTLAND.GOV, <https://www.portland.gov/transition/voting> [<https://perma.cc/8ZJ8-P4C5>].

⁹ *Ranked Choice Voting Just Had Its Biggest Election Day Ever*, FAIR VOTE ACTION (Nov. 25, 2022), <https://fairvoteaction.org/results-for-ranked-choice-voting-ballot-measures-in-2022> [<https://perma.cc/RB42-3FFF>] (highlighting Portland as “the largest city using proportional RCV [i.e., STV] to choose its city council”).

¹⁰ See *infra* notes 44–45 and accompanying text.

¹¹ See, e.g., Mary A. Inman, Comment, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 1991, 1996–97 (1993) (arguing for the adoption of STV in congressional elections); Michael A. McCann, *A Vote Cast; a Vote Counted: Quantifying Voting Rights Through Proportional Representation in Congressional Elections*, 12 KAN. J.L. & PUB. POL'Y 191, 194 (2002) (same); Bryce Rosenbower, *The Single Transferable Vote and Proportional Representation in the People's House*, CALIF. L. REV. ONLINE BLOG (Oct. 2020), <https://www.californialawreview.org/online/>

This Note's novel contribution is to make the case for why and how the courts should facilitate the adoption of STV in state and local elections. It argues, through a comparative analysis of two recent state supreme court decisions out of Alaska¹² and Maine,¹³ that courts should endorse the use of STV in these elections as constitutional under both state and federal constitutions. It goes on to contend that the courts should adopt STV in state and local elections as a remedy for a wide variety of legal harms, drawing inspiration from recent successes in Eastpointe, Michigan,¹⁴ and Palm Desert, California.¹⁵

The Note proceeds in four Parts. Part I contains background information on the state of American democracy, the functioning of STV, and the reasons why state and local, rather than federal, elections are prime venues for the adoption of STV. Part II presents the arguments for and against STV, concluding that as a policy matter, STV would be superior to FPTP as a voting system for U.S. elections because of its potential to remediate the serious harms of gerrymandering, vote dilution, and partisan polarization. Part III argues that federal and state constitutions should pose no serious barrier to the adoption of STV in state and local elections. Finally, Part IV presents a path forward for the future: The courts, both state and federal, can and should adopt STV as the most appropriate remedy for a variety of harms already recognized under federal and state law. These harms include violations of federal and state voting rights statutes, as well as racial and political gerrymandering that violates the federal and state constitutions.

I

BACKGROUND

A. *What's Wrong with American Democracy?*

American democracy is widely considered to be under threat.¹⁶ With politics dominated by two extremely antagonistic camps and little

the-single-transferable-vote-and-proportional-representation-in-the-peoples-house [https://perma.cc/9QBT-DLPY] (same).

¹² *Kohlhaas v. State*, 518 P.3d 1095 (Alaska 2022) (holding that the use of RCV in Alaska elections is permissible under the state's constitution).

¹³ *Op. of the Justs.*, 162 A.2d 188, 212 (Me. 2017) (holding that the use of RCV in state elections conflicts with the Maine Constitution).

¹⁴ *See infra* Section IV.A.2.

¹⁵ *See infra* Section IV.B.2.

¹⁶ *See, e.g.*, Gary Fields & Christina A. Cassidy, *Many Remain Critical of State of US Democracy: AP-NORC Poll*, ASSOCIATED PRESS (Oct. 19, 2022, 10:32 AM), <https://apnews.com/article/2022-midterm-elections-presidential-election-2020-democracy-33823de7f22a601a192fc82eeb88e630> [https://perma.cc/E7WG-FDSB] (reporting that only nine percent of U.S. adults believe democracy to be functioning "extremely" or "very

room for cooperation or compromise, one of the most commonly raised problems is increased polarization, extending from the federal level all the way down to city and town government.¹⁷ Another major concern is the rise of extremist elements, not only in society at large, but also in the halls of power, with far-right Republicans in the U.S. House of Representatives having acquired substantial leverage in the 2022 mid-term elections¹⁸ and left-wing Democrats also being viewed by many Americans as holding extreme policy positions.¹⁹ The mechanisms of American democracy are also frequently described as dysfunctional, or even broken.²⁰ For instance, some commentators argue that gerrymandering, the “practice of drawing districts to favor one political party or racial group,” has become so pernicious in the United States as to leave many Americans with the belief that their votes essentially do not count.²¹ And voters from marginalized backgrounds are particularly impacted by democratic backsliding,²² with changes being made to

well” and that fifty-two percent believe “it’s not working well”); Miriam Berger, *U.S. Listed as a ‘Backsliding’ Democracy for First Time in Report by European Think Tank*, WASH. POST (Nov. 22, 2021, 11:18 AM), <https://www.washingtonpost.com/world/2021/11/22/united-states-backsliding-democracies-list-first-time> [<https://perma.cc/7QSD-RQGX>].

¹⁷ See Fields & Cassidy, *supra* note 16 (referring to “decades of increasing polarization nationwide, from the presidential and congressional races down to local contests such as races for school boards”).

¹⁸ See Stephen Collinson, *McCarthy Is Speaker, but the Extremists Hold the Power*, CNN (Jan. 9, 2023, 3:51 AM), <https://www.cnn.com/2023/01/09/politics/kevin-mccarthy-house-speaker-test/index.html> [<https://perma.cc/UY4E-NQG3>] (arguing that Speaker Kevin McCarthy’s assent to rule changes had “empowered extremists” in the House).

¹⁹ See, e.g., Mark Mellman, *Opinion, Mellman: Who Are the Extremists?*, THE HILL (Dec. 14, 2022, 7:45 AM), <https://thehill.com/opinion/3774229-mellman-who-are-the-extremists> [<https://perma.cc/SWX7-MPQS>] (noting poll results showing that Americans are equally likely to view Democrats as “too tolerant of extremist groups” relative to Republicans and ascribing this result to public perception of Democrats’ policy stances, such as their alleged support for defunding the police).

²⁰ *Opinion, A Majority of Americans Think US Democracy Is Broken. Here Are 12 Ideas for Repairing It*, CNN (Oct. 14, 2022, 6:26 AM), <https://edition.cnn.com/2022/10/14/opinions/american-democracy-broken-solutions-roundup/index.html> [<https://perma.cc/AB88-J6T9>].

²¹ See *Gerrymandering & Fair Representation*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/gerrymandering-fair-representation> [<https://perma.cc/2AJ5-32GC>] (arguing that gerrymandering “makes races less competitive, hurts communities of color, and thwarts the will of the voters[.] . . . lead[ing] many Americans to feel their voices don’t matter”); see also, e.g., Bobby Harrison, *Gerrymandering Gives Mississippians Less Desire to Vote*, MISS. TODAY (Nov. 13, 2022), <https://mississippitoday.org/2022/11/13/gerrymandering-mississippi-less-desire-to-vote> [<https://perma.cc/Z6H6-9HT2>] (“[T]he state Legislature has created a gerrymandered system where the argument could be made that unless a voter was a family member of one of the congressional candidates running for office or taking a bribe to vote, there was very little reason to go to the polls.”).

²² See Berger, *supra* note 16 (defining democratic backsliding as “nations seeing a gradual decline in the quality of their democracy”).

elections that “target and . . . disproportionately harm voters of color, young voters, and voters with disabilities.”²³

Although these harms cannot be attributed to any single cause, there is one structural issue compounding American democracy’s challenges that may fly somewhat under the radar: the voting system.²⁴ U.S. elections are mostly conducted in a winner-take-all fashion, where each election in a jurisdiction or district selects a single elected official.²⁵ The use of this system, while perhaps unremarkable to most Americans, is a key factor underpinning what the *New York Times* editorial board has called “our hyperpolarized, geographically clustered and gerrymandered age.”²⁶ Winner-take-all (also known as first-past-the-post, or FPTP) voting systems favor the development of a strong two-party system. This is because votes cast for anyone other than a major-party candidate are likely to be “wasted,” causing smaller parties to struggle to gain traction.²⁷ In turn, the dominance of two major parties, Republican and Democratic, is one important factor that strengthens partisan polarization and extreme politics. By comparison to other democracies, “America’s relatively rigid, two-party electoral system stands apart by collapsing a wide range of legitimate social and political debates into a singular battle line that can make our differences appear even larger than they may actually be.”²⁸

The problems of partisan and racial gerrymandering are tied inextricably to the United States’ FPTP voting system. Gerrymandering is very difficult to remedy in the context of an electoral system where each district elects a single member to an elected body by the FPTP method. This is in part because legislators who draw the maps are unlikely to

²³ Wendy R. Weiser, Daniel I. Weiner & Dominique Erney, *Congress Must Pass the ‘For the People Act,’* BRENNAN CTR. FOR JUST. (Mar. 18, 2021), <https://www.brennancenter.org/our-work/policy-solutions/congress-must-pass-people-act> [<https://perma.cc/358U-JNDY>].

²⁴ This Note uses the terms “voting system” and “electoral system” interchangeably to refer to the “[m]ethod and rules of counting votes to determine the outcome of elections.” *Electoral System*, ENCYC. BRITANNICA (May 28, 2023), <https://www.britannica.com/topic/electoral-system> [<https://perma.cc/BZ6A-PK8W>].

²⁵ See *infra* notes 44–45 and accompanying text.

²⁶ Editorial, *A Congress for Every American*, N.Y. TIMES (Nov. 10, 2018), <https://www.nytimes.com/interactive/2018/11/10/opinion/house-representatives-size-multi-member.html> [<https://perma.cc/3DQC-VAKM>] (arguing that single-member districts threaten America’s representative democracy by contributing to political polarization and incentivizing gerrymandering).

²⁷ Inman, *supra* note 11, at 1993; see *infra* notes 87–89 and accompanying text.

²⁸ Michael Dimock & Richard Wike, *America Is Exceptional in Its Political Divide: The Pandemic Has Revealed How Pervasive the Divide in American Politics is Relative to Other Nations*, PEW (Mar. 29, 2021), <https://www.pewtrusts.org/en/trust/archive/winter-2021/america-is-exceptional-in-its-political-divide> [<https://perma.cc/9LTJ-BMRZ>].

voluntarily give up the power to draw maps that protect their own jobs,²⁹ and also in part because gerrymandering is not only a problem created by bad actors drawing unfair maps. Rather, gerrymandering can be understood as an inherent feature of the FPTP voting system: Even in the absence of any intent to gerrymander, redistricting proposals are likely to disadvantage parties whose voters naturally cluster together in small geographic areas, like major cities.³⁰ Even a truly unbiased, nonpartisan approach to mapmaking—which many jurisdictions have attempted to ensure through independent redistricting commissions³¹—would be unable to account for this phenomenon altogether.³² Moreover, since voters of color in the United States do, in fact, disproportionately reside in densely populated urban areas,³³ communities of color are particularly likely to be disadvantaged by this aspect of American elections.

U.S. law does already contain some provisions that help to mitigate the worst of these harms. An important example is § 2 of the Voting Rights Act, which forbids states and localities from adopting voting procedures that give voters of color “less opportunity than other members of the electorate to participate in the political process and to elect

²⁹ See Douglas J. Amy, *How Proportional Representation Would Finally Solve Our Redistricting and Gerrymandering Problems*, FAIRVOTE, <https://fairvote.org/archives/how-proportional-representation-would-finally-solve-our-redistricting-and-gerrymandering-problems> [<https://perma.cc/U5DN-S8Y7>] (“[T]he very jobs of the state legislators are at stake. Redrawing boundaries can make them vulnerable to defeat and they naturally will fight desperately to protect their careers.”).

³⁰ See *id.* (giving the example of “a central city district [where] Democratic voters are unintentionally packed into that district, forcing them to waste much of their voting power with excessively large majorities”).

³¹ See, e.g., *About*, N.Y. STATE INDEP. REDISTRICTING COMM’N, <https://www.nyirc.gov/about> [<https://perma.cc/SY3F-BBRY>] (“The purpose of creating the Commission is to make the process independent from the legislature in favor of an equally bipartisan body.”); *FAQ*, ARIZ. INDEP. REDISTRICTING COMM’N, <https://irc.az.gov/faq-0> [<https://perma.cc/5TQB-2MCY>] (noting that, prior to the creation of Arizona’s redistricting commission by popular initiative in 2000, the state legislature had responsibility for redistricting, and that “[m]any people believed this practice resulted in boundaries that served the politicians instead of the people of Arizona”).

³² A useful example is that of Massachusetts, whose congressional delegation is composed of nine Democrats and no Republicans. See *Massachusetts*, GERRYMANDERING PROJECT, <https://gerrymander.princeton.edu/reforms/MA> [<https://perma.cc/N8BS-ZKG7>]. With single-member districts, there is simply no way to draw the map such that a Republican representative could be elected to the House from Massachusetts, because Republican voters are too spread out throughout the state. *Id.* But under STV, Massachusetts could potentially elect several Republican representatives, a much fairer outcome given that about a third of the state votes Republican. See *A Congress for Every American*, *supra* note 26.

³³ See, e.g., Janell Ross, *How Black Voters in Key Cities Helped Deliver the Election for Joe Biden*, NBC NEWS (Nov. 7, 2020, 5:24 PM), <https://www.nbcnews.com/news/nbcblk/how-black-voters-key-cities-helped-deliver-election-joe-biden-n1246980> [<https://perma.cc/P2DX-QRM5>] (noting the concentration of Black voters in urban centers like Philadelphia, Detroit, Milwaukee, and Atlanta).

representatives of their choice.”³⁴ Voters of color may bring suit under § 2, and have successfully done so, to require the redrawing of district maps that unfairly disadvantage their communities.³⁵ But if the community of color is not “sufficiently large and geographically compact to constitute a majority in a single-member district,” § 2 will be of no help, as no conceivable redrawing of the maps would allow voters of color to elect a candidate of their choosing in a FPTP system.³⁶

Plaintiffs can also bring suit under the Supreme Court’s line of cases beginning with *Shaw v. Reno*, which prohibits so-called racial gerrymandering.³⁷ *Shaw* challenges can be, and have been, made to contest racially discriminatory districting plans, such as a map drawn with the intent to “pack as many [B]lack voters as possible into a district.”³⁸ But in adjudicating these claims, courts must consider the competing interests generated by § 2, which inherently requires the drawing of maps that concentrate minority voters together in so-called “majority-minority” districts.³⁹ If mapmakers have “good reason to believe that § 2 requires drawing a majority-minority district,” that will suffice to defeat a *Shaw* claim against the packing of voters of color into a single district, which might otherwise be considered impermissible racial gerrymandering.⁴⁰

Finally, plaintiffs have attempted to use the Federal Constitution to challenge partisan gerrymandering, but these attempts have failed. In *Rucho v. Common Cause*, the Supreme Court held that partisan gerrymandering claims are not justiciable under the political question doctrine, effectively closing off the federal courts as a venue to make this type of claim.⁴¹ Although these claims are still possible to raise

³⁴ 52 U.S.C. § 10301.

³⁵ See *infra* notes 122–26 and accompanying text.

³⁶ See *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) (explaining that, in the context of a challenge under § 2 of the Voting Rights Act to a multi-member districting scheme, a large, compact minority population is a “necessary precondition[]” for a finding of unlawful vote dilution).

³⁷ *Shaw v. Reno*, 509 U.S. 630 (1993) (holding that North Carolina’s race-based redistricting plan was subject to strict scrutiny review and violated the Fourteenth Amendment).

³⁸ *Cooper v. Harris*, 581 U.S. 285, 318 (2017).

³⁹ See Grant Hayden, *Majority-Minority Voting Districts and Their Role in Politics: Their Advantages, Their Drawbacks, and the Current Law*, FINDLAW (Oct. 7, 2004), <https://supreme.findlaw.com/legal-commentary/majority-minority-voting-districts-and-their-role-in-politics.html> [<https://perma.cc/74Y4-MUE4>] (defining a majority-minority district as a “political district[] in which members of a racial minority make up an effective voting majority” and noting that “[a]fter the 1990 census . . . majority-minority districts were created in order to comply with the mandates of the Voting Rights Act”).

⁴⁰ *Cooper*, 581 U.S. at 302; see also *infra* note 125.

⁴¹ 139 S. Ct. 2484, 2506–07 (2019) (“We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

as a matter of state constitutional law in state court,⁴² the *Rucho* decision dealt a harsh blow to advocates seeking to use existing law to combat the harms of partisan gerrymandering. In sum, although U.S. election law does provide remedies to combat harmful voting rights violations—like vote dilution in violation of § 2, or racial gerrymandering in contravention of *Shaw*—the limitations of the existing legal regime, including the current FPTP voting system, make it more difficult, and perhaps impossible, to remedy the problems altogether.

B. What Is STV?

Before diving into the intricacies of the STV voting system,⁴³ it will be helpful to summarize the first-past-the-post (FPTP) voting system and how it functions. In a typical U.S. election, voters cast their votes for one preferred candidate, and the candidate with the most votes wins the election; this is referred to as a “first-past-the-post” election⁴⁴—in an analogy to a literal horse race where whichever horse crosses the finish line first wins.⁴⁵ First-past-the-post voting systems are closely associated with Britain and former British colonies, including Canada, India, and the United States.⁴⁶

An alternative to FPTP elections is the use of preferential, or ranked-choice, voting (RCV). In an RCV election, voters rank the candidates on the ballot in order of preference.⁴⁷ If a candidate has few first-choice votes, they will be eliminated from consideration, and votes cast for them will be either redistributed to the voters’ second-choice candidates or removed from the count altogether if no second choice has been selected.⁴⁸ In this latter case, the ballot is said to be “exhausted.”⁴⁹ The process is repeated until a candidate has an absolute majority of the votes still active in the count (i.e., those that have not

⁴² See *infra* Section IV.D.

⁴³ For a helpful explanation of how STV works in general, see CGP Grey, *Politics in the Animal Kingdom: Single Transferable Vote*, YouTube (Oct. 24, 2014), <https://www.youtube.com/watch?v=l8XOZJkozfl> [<https://perma.cc/5JCN-6YQM>].

⁴⁴ See ANDREW REYNOLDS, BEN REILLY & ANDREW ELLIS, *ELECTORAL SYSTEM DESIGN: THE NEW INTERNATIONAL IDEA HANDBOOK* 35 (2005).

⁴⁵ See Pascal Tréguer, *Origin of ‘First Past the Post’ (As Applied to a Voting System)*, WORD HISTORIES, <https://wordhistories.net/2019/05/11/first-past-post> [<https://perma.cc/6F65-EL4C>] (“The allusion is to horse racing, in which a horse wins a race by being the first to pass the finishing post.”).

⁴⁶ See REYNOLDS ET AL., *supra* note 44, at 35.

⁴⁷ *Id.* at 47–49.

⁴⁸ *Id.*

⁴⁹ See *Dudum v. Arntz*, 640 F.3d 1098, 1101 (9th Cir. 2011) (defining an “exhausted” ballot as one that “is not recounted as the tabulation continues” because “all candidates ranked by a voter [have been] eliminated”).

been exhausted).⁵⁰ When elections are held using ranked-choice voting, but within single-member districts (i.e., where each electoral contest selects a single representative to a legislative body), the voting system can be described as the alternative vote,⁵¹ instant-runoff voting,⁵² or simply as ranked-choice voting.⁵³ Internationally, this is perhaps best known as the voting system in use for lower house elections to the Australian federal parliament.⁵⁴

Finally, we can turn to the single transferable vote (STV), the voting system that this Note suggests would be the ideal mechanism for selecting legislators in the United States, and which is currently used for national elections in Ireland and Malta and for the Australian Senate.⁵⁵ STV, which is known by a variety of names,⁵⁶ is “perhaps the most sophisticated of all electoral systems, allowing for choice between parties and between candidates within parties,”⁵⁷ and “has long been advocated by political scientists as one of the most attractive electoral systems.”⁵⁸ In an STV election, ranked-choice ballots are combined with multi-member districts—that is, voters in a single electoral constituency select

⁵⁰ See REYNOLDS ET AL., *supra* note 44, at 48.

⁵¹ This is the term used by the Institute for Democracy and Electoral Assistance’s handbook on electoral system design. *Id.* at 47.

⁵² The Ninth Circuit uses this term in *Dudum*. 640 F.3d at 1100–01; *see also infra* Section III.A.1 (discussing *Dudum*).

⁵³ The Supreme Court of Alaska uses this terminology in *Kohlhaas v. State*, 518 P.3d 1095, 1102 (Alaska 2022). *See also infra* Section III.A.2 (discussing *Kohlhaas*). This Note will likewise refer to ranked-choice voting within single-member districts as “ranked-choice voting” or RCV for short, as opposed to ranked-choice voting within multi-member districts, which will be referred to as STV. This Note does not take issue with efforts to promote the adoption of RCV in U.S. elections, but it should be noted that RCV with single-member districts is, like FPTP, a non-proportional voting system and therefore shares many of FPTP’s disadvantages. *See infra* notes 69–71 and accompanying text.

⁵⁴ REYNOLDS ET AL., *supra* note 44, at 49 (noting that “all national-level examples of the Alternative Vote at present occur in Oceania,” including Australia, Fiji, and Papua New Guinea).

⁵⁵ *Id.* at 71. Other than these examples, all other uses of STV are at the subnational level, such as in Scotland, Northern Ireland, and some Australian states. *Id.* In the United States, in addition to its upcoming use in Portland, STV is used in local elections in Albany, California; Arden, Delaware; Cambridge, Massachusetts; Eastpointe, Michigan; Minneapolis, Minnesota (for some municipal board elections); and Palm Desert, California. *Proportional RCV Information*, FAIRVOTE, <https://fairvote.org/our-reforms/proportional-ranked-choice-voting-information/#voting-rights-and-fair-representation> [<https://perma.cc/XJP8-LWG8>].

⁵⁶ FairVote, a nonprofit organization that is a leading proponent of STV and related reforms, calls the system “Proportional Ranked-Choice Voting” (PRCV), presumably to highlight the system’s similarity to RCV systems writ large. *Proportional RCV Information*, *supra* note 55. Similarly, Benjamin Lempert uses the term “multimember ranked-choice voting.” *See, e.g.*, Benjamin P. Lempert, Note, *Ranked-Choice Voting as Reprieve from the Court-Ordered Map*, 119 MICH. L. REV. 1785, 1786 (2021). This Note uses the more traditional political science term (STV), but the three terms are fully synonymous.

⁵⁷ REYNOLDS ET AL., *supra* note 44, at 76.

⁵⁸ *Id.* at 71.

multiple legislators using a single ballot.⁵⁹ As an illustration, consider, for example, the state of Massachusetts. At present, Massachusetts is divided into nine districts, which each elect one member of Congress.⁶⁰ Under one proposed STV plan, which would be coupled with an expansion of the overall size of the House, Massachusetts would be divided into three districts electing between three and five members each.⁶¹

Under STV, in a similar way to an RCV election within single-member districts, the candidates with the fewest votes will be eliminated one by one, and votes cast for them will be redistributed to the voters' second choices, then their third choices, and so on. The major distinction from an RCV election is that, in STV, once a candidate has reached the quota necessary to be elected—usually defined through a mathematical formula known as the Droop quota⁶²—that candidate is elected; a majority of all votes in the count is not required. A candidate's surplus votes, i.e., those that exceed the quota, will be redistributed to the voters' next-highest-ranked choices.⁶³

Perhaps the most obvious criticism of an STV election is that the system is difficult for voters to understand and might therefore undermine voter confidence in the system. Preference ballots may be confusing, and the counting process is admittedly rather complex, especially when compared to the simplicity of counting in an FPTP election.⁶⁴ But it is important to keep in mind that although STV may sound complicated, for the voter, an STV ballot is precisely the same as those used in an RCV election within single-member districts. The only differences come at the counting stage, where election officials must use more

⁵⁹ *Id.* at 71, 76.

⁶⁰ *A Congress for Every American*, *supra* note 26.

⁶¹ *Id.*

⁶² REYNOLDS ET AL., *supra* note 44, at 71, 76. The Droop quota is defined as $(\text{Votes}/(\text{Seats}+1)) + 1$, or, in plain English, the number of votes cast, divided by one more than the number of seats to be filled, plus one. *Id.* “[I]n practice, the Droop quota is always used” for STV elections. Michael Gallagher, *Comparing Proportional Representation Electoral Systems: Quotas, Thresholds, Paradoxes and Majorities*, 22 BRIT. J. POL. SCI. 469, 480 (1992). As Gallagher notes, why the Droop quota has been chosen over other formulas is somewhat obscure, but the arguments include that it may reduce the likelihood of tactical or insincere voting. See generally *id.* at 480–82 (outlining the arguments for using the Droop quota).

⁶³ See REYNOLDS ET AL., *supra* note 44, at 71, 76 (providing an overview of how votes in an STV system are allocated). To be precise, no individual's *vote* is transferred as surplus, but rather a *fraction* of every ballot cast for a candidate who has exceeded the quota is redistributed. For instance, if a candidate has 100 votes, and the quota to be elected was ninety-five (meaning the candidate has a surplus of five), all 100 ballots will be redistributed to the voters' next-ranked choices, each at the value of 1/20 of a vote (such that the redistributed vote total equals five, the candidate's surplus vote). *Id.* at 76.

⁶⁴ *Id.* at 77 (observing that “[t]he intricacies of an STV count are quite complex” and that STV ballots therefore generally need to be counted at a centralized counting center rather than at the polling place itself).

intricate calculations to determine when candidates have reached the quota and, if so, how to redistribute surplus votes. The actual balloting is no different from any RCV election—voters simply rank their choices by order of preference.⁶⁵ Voters who have experienced RCV elections have generally been able to understand the system and support its continued use; thus, as RCV becomes more common in American elections, resistance to STV due to its unfamiliarity should likewise decline.⁶⁶

Critics could also argue that, even if the voting process itself is simple enough, adopting a new and relatively complex voting system like STV could decrease voter trust in the legitimacy of American elections if voters are unable to understand how the system functions overall. Although this is one possible outcome of adopting STV, it is not the only one. Concerted efforts at educating the voting public could help mitigate this concern.⁶⁷ Moreover, STV could actually improve voter confidence in the election system by making elections more competitive, possibly motivating voters to turn out in currently sleepy state and local races.⁶⁸

It is important to note that, although STV elections appear from the voter's perspective like any other RCV election, from a political science perspective, the two systems are conceptually quite distinct. STV is an example of a proportional representation (PR) voting system in

⁶⁵ *Id.* at 71 (“STV uses multi-member districts, and voters rank candidates in order of preference on the ballot paper in the same manner as under the Alternative Vote system.”).

⁶⁶ See Rob Richie & Dave Daley, Opinion, *In NYC, Ranked Choice Voting Succeeded*, THE HILL (July 16, 2021, 1:00 PM), <https://thehill.com/opinion/campaign/563339-in-nyc-ranked-choice-voting-succeeded> [<https://perma.cc/SFA2-4XX6>] (noting that an exit poll following the 2021 New York City local elections, which were the first to be conducted using RCV, indicated that ninety-five percent of voters found the RCV system “easy” and that seventy-seven percent of them “wanted to use it again”).

⁶⁷ See, e.g., *New York City to Launch \$15 Million Ranked Choice Voting Education Campaign*, CITY OF N.Y. (Apr. 28, 2021), <https://www.nyc.gov/office-of-the-mayor/news/315-21/new-york-city-launch-15-million-ranked-choice-voting-education-campaign> [<https://perma.cc/UN9D-R897>] (detailing the city's considerable efforts to publicize the new RCV system in 2021, including a media campaign, multilingual resources, and direct outreach to voters); *California 2020 Statewide Voter Education Campaign*, CAL. SEC'Y OF STATE, <https://admin.cdn.sos.ca.gov/press-releases/2020/ap20-SKDK-fact-sheet.pdf> [<https://perma.cc/H4S5-H7Y6>] (describing the creation of an outreach and public education campaign aimed at “reassur[ing] the public of the accessibility, security and integrity” of the 2020 election in California).

⁶⁸ See REYNOLDS ET AL., *supra* note 44, at 125 (noting that proportional representation voting systems, which include STV, “are in general linked with higher turnout”); see also Zoltan L. Hajnal, Opinion, *Why Does No One Vote in Local Elections?*, N.Y. TIMES (Oct. 22, 2018), <https://www.nytimes.com/2018/10/22/opinion/why-does-no-one-vote-in-local-elections.html> [<https://perma.cc/8JCC-39BJ>] (“America is facing a crisis on which, for once, Democrats and Republicans can agree: low voter turnout in local elections.”). The potential of STV to reengage voters disaffected by persistent gerrymandering, see *supra* note 21 and accompanying text, is particularly exciting.

which the election result will generally translate into a similar composition for the legislature; for instance, a party receiving twenty percent of the vote can expect to receive twenty percent of the seats.⁶⁹ Thus, adopting STV would make a result like America's 2018 state legislative elections, where Republicans won a majority of the seats in the Pennsylvania, Michigan, and North Carolina state houses despite losing the popular vote to Democrats in all three states, significantly less likely.⁷⁰ RCV with single-member districts, on the other hand, is emphatically *not* a system of proportional representation. The composition of a legislative body elected using this system cannot be expected to match the composition of the electorate, and the results of the election can be even *less* proportional than in an FPTP election.⁷¹ For instance, in the lower house of the Australian parliament, which is elected using RCV within single-member districts, smaller parties have difficulty obtaining representation and the chamber is dominated by two major parties.⁷² In contrast, smaller parties can more easily attain representation in the Australian Senate (which is elected using STV), because the effective threshold number of votes needed to win a seat is lower when there are more seats to elect in each district.⁷³

STV can be seen as the most suitable way to introduce proportional representation into U.S. legislative elections, since its features are generally less foreign to U.S. democratic norms. Other PR systems require the voter to vote for parties, rather than candidates, which would be a novelty in the U.S. context.⁷⁴ In contrast, STV maintains the traditional

⁶⁹ See generally REYNOLDS ET AL., *supra* note 44, at 57 (explaining that under PR systems, including STV, smaller parties can enter into the legislature with just a few seats, while larger parties will still be awarded a number of seats that fairly represents their portion of the electorate).

⁷⁰ Christopher Ingraham, *In at Least Three States, Republicans Lost the Popular Vote But Won the House*, WASH. POST (Nov. 13, 2018, 6:00 AM), <https://www.washingtonpost.com/business/2018/11/13/least-three-states-republicans-lost-popular-vote-won-house> [https://perma.cc/2ULE-2ZAM].

⁷¹ REYNOLDS ET AL., *supra* note 44, at 49 (noting that this system “can often produce results that are disproportional when compared to PR systems—or even in some cases compared with FPTP”).

⁷² *Id.* at 139; see also Narelle Miragliotta, *The Australian Greens: Carving Out Space in a Two-Party System*, 22 ENV'T POL. 706, 706 (2013) (noting “[t]he resilience of the two-party dominant system” in Australia).

⁷³ See REYNOLDS ET AL., *supra* note 44, at 139 (“[M]inority interests which would normally not be able to win election to the lower house still have a chance of gaining election, in the context of state representation, in the upper house.”); Miragliotta, *supra* note 72, at 706 (observing that the third-party Australian Greens have had “continuous representation” in the Senate since the 1990s).

⁷⁴ Steve Mulroy, *Proportional Representation Through the Single Transferable Vote*, ELECTION L. BLOG (Jan. 24, 2019, 7:00 AM), <https://electionlawblog.org/?p=103265> [https://perma.cc/L7ZG-WP2F] (“Most PR systems have voters vote for parties rather than

U.S. practice of voting for individual candidates (albeit using preferential ballots), and allows for independent candidates to stand for election and win,⁷⁵ both of which might be considered important traits for any voting system to be appropriate for U.S. elections.⁷⁶ STV also maintains the traditional tie between elected representatives and a particular geographic area, albeit with more than one representative for each district. STV therefore maintains in part the “geographic accountability” associated with FPTP systems, while also giving each constituent multiple representatives tasked with advocating on their behalf.⁷⁷

C. *Shifting the Focus to State and Local Elections*

STV could, in theory, be used for any election to a multi-member body, such as the U.S. House of Representatives. But beginning with the 1842 Apportionment Act, federal law has conclusively prohibited multi-member districts—and therefore voting systems like STV—from being used in elections to the U.S. House.⁷⁸ Amid the intense sectional conflict preceding the Civil War,⁷⁹ there was vigorous debate as to whether Congress possessed the power to prohibit then-commonplace multi-member districts.⁸⁰ Nevertheless, Congress passed the Act, and a similar statutory enactment, adopted by Congress in 1967, remains in effect today.⁸¹ Later developments in the Supreme Court’s jurisprudence

candidates, eschew primary elections, or foster the instability of parliamentary systems, making them unsuitable for America.”).

⁷⁵ See REYNOLDS ET AL., *supra* note 44, at 76 (observing that STV “provides a better chance for the election of popular independent candidates” than other PR voting systems).

⁷⁶ See Daniel de Visé, *If ‘Independent’ Were a Party, It Could Dominate American Politics*, THE HILL (Jan. 31, 2023, 6:00 AM), <https://thehill.com/homenews/campaign/3836562-if-independent-were-a-party-it-could-dominate-american-politics> [https://perma.cc/49N7-GEJN] (noting that “[o]nly two-fifths of Americans have a favorable opinion of Democrats or Republicans, as of 2022”).

⁷⁷ See REYNOLDS ET AL., *supra* note 44, at 36; *see also infra* notes 106–07 and accompanying text (noting that the STV system in Ireland is sometimes criticized for causing legislators to spend *too much* time attending to constituent needs).

⁷⁸ Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491 (requiring each state to elect its congressional representatives from districts “equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative”). For the current version of this statute, see 2 U.S.C. § 2c.

⁷⁹ *The Apportionment Act of 1842: “In All Cases, by District,”* HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES (Apr. 16, 2019), <https://history.house.gov/Blog/2019/April/4-16-Apportionment-1/#> [https://perma.cc/9R64-THUX] (explaining that multi-member districts were more common in Southern and border states and therefore favored the Democratic Party, which dominated those regions, at the expense of the Whig Party, which maintained a “significant but not universal opposition to slavery,” in congressional elections).

⁸⁰ *Id.* (recounting that Representative William Halstead, chairman of the Committee of Elections, asked whether “Congress assume[s] the power to curtail this right of the voter”).

⁸¹ Act of Dec. 14, 1967, Pub. L. No. 90-196, 81 Stat. 581 (codified at 2 U.S.C. § 2c) (providing that, in U.S. House elections, “no district [is] to elect more than one Representative”).

interpreting the Elections Clause, which specifically gives Congress the power to “make or alter . . . Regulations” pertaining to the “Times, Places and Manner” of holding elections for the U.S. House,⁸² have made clear that this power is essentially plenary, and federal elections legislation enacted pursuant to the clause preempts state legislation to the contrary.⁸³

Thus, the use of STV, or indeed any electoral system dependent on multi-member districts, for U.S. House elections is squarely foreclosed by the federal statute, even if individual states might prefer to use such a system to elect their congressional representatives. However, this decision is ultimately a political one that lies within Congress’s power to revisit.⁸⁴ In recent Congresses, Representative Donald Beyer of Virginia has repeatedly introduced legislation, the so-called Fair Representation Act, which would use Congress’s Elections Clause power to repeal the ban on multi-member districts and mandate the use of STV for all U.S. House contests.⁸⁵ Short of passing that sweeping legislation, Congress could also simply repeal the provision of federal law prohibiting multi-member districts, returning the choice of whether or not to adopt a system like STV to the states.⁸⁶

Just as the Elections Clause served as the basis for prohibiting multi-member districts, federal legislation enacted under the Elections Clause could also be the foundation for adopting STV for congressional elections, whether on a state-by-state basis or on a systematic,

⁸² U.S. CONST. art. I, § 4.

⁸³ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 14 (2013) (holding that the ordinary presumption against preemption does not apply when Congress acts under its Elections Clause power, since such actions “necessarily displace[] some element of a pre-existing legal regime erected by the States”).

⁸⁴ See Robert E. Ross & Barrett Anderson, *Single-Member Districts Are Not Constitutionally Required*, 33 CONST. COMMENT. 261, 290 (2018).

⁸⁵ See, e.g., Fair Representation Act, H.R. 3863, 117th Cong. (2021); Fair Representation Act, H.R. 4000, 116th Cong. (2019).

⁸⁶ Although this approach could lead to a lack of uniformity among the states, it would have the positive effect of freeing individual state legislatures, and potentially also state courts, to experiment with the use of multi-member districting schemes such as STV for U.S. House elections. This freedom could be particularly vital following the Court’s decision in *Moore v. Harper*, 600 U.S. 1 (2023). In that case, the Court held that “state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections,” but did not articulate any standard by which to apply that principle. *Id.* at 29. Depending on how the Court’s Elections Clause jurisprudence develops in the future, the ability to order multi-member districting systems like STV as a remedy could be a key weapon left in the state courts’ arsenal to combat harms like partisan gerrymandering. Allowing state-court judges to draw redistricting maps from scratch might be viewed as an arrogation of legislative power, but simply erasing the lines from the map altogether and mandating an STV election for the U.S. House across the state might be more easily construed as an action that lies within the “ordinary bounds of judicial review.” *Id.*

nationwide scale. But the political willpower needed to usher such a monumental change in our democratic system through the Federal Congress would be formidable. Thus, this Note turns its attention now to lower-hanging fruit: the possibility of adopting STV for state elections, which Congress has no power to regulate, but where state legislative action—and, as Part IV of this Note argues, judicial intervention—could be used to make STV a reality in American elections.

II

WHY STV SHOULD BE ADOPTED FOR U.S. ELECTIONS

A. *How STV Could Combat Polarization (Without Empowering Extremists)*

1. *Generally*

We turn now to the question of why adopting STV for state and local elections in the United States would be preferable to the status quo as a matter of policy. One key reason for adopting STV is that doing so would be likely to reduce partisan polarization—frequently identified as a major threat to American democracy—but without creating a major risk of promoting the election of extremists or candidates with extremist views.

In proposing STV as an alternative voting system, commentators have argued that proportional representation would “ameliorate[] the extreme majoritarianism of the current system, allowing more comprehensive representation of the diverse tendencies and nuances of American public opinion.”⁸⁷ Adopting STV would be likely to incentivize voters who feel unrepresented by the two current major parties to vote for smaller parties, because they will be safe in the knowledge that their votes cannot be “wasted,” since votes for losing candidates can still be transferred to the voter’s second or third choice.⁸⁸ This could, in turn, weaken the existing two-party system and its tendency to channel

⁸⁷ Inman, *supra* note 11, at 1998.

⁸⁸ See *Representation of Third-Party and Independent Voters*, FAIRVOTE, <https://fairvote.org/archives/representation-of-third-party-and-independent-voters> [https://perma.cc/ZUB6-LF7M] (noting that, under ranked-choice voting systems like STV, “[t]hird part[y] supporters are . . . free to elect their favorite candidate with minimal chance that that support will spoil the election outcome”); see also Lee Drutman, *Let a Thousand Parties Bloom*, FOREIGN POL’Y (Oct. 19, 2019, 12:01 AM), <https://foreignpolicy.com/2019/10/19/us-democracy-two-party-system-replace-multiparty-republican-democrat> [https://perma.cc/L7CL-LL54] (arguing that the adoption of a proportional representation system would likely lead to the formation of at least five main political parties in the United States).

American democratic discourse into two opposing camps with extremely divergent sets of views on policy and governance.⁸⁹

Others have focused on another potential benefit, arguing that “coalition-building would more likely occur under a system of proportional representation.”⁹⁰ PR systems like STV are likely to result in the formation of coalition governments, where a few smaller parties must join forces to govern, rather than a single party dominating government at any given time.⁹¹ Rather than having power oscillate between two ideologically polarized large parties, coalition governments could facilitate stability in governance.⁹²

That said, there are serious criticisms of PR voting systems and their tendency to promote coalitional government. Critics argue that coalitions lead to gridlock and impede effective governance, rendering decisionmaking more difficult due to the need to satisfy many constituencies.⁹³ They also argue that PR may contribute to the rise of extremist parties; after all, by favoring two large, big-tent parties over all others, FPTP elections keep smaller, more radical parties out of the legislature.⁹⁴

While there may be some truth to these criticisms, this Note argues that they are somewhat overblown. Although it is certainly true that countries with PR systems have experienced legislative gridlock,⁹⁵ this phenomenon is not unique to those countries. Nations like the United States and the United Kingdom, both of which have FPTP elections and two-party systems, have certainly also experienced serious gridlock that

⁸⁹ See Rosenbower, *supra* note 11 (discussing how single-member district plurality voting enhances polarization by rewarding self-sorting). *But see id.* (noting that STV is not preclusive of a two-party system and observing that in Malta, where the two-party system has widespread public support, two major parties have retained power despite the adoption of STV).

⁹⁰ McCann, *supra* note 11, at 194.

⁹¹ REYNOLDS ET AL., *supra* note 44, at 58.

⁹² *Id.* (“[R]egular switches in government between two ideologically polarized parties, as can happen in FPTP systems, makes long-term economic planning more difficult, while broad PR coalition governments help engender a stability and coherence in decision making . . .”).

⁹³ *Id.* at 59 (summarizing the argument that “[q]uick and coherent decision making can be impeded by coalition cabinets”).

⁹⁴ *Id.* (“PR systems are often criticized for giving a stage in the legislature to extremist parties of the left or the right.”).

⁹⁵ One extreme example is that of Israel, whose PR electoral system is often blamed for the country’s political instability and frequent elections. See, e.g., Emily Schrader, *Opinion, Election Reforms Have Increased Representation but Killed Functionality*, JERUSALEM POST (Mar. 22, 2021, 10:03 PM), <https://www.jpost.com/opinion/election-reforms-have-increased-representation-but-killed-functionality-opinion-662852> [<https://perma.cc/99TF-7AJV>] (“[T]he smaller parties and a lower electoral threshold result in political gridlock and inefficiency.”).

has damaged public confidence in governmental institutions.⁹⁶ Therefore, although an STV-elected legislature might be susceptible to gridlock, this is not a compelling argument for retaining the current FPTP system. Likewise, although extremist parties may have a more visible presence in countries with PR systems—like Germany, where the far-right Alternative für Deutschland (AfD) plays a prominent political role—extremists can still be kept out of positions of power if other political forces collaborate to exclude them.⁹⁷ The salient difference between Germany and the United States is that, in Germany, the PR voting system has enabled a far-right group to be elected to the legislature *as a party*, whereas American politics take place largely within the existing two-party system. But it would be hard to seriously make the claim that just because American politics take place within the framework of a two-party system today, there are no extremist elements who have successfully been elected to American legislatures.⁹⁸ Therefore, without

⁹⁶ Think, for instance, of the shutdown of the U.S. federal government in December 2018 and January 2019, which stemmed from then-President Trump's demand that Congress fund a border wall and lasted more than a month. See Andrew Restuccia, Burgess Everett & Heather Caygle, *Longest Shutdown in History Ends After Trump Relents on Wall*, POLITICO (Jan. 25, 2019, 7:06 PM), <https://www.politico.com/story/2019/01/25/trump-shutdown-announcement-1125529> [https://perma.cc/P3AR-ACSS]. Or consider how the British Parliament demonstrated a paralyzing inability to legislate with regard to Britain's withdrawal from the European Union, such as when the House of Commons voted down four competing Brexit plans less than two weeks before Brexit was scheduled to take place. See Stephen Castle, *U.K. Parliament Votes Down Alternative Brexit Deals*, N.Y. TIMES (Apr. 1, 2019), <https://www.nytimes.com/2019/04/01/world/europe/uk-parliament-soft-brexite-may.html> [https://perma.cc/WV84-VKHB].

⁹⁷ See, e.g., Benjamin Dodman, *Isolated, Volatile and Divided, Has Germany's Far-Right AfD Reached a Dead-End?*, FRANCE 24 (Sept. 23, 2021), <https://www.france24.com/en/europe/20210923-isolated-volatile-and-divided-has-germany-s-far-right-afd-reached-a-dead-end> [https://perma.cc/54HF-ZQF6] (reporting one German political scientist's view that the AfD "has zero prospects of joining a coalition"). Media coverage of the AfD tends to focus on the party's sizable contingents in German state and federal legislatures as cause for concern. See, e.g., Jörn Fleck & Alex Pieter Baker, *Germany's Far-Right Is Creeping Ever Closer to Power*, FOREIGN POL'Y (Aug. 28, 2019, 11:29 AM), <https://foreignpolicy.com/2019/08/28/germanys-far-right-is-creeping-ever-closer-to-power-afd-merkel-saxony-brandenburg> [https://perma.cc/AD85-BFBF]. But it remains the case that the AfD has never entered into government, either at the federal level or in any of the German states. See Dodman, *supra*. In 2020, the mere fact that the AfD had agreed to support the government in the state of Thuringia caused the collapse of the governing coalition. See *Germany AfD: Thuringia PM Quits amid Fury over Far Right*, BBC (Feb. 6, 2020), <https://www.bbc.com/news/world-europe-51399445> [https://perma.cc/4QJV-MA57]. In contrast, and perhaps even more worryingly, in the United States, far-right politics have taken root within the confines of the institutional Republican Party, with extremist groups like the Proud Boys taking center stage in some Republican circles. See Editorial, *How a Faction of the Republican Party Enables Political Violence*, N.Y. TIMES (Nov. 26, 2022), <https://www.nytimes.com/2022/11/26/opinion/republican-party-extremism.html> [https://perma.cc/5ZLA-FEXP].

⁹⁸ See, e.g., Rex Huppke, *Stop Trying to Make Sense of Marjorie Taylor Greene. She Inhabits a World of Nonsense.*, USA TODAY (Feb. 5, 2023, 5:00 AM), <https://www.usatoday.com/>

discounting the risk that extremism poses to democracies writ large, this Note argues that adopting a PR system like STV would not be particularly likely to empower extremists relative to the current U.S. baseline.

Moreover, traits specific to STV vis-à-vis other PR voting systems may also help mitigate partisanship and extremism. STV systems provide independent candidates with a relatively clear path to election, perhaps helping to dent the control of political parties, extremist or otherwise.⁹⁹ And, although the particular quota set for any given STV election will depend on the number of seats to fill, the barrier to entry will generally be relatively high—for instance, in a five-seat district, the Droop quota will be approximately seventeen percent of redistributed votes. An extremist party that is widely unpopular among the electorate will likely have more trouble reaching this threshold than in a party-based PR system, such as that used in Germany, where only a five-percent national threshold must be met for a party to gain seats.¹⁰⁰

2. *An Example: Ireland*

To help understand how STV could combat polarization and mitigate extremism, let us consider one of the places where the system has most frequently been used: the island of Ireland. Ireland is geopolitically divided into Northern Ireland, which is part of the United Kingdom, and the Republic of Ireland, an independent state.¹⁰¹ In the Republic of Ireland, STV has been used for elections to the national parliament since independence from Britain in 1922.¹⁰² There, the system has led to a succession of stable governments, some coalitional and others formed by a single major party.¹⁰³ Governments tend to be “reasonably durable,” lasting for terms of around three years, and “Ireland has not experienced problems in the area of stable and

story/opinion/columnist/2023/02/05/marjorie-taylor-greene-conspiracy-theories-republicans-credibility/11177940002 [https://perma.cc/6454-C3EH] (“[T]he Republican Party has taken Georgia Rep. Marjorie Taylor Greene—arguably the most ludicrous lawmaker in an age of pervasive ludicrousness—and awarded her legitimacy.”).

⁹⁹ REYNOLDS ET AL., *supra* note 44, at 76.

¹⁰⁰ *Id.* at 83.

¹⁰¹ See *Ireland*, ENCYC. BRITANNICA (July 12, 2023), <https://www.britannica.com/place/Ireland> [https://perma.cc/53SC-WB6N].

¹⁰² REYNOLDS ET AL., *supra* note 44, at 72.

¹⁰³ *Id.*; see also Michael Gallagher, *Ireland's PR-STV Electoral System: A Need for Reform?*, TRINITY COLL. DUBLIN (Aug. 5, 2022, 5:48 PM) [hereinafter Gallagher, *A Need for Reform?*], https://www.tcd.ie/Political_Science/about/people/michael_gallagher/IrishElectSys.php [https://perma.cc/Y7KM-2L6K] (summarizing past debates in Irish society over whether STV caused “unstable and internally divided coalition governments” and concluding that “[t]his line of argument is no longer taken seriously” in Ireland).

effective governments.”¹⁰⁴ The system’s outcomes have been highly proportional, with representation for small parties and independents.¹⁰⁵ The most controversial element of Ireland’s STV system seems to be its tendency to promote intra-party competition (i.e., between candidates belonging to the same party running in the same district).¹⁰⁶ Irish critics of STV have argued that this feature causes legislators to spend too much time trying to keep their constituents happy, at the expense of their ability to focus on national political issues.¹⁰⁷ But this criticism is not universal,¹⁰⁸ and intra-party competition is already a defining feature of the existing U.S. political landscape, characterized as it is by vigorously contested primary elections.¹⁰⁹ Of course, the Republic of Ireland is a much smaller country than the United States, and any comparison will necessarily be imprecise, but Ireland’s experience does not suggest that STV necessarily leads to extremism or instability in a country’s political system.

Meanwhile, in neighboring Northern Ireland, where politics are considerably more volatile,¹¹⁰ STV is also used for local and regional elections. As one scholar’s analysis found, “STV in Northern Ireland has allowed all communities to be fairly represented by a range of parties, some more moderate than others.”¹¹¹ Moreover, the same analysis

¹⁰⁴ Ireland: *The Archetypal Single Transferable Vote System*, ACE: THE ELECTORAL KNOWLEDGE NETWORK [hereinafter *The Archetypal STV System*], https://aceproject.org/main/english/es/esy_ie.htm [<https://perma.cc/853S-PXUV>].

¹⁰⁵ REYNOLDS ET AL., *supra* note 44, at 73. More specifically, Fianna Fáil, historically the largest Irish political party, “has won on average 45 percent of the votes at post-war elections, and 48 percent of the seats,” while the traditional third party, Labour, “has won an average of 12 percent of the votes and 11 percent of the seats.” *The Archetypal STV System*, *supra* note 104.

¹⁰⁶ See REYNOLDS ET AL., *supra* note 44, at 73 (“Much of the praise and criticism of STV in the Republic of Ireland hinges on the same factor, namely the power it gives to voters to choose among candidates of the same party.”).

¹⁰⁷ Gallagher, *A Need for Reform?*, *supra* note 103.

¹⁰⁸ See *id.* (“[I]t is very likely that the demand from voters for constituency service from their [legislators] . . . would be altered little by the adoption of a different electoral system in Ireland.”).

¹⁰⁹ See Elaine Kamarck, Alexander Podkul & Nicholas W. Zeppos, *Political Polarization and the 2016 Congressional Primaries*, BROOKINGS INST. (Jan. 18, 2017), <https://www.brookings.edu/articles/political-polarization-and-the-2016-congressional-primaries> [<https://perma.cc/BVM6-QQGB>] (observing that “[t]he United States is one of the few countries in the world that uses political primaries to choose who will represent major political parties in general elections” and arguing that “[c]ongressional primaries . . . have a profound impact on policymaking in the United States”).

¹¹⁰ See Deirdre Heenan & Derek Birrell, *Exploring Responses to the Collapse of Devolution in Northern Ireland 2017–2020 Through the Lens of Multi-Level Governance*, 75 PARLIAMENTARY AFFS. 596, 596 (2021) (noting that, since the establishment of a local government with devolved powers in 1999, “Northern Ireland’s power-sharing governments have been fragile and prone to collapse”).

¹¹¹ Paul Mitchell, *The Single Transferable Vote and Ethnic Conflict: The Evidence from Northern Ireland*, 33 ELECTORAL STUD. 246, 255–56 (2014).

found that “STV is an appropriate electoral system for ethnationally divided multi-party systems because its logic may facilitate pre-electoral co-operation and potentially even accommodation.”¹¹² Specifically, STV has the advantage of allowing voters to use their votes in ways that “cut across preconceived social boundaries,” such as by giving their second preference to a candidate of a different religious or ethnic group but who might otherwise be a good match for them politically.¹¹³ In other words, even in an intensely divided society like that of Northern Ireland—which might bear more resemblance to today’s United States than that of the relatively tranquil realm of politics in the Republic of Ireland—STV has been a net positive, allowing a diverse range of interests to be represented, without excessively promoting extreme views. This suggests that STV could serve a similar role in the United States, promoting fair representation of subnational communities (racial, cultural, and geographic, to name a few) while also favoring coalition-building and intergroup cooperation.

B. How STV Could Put a Stop to Gerrymandering (Partisan and Racial)

1. Generally

Another key advantage of adopting STV in U.S. elections would be the potential to mitigate—or even end—gerrymandering of electoral districts on both racial and partisan grounds. In an STV election, which uses large, multi-member electoral districts, the potential for mapmakers to use the districting process for unfair advantage, or to suppress minority groups’ voting power, is greatly diminished.

Scholars have found that “[i]n districts with more than five seats, gerrymandering is nearly impossible,”¹¹⁴ and that, even in a three-seat district, gerrymandering is considerably more difficult than in a

¹¹² *Id.* at 252.

¹¹³ REYNOLDS ET AL., *supra* note 44, at 11 (noting that, during the 1998 elections in Northern Ireland, “vote transfers under the STV system benefited ‘pro-peace’ parties while still providing broadly proportional outcomes”). Although the Northern Irish system is far from perfect, STV is probably superior to an FPTP system for the Northern Irish context because it protects the representation of minority communities. See *Single Transferable Vote (STV): What Is Northern Ireland’s Voting System?*, BBC (Apr. 27, 2023) [hereinafter *What Is Northern Ireland’s Voting System?*], <https://www.bbc.com/news/uk-northern-ireland-61022550> [<https://perma.cc/7WTJ-8KNF>] (noting that Northern Ireland’s use of STV enhances the ability of minority voters to elect candidates of their choice). This is particularly important given Northern Ireland’s recent and intense experience of sectarian violence between Protestants and Catholics, known as the Troubles, which lasted from about 1968 until 1998. See *The Troubles*, ENCYC. BRITANNICA (July 3, 2023), <https://www.britannica.com/event/The-Troubles-Northern-Ireland-history> [<https://perma.cc/V84R-GAZ9>].

¹¹⁴ Rosenbower, *supra* note 11.

single-member district system.¹¹⁵ A gerrymandered map is characterized by both “cracking” — dividing up voters who support the opposing party into several districts, to prevent them from forming a majority in any of them — and “packing” — making some districts safe by “packing” them with the opposing party’s voters, whose votes will essentially be wasted.¹¹⁶ Both cracking and packing become more difficult as districts grow larger and necessarily must incorporate more politically diverse geographic areas.¹¹⁷

As Douglas Amy has argued, “The only sure way to eliminate gerrymandering—both intentional and unintentional—from American elections is to abandon single-member plurality arrangements and adopt proportional representation.”¹¹⁸ Reforms like giving the task of redistricting to an independent commission may, at least in part, correct for partisan gerrymandering when it occurs because of intentional acts by bad actors. But even when maps are drawn by neutral parties, some voters may simply be clustered together by virtue of geography—such as, in recent decades, Democratic voters in major urban centers.¹¹⁹ This then results in a natural form of packing, with an effect similar to that of intentional partisan gerrymandering. This effect cannot be remedied by reforming the redistricting system within the confines of a single-member district system; a shift to a proportional system like STV, however, is likely to counter it effectively, as the larger electoral districts that must be formed under STV will naturally be more ideologically diverse and therefore less packed.¹²⁰

In addition to combatting partisan gerrymandering—a particularly important task given the inability of federal courts to involve themselves in this issue following the Supreme Court’s decision in *Rucho v. Common Cause*¹²¹—STV also may have a role to play in remedying racial discrimination in districting, which courts have recognized as a grave harm.¹²² FPTP elections with single-member districts lead

¹¹⁵ *Id.*

¹¹⁶ Amy, *supra* note 29.

¹¹⁷ See Rosenbower, *supra* note 11 (noting that, under STV, “[i]t becomes impossible to pack or crack a district, because whether a voting bloc is diluted across several districts, or concentrated in one, it will receive proportional, local representation”).

¹¹⁸ Amy, *supra* note 29.

¹¹⁹ *Id.*

¹²⁰ *Id.* (“The key to eliminating partisan gerrymandering is the large multimember districts used in PR systems.”).

¹²¹ 139 S. Ct. 2484, 2508 (2019) (finding political gerrymandering claims nonjusticiable).

¹²² See *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (noting that claims arise under § 2 of the Voting Rights Act when “a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [B]lack and white voters to elect their preferred representatives”).

naturally to underrepresentation of racial and other minorities, since a minority group may not constitute a critical mass in many, or any, of the jurisdiction's electoral districts.¹²³ To remedy this, U.S. law, notably § 2 of the Voting Rights Act,¹²⁴ requires the drawing of tailor-made “majority-minority” districts to ensure minority groups can select at least some representatives of their choice.¹²⁵ But if a minority group is widely dispersed across the jurisdiction, even well-intentioned mapmakers might find themselves unable to draw a map with even a single majority-minority district. STV, on the other hand, is likely to remedy this problem, by allowing even a relatively dispersed minority group to gain one of the several seats available in a given district.¹²⁶ Two historical examples from major American cities—New York and Cincinnati—will help to illustrate this principle.

2. *Two Examples: New York and Cincinnati*

To understand how STV counteracts partisan gerrymandering and pernicious racial vote dilution, it is helpful to look to the past—the historical examples of STV being used in local elections in the United States. While today the best-known use of STV in local elections (other than the system's recent adoption in Portland¹²⁷) is probably the liberal bastion of Cambridge, Massachusetts,¹²⁸ the system was also used historically in places as far apart as Sacramento, Cincinnati, and New York City.¹²⁹

In New York City, prior to the adoption of STV by referendum in 1936, Democrats had won more than ninety-five percent of the seats on the city's Board of Aldermen with only about two-thirds of the

¹²³ See Rosenbower, *supra* note 11.

¹²⁴ 52 U.S.C. § 10301.

¹²⁵ See, e.g., *Cooper v. Harris*, 581 U.S. 285, 302 (2017) (holding that, if the prerequisites set forth by the Court in *Gingles* are met, mapmakers have “good reason to believe that §2 requires drawing a majority-minority district”). But see *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (forbidding mapmakers from placing too much weight on racial considerations at the expense of “traditional districting principles”).

¹²⁶ See Rosenbower, *supra* note 11 (“STV removes one of the incentives for self-sorting by providing representation to minority groups that would otherwise be incapable of winning any representation in an [FPTP] election.”).

¹²⁷ See *supra* notes 1–9 and accompanying text.

¹²⁸ See *McSweeney v. City of Cambridge*, 665 N.E.2d 11, 13 (Mass. 1996) (describing the STV system used to elect members of Cambridge's city council).

¹²⁹ Douglas J. Amy, *The Forgotten History of the Single Transferable Vote in the United States*, 34 REPRESENTATION 13 (1996), reprinted in ELECTORAL REFORM SOCIETY, *STV: A PROGRESSIVE CAUSE: A SHORT HISTORY OF STV IN THE U.S.* 3 (2017), <https://www.electoral-reform.org.uk/wp-content/uploads/2017/06/A-short-history-of-STV-in-the-USA.pdf> [<https://perma.cc/6HET-KVFD>].

vote¹³⁰—a clear instance of the electoral process failing to adequately represent the electorate, whether due to intentional partisan gerrymandering or simply because of the natural distribution of the various parties' voters throughout the city. After STV was adopted, the next election gave Democrats 65.5% of the seats, a nearly exact proportional match to their 64% share of the vote, demonstrating the system's ability to achieve fair representation of partisan interests.¹³¹ In New York, STV remained the system in place until the "Red Scare" took hold during the Cold War.¹³² Although only one or two Communists had ever served in the New York City Council at a time since the adoption of STV, opponents effectively deployed rhetoric associating the system with Soviet-style communism, contributing to the system's eventual repeal.¹³³

The STV experience of Cincinnati, Ohio, helps illustrate the system's effect on the representation of racial minorities. Prior to the adoption of STV, no Black Cincinnati had ever been elected to the city council.¹³⁴ Under STV, two Black council members won election in the 1950s, with a Black candidate, Theodore Berry, gaining the highest vote share among all candidates.¹³⁵ White opponents of STV took advantage of this landscape to mobilize white voters against the system. Critics warned that STV increased the power of Cincinnati's Black voters and suggested to white voters that it would inevitably lead to the city electing a Black mayor.¹³⁶ This racist campaign was effective, and white Cincinnati voters voted, two-to-one, to repeal STV in 1957.¹³⁷ When mounting racial tensions in Cincinnati led to civil unrest in the 1960s, an official report cited the repeal of STV's effect on Black representation as one cause of the violence.¹³⁸ These troubling episodes from history show how, beyond a mere lack of political imagination, one major constraint on the adoption of STV in the United States has been the deliberate intent to perpetuate harmful partisan and race-based gerrymandering. It should come as no surprise that STV—a system that has the potential to put an end to gerrymandering and reshape our elections for the

¹³⁰ *Id.* at 3.

¹³¹ *Id.* at 3.

¹³² *Id.* at 6.

¹³³ See *id.* (noting that STV's opponents characterized the system as a "political importation from the Kremlin," "the first beachhead of Communist infiltration in this country," and "an un-American practice which has helped the cause of communism and does not belong in the American way of life").

¹³⁴ *Id.*

¹³⁵ *Proportional RCV Information*, *supra* note 55.

¹³⁶ Amy, *supra* note 129, at 18.

¹³⁷ *Id.*

¹³⁸ *Proportional RCV Information*, *supra* note 55.

better—has come under such forceful attack from those who stand to benefit from the inequities of the status quo.

III WHY STV IS CONSTITUTIONAL

Having made the case in Part II that STV should be adopted for American elections as a matter of policy, this Note now turns to the question of whether adopting STV is permissible as a matter of constitutional law. Our focus on state and local elections calls for an analysis of whether either the Federal Constitution or the various state constitutions impose limits that would preclude the adoption of STV, either by action of state legislators or as a remedy ordered by state or federal courts. Few court cases have specifically analyzed the constitutionality of STV.¹³⁹ This Note, therefore, will analyze the constitutionality of STV by breaking it down into the two key elements that make STV work—ranked-choice voting and multi-member districts—and tackling the constitutionality of each of these procedures in turn.

A. Ranked-Choice Voting Is Constitutional

1. Under the Federal Constitution: Dudum v. Arntz

The Supreme Court has never opined on the constitutionality of ranked-choice voting in American elections. But, in the leading circuit case on this issue, Judge Marsha Berzon of the Ninth Circuit upheld the city of San Francisco’s use of ranked-choice voting for city offices against a federal constitutional challenge by Ron Dudum.¹⁴⁰ Dudum, a San Francisco voter who opposed the adoption of RCV, brought suit against the city in federal court, raising constitutional claims under the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹⁴¹ First, Dudum argued that RCV, by allowing “exhausted” ballots to be discarded if they no longer expressed a preference relevant to the ongoing count, effectively prevented certain voters from participating in the election at all, because their votes would no longer play a role in the final, decisive round of tabulations. Judge Berzon rejected this argument, noting that although counting of RCV

¹³⁹ One notable exception is *McSweeney v. City of Cambridge*, 665 N.E.2d 11, 16 (Mass. 1996) (finding the use of STV for city council elections in Cambridge, Massachusetts permissible under the state and federal constitutions).

¹⁴⁰ *Dudum v. Arntz*, 640 F.3d 1098, 1113 (9th Cir. 2011); see also Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CALIF. L. REV. 1773, 1777, 1778 & n.9 (2021) (collecting cases and noting that “state and federal courts have uniformly upheld RCV against federal constitutional challenges thus far”).

¹⁴¹ *Dudum*, 640 F.3d at 1102.

ballots takes place over multiple rounds, the votes themselves are cast all at once, and “[t]he series of calculations required by the algorithm to produce the winning candidate are simply steps of a single tabulation, not separate rounds of voting.”¹⁴²

Second, *Dudum* argued that the discarding of “exhausted” ballots in the course of counting votes was a burden on the constitutional right to vote.¹⁴³ As Judge Berzon noted, “An examination of how [RCV] works, however, indicates that the supposed inequity *Dudum* has identified is one of surface appearances and semantics, not substance.”¹⁴⁴ Specifically, the RCV counting method could be more accurately understood as counting exhausted ballots, simply as votes for losing candidates. While these votes are “wasted” in the sense that they are cast for candidates who were not elected, the RCV system actually reduces the number of wasted votes, by allowing some voters whose first-choice candidate is eliminated to transfer their votes to the ultimate winner of the election.¹⁴⁵

Third and finally, *Dudum* argued that RCV was an unconstitutional dilution of certain voters’ votes, violating the “one person, one vote” principle set forth by the Supreme Court in *Reynolds v. Sims*.¹⁴⁶ Judge Berzon rejected this argument, too, noting that while RCV allows voters to rank multiple *preferences*, in no case does it give any voter more or less than one *vote*.¹⁴⁷ As she explained, “The ability to rank multiple candidates simply provides a chance to have several preferences recorded and counted *sequentially*, not at once.”¹⁴⁸ Having rejected all of *Dudum*’s arguments for why RCV posed a severe burden to his constitutional rights, the court declined to apply strict scrutiny and upheld the voting system on the basis of the city of San Francisco’s “important regulatory interests,”¹⁴⁹ such as saving money by avoiding the need for multiple rounds of elections, “providing voters an opportunity to express nuanced voting preferences[,] and electing candidates with strong plurality support.”¹⁵⁰

Notably, the *Dudum* opinion cites *McSweeney v. City of Cambridge*,¹⁵¹ a Massachusetts case addressing an STV voting system, in support of its argument pertaining to San Francisco’s RCV system.¹⁵²

¹⁴² *Id.* at 1107.

¹⁴³ *Id.* at 1109.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1111.

¹⁴⁶ *Id.* at 1112; *see Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

¹⁴⁷ *Dudum*, 640 F.3d at 1112.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1114.

¹⁵⁰ *Id.* at 1116.

¹⁵¹ 665 N.E.2d 11 (Mass. 1996).

¹⁵² *Dudum*, 640 F.3d at 1111 & n.21.

Moreover, essentially all the arguments Judge Berzon presented in *Dudum* to support San Francisco's RCV electoral system apply with equal force to an STV system, which differs only in that it employs multi-member rather than single-member districts. Although STV systems also discard "exhausted" ballots, the principle that "exhausted" ballots are still *cast* ballots, just ballots cast for defeated candidates, remains true. And although STV elections result in the election of multiple candidates, each voter still receives the exact same number of votes to cast—one—as any other; that vote may simply be *transferred* to candidates other than the voter's first choice (or not, if the voter has not ranked additional choices). Thus, Judge Berzon's reasoning in *Dudum* is enough to show that ranked-choice voting systems like STV do not contravene the Federal Constitution—although, as will be discussed below,¹⁵³ the constitutionality of multi-member districts, the other key element of STV, must be analyzed under a different set of doctrines.

2. *Under State Constitutions: The Cases of Maine and Alaska*

Aside from the Federal Constitution, there is the additional question of whether RCV is compatible with the various state constitutions—which it would, of course, need to be for STV to be constitutionally adopted for state and local elections. In 2017, Maine's Supreme Judicial Court issued an advisory opinion holding that Maine's adoption of an RCV system for the election of state officials (the governor, as well as both houses of the state legislature) was in violation of the state's constitution,¹⁵⁴ although the system remained in place for other offices, like the state's U.S. House and Senate seats.¹⁵⁵ Specifically, the court applied the state constitution's requirement that state offices be filled by the candidate who obtains "a plurality of" the votes cast.¹⁵⁶ RCV, the court reasoned, was in direct contravention of this rule:

The discrepancy between the Act [establishing RCV] and the Constitution is easily illustrated by the simplest of scenarios. If, after one round of counting, a candidate obtained a plurality of the votes but not a majority, that candidate would be declared the winner according to the Maine Constitution as it currently exists. According to

¹⁵³ See *infra* Section III.B.

¹⁵⁴ Op. of the Justs., 162 A.3d 188, 212 (Me. 2017).

¹⁵⁵ *Ranked-Choice Voting in Maine: Frequently Asked Questions*, MAINE.GOV, <https://www.maine.gov/sos/cec/elec/upcoming/rankedchoicefaq.html> [https://perma.cc/V7SE-JEP2] ("Primary elections in Maine and elections for federal offices are governed by statute and not by the Maine Constitution.")

¹⁵⁶ Op. of the Justs., 162 A.3d at 211.

the Act, however, that same candidate would not then be declared the winner.¹⁵⁷

Under this simple logic, because RCV does not provide for the election of the plurality winner on the first count, it is incompatible with the plain text of the state constitution.

Although the Maine Supreme Judicial Court is, of course, the final arbiter of the meaning of the Maine Constitution, the logic it employed in its opinion simply does not stand up to scrutiny; the Alaska Supreme Court noted as much when it decided *Kohlhaas v. State* in 2022.¹⁵⁸ In that case, the Alaska court took up the adoption of RCV for state and federal offices in Alaska, combined with an open primary to select four candidates for each RCV general election.¹⁵⁹ Alaska's constitution, like Maine's, includes a plurality requirement, stipulating that "[t]he candidate receiving the greatest number of votes shall be governor."¹⁶⁰ As this court observed, this means a candidate can win the governorship with a mere plurality, rather than a majority, of votes. But as the Alaska Supreme Court aptly deduced, the RCV system that Alaskan voters chose to adopt does not require a majority of all voters to elect a governor; instead, "[i]t is entirely possible for a candidate to win an election by receiving less than a majority of total votes cast."¹⁶¹ This is the case because, while ballots can become "exhausted" if they no longer contain a preference relevant to the ongoing count, those ballots do not cease to exist; rather, the ultimate winner of the election is whoever has the most votes on the final count, with the "exhausted" ballots being counted as votes for candidates previously eliminated. Thus, while a majority of *active* votes is required to win an RCV election on the final count, a majority of *total* votes is not, and could not be, required.¹⁶²

Amici curiae in the *Kohlhaas* case made an argument similar to that put forth by the Maine Supreme Judicial Court in striking down the Maine RCV system for state elections. But the Alaska court, after carefully considering this argument, rejected it as logically unsound, exposing the flaws in the Maine court's analysis in the process. As the Alaska court explained, its counterpart in Maine failed to justify its finding that

¹⁵⁷ *Id.*

¹⁵⁸ 518 P.3d 1095 (Alaska 2022).

¹⁵⁹ *Id.* at 1100–01.

¹⁶⁰ *Id.* at 1118.

¹⁶¹ *Id.* at 1119.

¹⁶² The only way to actually require majority support for the winning candidate would be to require all voters to rank all candidates. While this approach has been adopted, for instance in Australia, see REYNOLDS ET AL., *supra* note 44, at 155, it is not the approach taken by Alaska or Maine.

the Maine Constitution required calling the election after a single round of *counting*.¹⁶³ In an RCV election, as the Alaska court noted, if additional rounds of tabulation are needed, “the candidate in first place after the first round is not necessarily the candidate ‘receiving the greatest number of votes.’ Instead, that candidate is simply the candidate in the lead before the votes have been fully counted.”¹⁶⁴ Rather than adopt the Maine court’s assumption that whoever has the plurality after one round of counting must be declared the winner, the Alaska court turned instead to Judge Berzon’s “more persuasive account of how ranked-choice voting works” in *Dudum*.¹⁶⁵ As Judge Berzon explained, each round of tabulation of votes is not a separate round of voting; on the contrary, voters vote only once, although the counting process requires multiple calculations. With this insight into how RCV works in mind, the court held that the Alaska Constitution “do[es] not preclude adopting a way of tabulating votes that allows voters to provide more input about their preferences.”¹⁶⁶

The Alaska court’s reasoning is clear, and its holding should be adopted as a guide by other future courts tasked with interpreting their own states’ constitutions in response to the adoption of RCV. Other states’ courts should not be persuaded by the Maine court’s reasoning, because, while simple, it relies on an incorrect assumption—that RCV elections can be understood metaphorically as multiple rounds of voting, condensed into one ballot on one election day. This assumption errs because a voter in an RCV election votes only once—it is only the counting process that gives the illusion of a multiple-round election. Consider voters who may have given their first-preference votes to a protest candidate, with full knowledge that that candidate will not win the election, but who rely on the assurance that their votes will not be wasted because RCV will transfer those votes to a more mainstream candidate later in the process. It is not sensible to suggest that those voters’ votes have been “counted” after the first round of tabulations. Only after the full RCV tabulation is complete can those voters truly be said to have had their democratic will expressed through the ballot box.

B. Multi-Member Districts Are Constitutional

1. Under the Federal Constitution

Section III.A showed that the most persuasive readings of both federal and state law permit ranked-choice voting as a constitutional

¹⁶³ *Kohlhaas*, 518 P.3d at 1121.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1123.

matter. To show STV is also permissible, what remains is to prove that multi-member districts—the key distinction between STV and other RCV systems—are constitutional as well. The Supreme Court has tackled the federal constitutional issue headfirst, since multi-member district schemes were frequently challenged in voting rights suits alleging unconstitutional racial discrimination. In one such case, *Whitcomb v. Chavis*, the Court observed that “when the validity of the multi-member district, as such, was squarely presented, we held that such a district is not per se illegal under the Equal Protection Clause.”¹⁶⁷ Rather, plaintiffs who bring challenges to particular multi-member districting schemes “carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements.”¹⁶⁸ Since STV systems provide for representation that is roughly proportional to the composition of the electorate, there is little reason to believe that STV could ever operate to dilute the voting strength of any racial or political minority—in fact, the system is much more likely to function as a remedy to vote dilution claims, as will be discussed in Part IV.¹⁶⁹

It could be argued, however, that language that the Supreme Court has used in Equal Protection cases regarding multi-member districting plans might bar their use as a remedy in voting rights suits. For instance, the Court has stated that “when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter,”¹⁷⁰ and that “unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts.”¹⁷¹ None of this language, however, serves to conclusively bar multi-member districts, and the context in which the Court pronounced these statements should also be kept in mind. Since the representatives for the multi-member districts in question in these cases were elected, like nearly all American elected officials, in first-past-the-post elections, the risk of the electoral system diluting minority votes was high, and members of the majority voting in a bloc could easily win every available seat. In contrast, in an STV election, minority groups are likely to be able to win seats in proportion

¹⁶⁷ 403 U.S. 124, 142 (1971).

¹⁶⁸ *Id.* at 144.

¹⁶⁹ See *infra* Sections IV.A–B.

¹⁷⁰ *Connor v. Williams*, 404 U.S. 549, 551 (1972) (quoting *Connor v. Johnson*, 402 U.S. 690, 692 (1971) (internal quotation marks omitted)) (remanding a one-person, one-vote challenge to the trial court to determine if a single-member district scheme was feasible for Hinds County, Mississippi).

¹⁷¹ *Chapman v. Meier*, 420 U.S. 1, 26–27 (1975) (striking down a reapportionment plan ordered by a federal district court for the North Dakota legislature).

to their share of the population, which should constitute a “persuasive justification[.]”¹⁷² sufficient to justify the use of multi-member districts, which are a key part of the functioning of STV as a voting system.

2. *Under State Constitutions*

With the prior Section having made the case that the Federal Constitution permits multi-member districts, at least when their use does not implicate racial vote dilution, we turn now to the question of what the state constitutions have to say about multi-member districting. The answer is that it depends, with each state making its own arrangements for the election of its own state legislature, but that the use of multi-member districts is not rare and, indeed, was even more common in the not-so-distant past. At present, nine states elect at least one chamber of their legislature using multi-member districts.¹⁷³ In all but one of these states, the state constitution explicitly provides for the use of multi-member districts; in the sole exception, Washington State’s constitution is silent on the issue, but state statute directs the use of multi-member districts.¹⁷⁴

Notably, multi-member districts were significantly more common within living memory. The decline of multi-member district systems was closely associated with the passage of the Voting Rights Act and court decisions striking down multi-member districting schemes, not categorically, but based on a particular plan’s tendency to cause racial vote dilution of minority groups.¹⁷⁵ Even in states where no litigation specifically required the abandonment of multi-member districts, there was a shift toward adopting single-member districting schemes, perhaps out of a desire to avoid litigation and a sense that single-member systems were relatively immune to challenge.¹⁷⁶ In any event, the decline has been stark: In 1960, nearly fifty percent of state lower house representatives

¹⁷² *Id.*

¹⁷³ *State Legislative Chambers that Use Multi-Member Districts*, BALLOTPEDIA [hereinafter *Multi-Member Districts*], https://ballotpedia.org/State_legislative_chambers_that_use_multi-member_districts [<https://perma.cc/A7MC-DLHG>]. The nine states are Arizona, Idaho, Maryland, New Hampshire, New Jersey, North Dakota, South Dakota, Vermont, and Washington. *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See *Thornburg v. Gingles*, 478 U.S. 30, 42 (1986) (observing that “multimember districts can operate to impair [Black voters’] ability to elect representatives of their choice”); see also, e.g., *McNeil v. City of Springfield*, 658 F. Supp. 1015, 1033 (C.D. Ill. 1987) (applying *Gingles* and finding that the multi-member district used to elect the city council in Springfield, Illinois, violated § 2).

¹⁷⁶ For instance, although the multi-member districts used in West Virginia were never subject to a VRA challenge, West Virginia legislators abolished the system by statute in 2018. *Multi-Member Districts*, *supra* note 173.

nationwide were elected from multi-member districts, but by 1984, that figure had dropped to twenty-six percent.¹⁷⁷

Vigorous enforcement of the VRA was certainly a positive development for voting rights generally and the rights of voters of color, especially Black voters in the South.¹⁷⁸ But reversing the retreat from multi-member districts and adopting STV could potentially have an even greater impact for minority voting rights, as seen by the positive impact Cincinnati's STV experiment had on racial diversity in representation.¹⁷⁹ And although many state constitutions now preclude multi-member districting systems like STV from being used in state legislative elections,¹⁸⁰ the fact that state constitutions are generally much easier to amend than the federal one¹⁸¹ suggests that state constitutional change might be a ripe area to advance the adoption of STV. Although changing state constitutions to permit multi-member districts would not, by itself, replace the current first-past-the-post voting system with STV, it could be a positive first step. Part IV, below, will outline a variety of legal strategies that could be employed to push the courts toward ordering STV as a remedy. At the local level, some courts have already approved of STV as a means to resolve violations of the VRA and other voting rights laws. In states whose constitutions permit multi-member districting for the state legislature, the courts could also mandate the use of STV for state legislative elections. If these efforts were to succeed in spreading STV nationwide, it would constitute probably the most

¹⁷⁷ *Id.*

¹⁷⁸ See Samuel Issacharoff, *Voting Rights at 50*, 67 ALA. L. REV. 387, 388 (2015) (“The [VRA] set about to empower [B]lack voters for the first time since Reconstruction and succeeded beyond all realistic hopes.”).

¹⁷⁹ See *supra* notes 134–38 and accompanying text; see also *What Is Northern Ireland's Voting System?*, *supra* note 113 (noting how the use of STV protects minority representation in Northern Ireland).

¹⁸⁰ See, e.g., N.Y. CONST. art. III, § 5 (“The members of the assembly shall be chosen by single districts . . .”); TEX. CONST. art. III, § 25 (providing that “each [senatorial] district shall be entitled to elect one Senator”).

¹⁸¹ See Amanda Powers, *Voters Amend State Constitutions to Enshrine New Rights*, BRENNAN CTR. FOR JUST. (NOV. 16, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/voters-amend-state-constitutions-enshrine-new-rights> [<https://perma.cc/62FT-GB6Y>] (“State constitutions are far easier to amend than the federal constitution . . .”). The New York state constitution, for instance, has been amended more than 200 times since being adopted in 1895, with seventeen amendments made in the period from 1996 to 2017 alone. *New York Constitution*, BALLOTPEdia, https://ballotpedia.org/New_York_Constitution [<https://perma.cc/RDJ9-VC6K>]. The Federal Constitution, on the other hand, has not been amended at all since the Twenty-Seventh Amendment became effective in 1992. Scott Bomboy, *How a College Term Paper Led to a Constitutional Amendment*, NAT'L CONST. CTR. (May 7, 2022), <https://constitutioncenter.org/blog/how-a-c-grade-college-term-paper-led-to-a-constitutional-amendment> [<https://perma.cc/ACQ8-G2M4>].

significant reform of U.S. elections in at least a generation¹⁸² and could radically transform American democracy for the better.

IV

HOW THE COURTS CAN USE STV AS A REMEDY

This Part will outline four types of claims, rooted in existing state and federal law, for which courts can and should entertain ordering the use of STV as a remedy in state and local elections. First, Section IV.A will examine § 2 of the Voting Rights Act of 1965, a federal statute which prohibits state and local governments from engaging in racial vote dilution, with the aim of helping communities of color “to elect representatives of their choice.”¹⁸³ Section IV.B focuses on comparable state statutes, such as the California Voting Rights Act (CVRA).¹⁸⁴ Section IV.C addresses federal constitutional claims alleging racial gerrymandering under *Shaw v. Reno* that can be brought against state and local districting plans.¹⁸⁵ Finally, Section IV.D will discuss constitutional challenges to partisan gerrymandering, which, following the Supreme Court’s decision in *Rucho v. Common Cause*, can only be brought as a matter of state law in state court.¹⁸⁶ For each of these types of claims, this Note contends that the courts should consider, and ultimately order, STV as the most effective remedy for the harms that the law seeks to redress.

A. *Remediating Vote Dilution Under Section 2 of the VRA*

1. *Section 2 Generally*

As various commentators have noted, STV is a promising remedy for claims of vote dilution arising under § 2 of the Voting Rights Act. For instance, as early as 1993, Richard Engstrom, a prominent scholarly advocate of STV, suggested the use of the voting system as a remedy for § 2

¹⁸² Since the Voting Rights Act was adopted in 1965, there has been some federal legislation regarding elections, including the National Voter Registration Act (NVRA) of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified in scattered sections of 39 U.S.C. and 42 U.S.C.), and the Help America Vote Act (HAVA) of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 42 U.S.C.), but these were relatively modest reforms. See BIPARTISAN POL’Y CTR., PRIORITIZING ACHIEVABLE FEDERAL ELECTION REFORM app. A at 19 (2022), <https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2022/02/AchievableFederalElectionReformV2.pdf> [<https://perma.cc/UDW9-KZC7>] (noting that “HAVA was built on compromise” and that “NVRA arguably does not do enough to provide funding and resources to election offices to ensure compliance”).

¹⁸³ 52 U.S.C. § 10301.

¹⁸⁴ CAL. ELEC. CODE §§ 14027–32 (West 2023).

¹⁸⁵ 509 U.S. 630 (1993); see also *supra* notes 37–40 and accompanying text.

¹⁸⁶ 139 S. Ct. 2484, 2506–07 (2019) (holding partisan gerrymandering to be a nonjusticiable political question under the Federal Constitution).

violations.¹⁸⁷ As Engstrom argued, “Lawyers and others seeking remedies for dilutive election arrangements would be well advised to consider STV . . . when examining alternatives to [single-member districts].”¹⁸⁸ Advocacy organization FairVote has also consistently pushed the adoption of STV as a remedy in § 2 suits. In 2013, FairVote’s Rob Richie and Andrew Spencer argued that “[j]urisdictions subject to VRA liability should consider choice voting [i.e., STV] as a preferred remedy in settlement or in final judgment.”¹⁸⁹ And in 2016, Andrew Spencer and his FairVote colleagues argued that “using fair representation voting [i.e., STV] when a racial minority population is unable to elect representatives because of unfair districts or at-large bloc voting solves the same problem § 2 suits confront while avoiding the pitfalls of single-member districts.”¹⁹⁰

Authorities as persuasive as Justices of the Supreme Court have made essentially the same argument. As Justice Thomas wrote, concurring in *Holder v. Hall*: “[N]othing . . . places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under § 2, or even from establishing a more elaborate mechanism for securing proportional representation based on transferable votes.”¹⁹¹ Although Justice Thomas appears to have meant this as a pejorative statement—given his clear disdain for STV as an overly “elaborate” voting system—his underlying point is an accurate one. As he explained, “In principle, cumulative voting and other non-district-based methods of effecting proportional representation are simply more efficient and straightforward mechanisms for achieving what has already become our tacit objective: roughly proportional allocation of political power according to race.”¹⁹² Regardless

¹⁸⁷ Richard L. Engstrom, *The Single Transferable Vote: An Alternative Remedy for Minority Vote Dilution*, 27 U.S.F. L. REV. 781, 805–06 (1993).

¹⁸⁸ *Id.* at 807. Engstrom’s argument centered on the premise that STV would not only improve minority representation, but also “accommodate electoral competition within the minority.” *Id.*

¹⁸⁹ Rob Richie & Andrew Spencer, *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, from City Councils to Congress*, 47 U. RICH. L. REV. 959, 1000 (2013). Richie and Spencer argued that STV should be used as a remedy in part because it is “race neutral” and because it would obviate the need for future redistricting “that could result in further litigation.” *Id.* This argument would have been particularly salient at the time because it was made shortly before the Court’s decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), which struck down the preclearance regime under section 5 of the VRA.

¹⁹⁰ Andrew Spencer, Christopher Hughes & Rob Richie, *Escaping the Thicket: The Ranked Choice Voting Solution to America’s Redistricting Crisis*, 46 CUMB. L. REV. 377, 407 (2016).

¹⁹¹ *Holder v. Hall*, 512 U.S. 874, 910 (1994) (Thomas, J., concurring) (reasoning that districting decisions are merely citizens’ political choices and arguing that the Court’s Voting Rights Act jurisprudence has given too much power to the courts).

¹⁹² *Id.* at 912.

of whether Justice Thomas is correct in criticizing the Court's VRA jurisprudence for devolving into an exercise in proportional representation by race, proportional representation systems writ large, including STV, are indeed more efficient mechanisms for realizing the goal of § 2—namely, keeping the redistricting process from becoming a tool for minority vote dilution.¹⁹³

Lower federal courts have also endorsed STV as a remedy for § 2 violations. For instance, in *Huot v. City of Lowell*, a somewhat confused District Court for the District of Massachusetts approved a settlement of a § 2 suit that included, among other potential solutions, an “at-large” system whereby Lowell’s city council and school committee would be elected through “‘proportional representation’ (also sometimes described as ‘ranked-choice voting’ or ‘single transferrable vote’).”¹⁹⁴ Although the terms “proportional representation,” “ranked-choice voting,” and “single transferrable vote” are, of course, not actually synonyms, the agreement specified that any such system would be “substantially similar to [that] currently in place in the City of Cambridge, Massachusetts”¹⁹⁵—where STV has been in use since 1941¹⁹⁶—leaving little doubt that STV was the system envisioned.

2. *The Case of Eastpointe, Michigan*

Even more recently, STV has been adopted in the course of resolving a § 2 controversy in the racially diverse Detroit suburb of Eastpointe, Michigan. In June 2019, the U.S. Department of Justice settled its § 2 lawsuit against Eastpointe after the city agreed to adopt STV, replacing its prior system of single-member districts.¹⁹⁷ As of the time the suit was brought, Eastpointe had a fairly even racial split, with a Black citizen voting-age population of approximately forty-two percent,¹⁹⁸ but no

¹⁹³ It is important to distinguish between “proportional representation,” as in the family of voting systems that includes STV, and “proportional representation by race,” which refers to the concept of a voting system that provides various racial groups with representation proportional to their share of the population, and which § 2 was explicitly written *not* to guarantee. Section 2’s disavowal of proportional representation by race should not be confused for a rejection of proportional representation voting systems like STV. See Richie & Spencer, *supra* note 189, at 996 (noting that PR voting systems, far from mandating “racial entitlements,” in fact “require no classification by race,” an advantage “which cannot be said of majority-minority district remedies”).

¹⁹⁴ Consent Decree at 10, *Huot v. City of Lowell*, No. 17-cv-10895 (D. Mass. June 13, 2019), ECF No. 106.

¹⁹⁵ *Id.*

¹⁹⁶ *Proportional RCV Information*, *supra* note 55.

¹⁹⁷ Lempert, *supra* note 56, at 1792.

¹⁹⁸ Consent Judgment and Decree at 3, *United States v. City of Eastpointe*, No. 17-CV-10079 (E.D. Mich. June 26, 2019), 2019 WL 2647355.

Black candidate had ever been elected to Eastpointe's city council.¹⁹⁹ The parties agreed that the three prerequisites to liability under the Supreme Court's ruling in *Thornburg v. Gingles*—the minority group being sufficiently large and compact, the minority group having political cohesion, and the majority white population voting as a bloc—were likely to be met.²⁰⁰ As part of the settlement, although Eastpointe did not concede liability, it accepted that its prior electoral scheme, whereby two of the four members of the city council were elected at-large at any given election, with each voter given two votes, likely resulted in a § 2 violation.²⁰¹ To remedy the violation, Eastpointe agreed to replace the existing system with “ranked choice voting,” with two members continuing to be elected at large at each election—in other words, making the city a two-member electoral district with the use of STV.²⁰²

Although the courts have weighed in to endorse the proposal of STV as a potential § 2 remedy, as in *Huot*, and to approve the adoption of STV as a means for settling a § 2 suit, as in *City of Eastpointe*, they have yet to take the further step of affirmatively ordering that STV be used to remedy an adjudicated § 2 violation. But Benjamin Lempert has compellingly argued that STV should be adopted by the courts as a VRA remedy for two key reasons. For one, he argues that STV promotes the value of respecting the legislature's role in redistricting while minimizing the intrusion by the court: “A court that applies [STV] enacts a rule-like remedy, consistent with the current vision of the relationship between courts and legislatures. But this remedy is also a manageable and workable substitute for single-member districts.”²⁰³ Second, Lempert argues that STV “allows courts to sidestep constitutionally and politically fraught questions about the scope of a racial community.”²⁰⁴ Since STV allows courts to draw fewer, larger districts compared to when they redraw the maps used in single-member-district systems, courts will not have to make as many difficult choices about “how exactly to divide up a particular community of color.”²⁰⁵

These arguments are highly persuasive: Although adopting STV as a remedy would not free courts adjudicating § 2 claims from the thorny arena of redrawing district maps altogether, it would lighten the

¹⁹⁹ *United States v. City of Eastpointe*, 378 F. Supp. 3d 589, 595 (E.D. Mich. 2019) (denying Eastpointe's motion for summary judgment).

²⁰⁰ Consent Judgment and Decree, *supra* note 198, at 3–4 (citing *Thornburg v. Gingles*, 478 U.S. 30 (1986)); *see also Gingles*, 478 U.S. at 49–51 (1986).

²⁰¹ Consent Judgment and Decree, *supra* note 198, at 4.

²⁰² *Id.* at 4.

²⁰³ Lempert, *supra* note 56, at 1813.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1817.

load considerably. In the case of Eastpointe, for instance, by approving an STV system that retained the entire city as a single, multi-member district, the court was able to avoid the potentially fraught task of dividing the city into two single-member districts, a task which necessarily would have entailed carving the city up by the race of its residents.²⁰⁶ Additionally, because STV does not require the courts to simply repeat the task of drawing districts that the legislature has already attempted (causing the § 2 violation in the process), it promotes an amicable relationship between the judiciary and the legislature, when compared to remedies that have been used to date in enforcing the VRA.²⁰⁷ In Eastpointe, for example, adopting STV allowed the court to respect the political branches' prior choice to use an at-large district scheme for the city, while simultaneously remedying the VRA violation that the prior scheme had caused.²⁰⁸ Mandating single-member districts for Eastpointe would have necessarily involved overruling the political decision in favor of the need to protect voting rights. STV, however, allows both interests to be accommodated.

Courts should not stop, however, at using STV as a remedy to enforce the federal Voting Rights Act. As the following Sections will show, STV is equally appropriate as a resolution to state-level voting rights claims, including claims that may or may not be possible to raise as a matter of federal law—such as actions arising under state voting rights legislation, or alleging impermissible partisan gerrymandering.

B. Remediating Vote Dilution Under State Law

1. The California Voting Rights Act

State legislation is another promising avenue for the courts to expand the use of STV. State-level voting rights acts have been adopted in California, Washington, Oregon, and Virginia,²⁰⁹ with the California Voting Rights Act (CVRA) of 2001 having been the first.²¹⁰ The test for vote dilution under the CVRA differs from that under the federal VRA: The CVRA

explicitly omit[s] the requirement that the racial minority be geographically compact, explicitly opening the door to non-winner-take-all voting systems, at the very least when there is no such geographic

²⁰⁶ For context on why elections using single-member districts require race-conscious map drawing to achieve fair representation of voters of color, see *supra* Section II.B.1.

²⁰⁷ See *supra* notes 203–05 and accompanying text.

²⁰⁸ See *supra* notes 197–202 and accompanying text.

²⁰⁹ *Proportional RCV Information*, *supra* note 55.

²¹⁰ See *Richie & Spencer*, *supra* note 189, at 1000.

compactness. . . . The CVRA also suggests the use of single-member districts as remedies, but does not foreclose the use of modified, at-large remedies.²¹¹

FairVote has done considerable work to advance the argument that STV can and should be used as a remedy for CVRA claims. For instance, in *Higginson v. Becerra*, FairVote submitted an amicus brief arguing that STV systems “remedy minority vote dilution,” citing the historical example of Cincinnati’s adoption of STV.²¹² This fact was a key part of the constitutional defense of the CVRA, against which the plaintiff in *Higginson* brought a facial challenge.²¹³ Unlike the federal VRA, the CVRA allows a claim to be brought even in the absence of a geographically compact racial minority group.²¹⁴ Therefore, if the only remedy available under the CVRA, as plaintiffs argued, were a single-member-district system, that would mean that the CVRA allowed for “a race-conscious remedy where there has been no wrong.”²¹⁵ But, as FairVote noted, the CVRA, like the federal VRA, *also* permits multi-member districting schemes like STV to be used as a remedy.²¹⁶ Therefore, minority plaintiffs bringing a CVRA claim can argue instead that they would be entitled to representation under STV, which, by its very nature, does not require compactness for a group to elect a representative of its choice. In other words, the availability of multi-member districting systems as a remedy under the CVRA may be not just a feature, but an *essential* feature of the CVRA’s statutory scheme.

In *City of Santa Monica v. Pico Neighborhood Association*, FairVote again submitted a brief as amicus.²¹⁷ There, the defendant, the city of Santa Monica, had appealed the trial court’s decision ordering a system based on single-member districts, arguing that it would not be sufficient to guarantee Latino voters a seat in the city council. Under the challenged plan, the Latino population of the most heavily Latino district

²¹¹ *Id.* at 1001.

²¹² Brief for FairVote as Amicus Curiae in Support of Appellees and Affirmance at 15–16, *Higginson v. Becerra*, 786 F. App’x 705 (9th Cir. 2019) (No. 19-55275) [hereinafter *Higginson* Brief]. The *Higginson* suit was dismissed for failure to state a claim, and the Ninth Circuit ultimately affirmed. *Higginson v. Becerra*, 786 F. App’x 705, 706 (9th Cir. 2019).

²¹³ *Higginson* Brief, *supra* note 212.

²¹⁴ *Id.* at 6.

²¹⁵ *Id.* at 24.

²¹⁶ *Id.*

²¹⁷ Brief for FairVote as Amicus Curiae in Support of Respondents and Affirmance at 16, *City of Santa Monica v. Pico Neighborhood Ass’n*, No. B295935 (Cal. Ct. App. Feb. 4, 2020) [hereinafter *Santa Monica* Brief].

would still be only around thirty percent.²¹⁸ FairVote’s amicus brief argued that, regardless of whether the single-member-district system was an adequate remedy, the CVRA provided for alternative remedies, including STV. As the brief argued, “Minority voters in an STV system can elect their preferred candidate even if their population does not exceed the number of votes required to win a single seat.”²¹⁹ In the case at hand, only one Latino candidate had been elected to Santa Monica’s city council in seventy-two years.²²⁰ Under STV, amici argued, “Latino voters in Santa Monica could elect a candidate of their choice”²²¹ As the Santa Monica case shows, by keeping systems like STV available as a remedy, the CVRA can achieve its goal of preventing vote dilution, even in cases where no single-member-district map would be able to do so.

2. *The Case of Palm Desert, California*

STV was employed as a judicially enforced remedy to a CVRA case for the first time in 2022, in the city of Palm Desert, located in Southern California’s Coachella Valley.²²² In the Palm Desert case, which was settled in 2019, plaintiffs brought suit under the CVRA against the city of Palm Desert’s electoral system, whereby all five city council members were elected at large.²²³ The plaintiffs asserted that this system unlawfully diluted the city’s Latino vote—Palm Desert having a Latino population of twenty-six percent.²²⁴ Although the most obvious remedy—and the one favored by plaintiffs—would have been to impose a single-member-district system on Palm Desert (as had been done in other, neighboring cities under threat of CVRA litigation),²²⁵ Palm Desert’s elected officials were hesitant to accept this result. As the city manager told the audience at an open house regarding the CVRA suit:

²¹⁸ See *id.* The litigation in the case is still ongoing at the time of writing. See *Santa Monica Election Litigation*, CITY OF SANTA MONICA, <https://www.santamonica.gov/election-litigation-pna-v-santa-monica> [https://perma.cc/MK8X-J89D].

²¹⁹ *Santa Monica* Brief, *supra* note 217, at 22.

²²⁰ *Id.* at 23.

²²¹ *Id.*

²²² *Proportional RCV Information*, *supra* note 55; see Settlement Agreement and General Release of Claims at 1–2, *Salas v. City of Palm Desert*, No. PSC-1903800 (Cal. Super. Ct. Riverside Cnty. Nov. 22, 2019).

²²³ Sherry Barkas, *Palm Desert Plaintiff Wants 5 Voting Districts, Not 2. Here’s Why She Signed the Agreement Anyway*, DESERT SUN (Feb. 12, 2020, 12:22 PM), <https://www.desertsun.com/story/news/local/palm-desert/2020/02/10/palm-desert-open-house-public-hearing-focus-voting-districts-ranked-choice-voting-system/4717874002> [https://perma.cc/JNL8-BZ5E].

²²⁴ *Id.*

²²⁵ *Id.* (reporting that nearby Palm Springs, Indio, and Cathedral City had all recently changed to a single-member district system after receiving a letter from the law firm Shenkman & Hughes, which was also counsel for the plaintiffs in the Palm Desert case).

Our immediate fear was that we'd divide ourselves up into five districts, because we have five council members. We would have individual portions of Palm Desert fighting against one another to get the same money, to get the same resources, to be able to do the projects that they want to do in their areas. We thought we've been so well-served by working together; we don't want to lose that.²²⁶

The CVRA provided a solution that, while not totally satisfactory to either party, may have threaded the needle. A single district was created in the center of Palm Desert, where the city's Latino population is concentrated, to elect one council member by first-past-the-post.²²⁷ The remainder of the city—coined the “donut” district by local media—would elect four members, at-large, using STV.²²⁸ This solution balanced the plaintiff's interests in ensuring Latino voters could elect a candidate of their choice (in the single-member district) with the defendant City's desire to maintain its unity in a single electoral jurisdiction to the extent possible.

The solution was neither perfect nor universally loved. Plaintiffs, after signing the settlement, complained that they would have preferred a single-member-district system after all.²²⁹ And, as the Santa Monica example discussed above illustrates, a pure STV system with one at-large district would probably have ensured Latino representation on the council without creating the oddly shaped “donut” district. But the settlement did serve its purpose of balancing competing interests. In the words of Palm Desert Councilman Sabby Jonathan:

It addresses the concerns of the [CVRA] by creating a new single-member district that focuses on a unique part of town that has long been a particular focus of the City Council, and by incorporating ranked-choice voting, which is recognized as a system designed to encourage minority voting opportunity and decrease political polarization. . . . At the same time, [the agreement] maintains a broader citywide focus by members of the council to prevent the development of narrow parochial interests.²³⁰

²²⁶ Kevin Fitzgerald, *Not a Done Deal: Despite Misleading Statements by the City, Palm Desert's New Two-District Voting System Is Still Up for Discussion*, COACHELLA VALLEY INDEP. (Jan. 24, 2020), <https://cvindependent.com/2020/01/not-a-done-deal-despite-misleading-statements-by-the-city-palm-desert-s-new-two-district-voting-system-is-still-up-for-discussion> [<https://perma.cc/X46B-SGQC>].

²²⁷ Barkas, *supra* note 223.

²²⁸ *Id.*

²²⁹ In a news article published after the case settled, plaintiff Karina Quintanilla stated, “Now, it's up to the rest of the city's residents to come forward and say, ‘We don't like this,’ and then they can speak up against that ranked-choice voting (proposal) and decide that's not what they want.” Fitzgerald, *supra* note 226.

²³⁰ Barkas, *supra* note 223.

C. *Remedying Racial Gerrymandering Under Shaw*

In addition to typical vote dilution claims under § 2 of the VRA or analogous provisions of state voting rights law, there may be room for STV to serve as a remedy in another type of case: those that arise under the Supreme Court's line of cases concerning so-called racial gerrymandering, starting with *Shaw v. Reno*.²³¹ Although there are not any reported cases where claims raised under *Shaw v. Reno* were resolved using STV as the remedy, there is no analytical reason why they could not be. Indeed, *Shaw* claims rest on the notion that a mapmaker has impermissibly relied on race in drawing district lines in violation of the Equal Protection Clause.²³² A typical *Shaw* claim may therefore be particularly suitable for resolution with a multi-member districting scheme like STV, rather than an order for the single-member maps to be redrawn, which is the norm today.²³³ Richie and Spencer have noted:

As *Shaw* itself recognized, at-large and multi-member electoral systems do not classify anyone by race at all. At-large or multi-member choice voting elections guarantee that minority *viewpoints* have the opportunity to achieve representation. They do not require drawing lines around particular individuals or considering the race of any particular individuals. Choice voting does not rely on any racial stereotypes or balkanize racial groups by putting them into racially defined districts.²³⁴

In other words, since STV elections largely bypass the need for racially conscious districting, STV could make it possible to guarantee voters of color fair representation without classifying voters according to race—making it an ideal solution to the harms identified by the Court in *Shaw*.

D. *Remedying Partisan Gerrymandering Under the State Constitutions*

A final potential area in which the courts should consider ordering STV as a remedy is in cases involving challenges to partisan gerrymandering. While the use of race in redistricting can be and has been

²³¹ See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Cooper v. Harris*, 581 U.S. 285 (2017).

²³² See Richie & Spencer, *supra* note 189, at 998.

²³³ See, e.g., *Cooper*, 581 U.S. at 321–23 (affirming the district court's determination that two North Carolina congressional districts had been unconstitutionally gerrymandered on racial grounds and needed to be redrawn).

²³⁴ Richie & Spencer, *supra* note 189, at 998.

challenged successfully under the *Shaw* line of cases as racial gerrymandering in violation of the Federal Constitution's guarantee of Equal Protection, claims of undue use of partisanship in redistricting are now, after the Supreme Court's decision in *Rucho v. Common Cause*,²³⁵ categorically nonjusticiable in the federal courts. With that decision, the legal avenues to challenge partisan gerrymandering have narrowed, with the state courts enforcing their state constitutions as one of the key remaining pathways to mount a challenge.²³⁶

As discussed above, STV, like all forms of proportional representation voting systems, would essentially eliminate partisan gerrymandering from the process altogether.²³⁷ It is therefore appropriate to ask whether there is a pathway for the courts, particularly state courts hearing partisan gerrymandering claims that arise under state law, potentially to use STV as a remedy to cure partisan gerrymandering in the state legislatures. The answer is that, under existing law, there may be at least one state (Maryland) where such a solution is already possible.²³⁸ Additionally, a relatively simple state constitutional change (permitting the use of multi-member districts where the state constitution currently requires single-member ones) would open the door for courts to expand the solution, sketched in broad terms below, to other states as well.

1. *A Proposal (for Maryland)*

There are a few factors that make Maryland a prime candidate for using STV to remedy partisan gerrymandering at the state legislative level. For one, Maryland's House of Delegates already uses multi-member districts that elect three members each—a suitable number for the use of STV²³⁹—so no redrawing of the maps would be necessary at all for STV to be adopted.²⁴⁰ Second, Maryland's state constitution has been interpreted, in the separate context of the state's U.S. House districting map, to include guarantees against partisan gerrymandering.²⁴¹ Specifically, the provision of the Maryland Constitution mandating that

²³⁵ 139 S. Ct. 2484 (2019).

²³⁶ *Redistricting in the Courts*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/gerrymandering-fair-representation/redistricting/redistricting-courts> [<https://perma.cc/GX4V-4L3L>] (“[I]n June 2019, the U.S. Supreme Court ruled that federal courts may not police partisan gerrymandering, leaving that issue to state courts or the political process.”).

²³⁷ *See supra* Section II.B.

²³⁸ *See infra* Section IV.D.1.

²³⁹ *See supra* notes 114–15 and accompanying text.

²⁴⁰ *Multi-Member Districts*, *supra* note 173.

²⁴¹ Memorandum Opinion and Order at 93–94, *Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022), <https://www.democracymocket.com/wp-content/uploads/2021/12/MD-Order-Permanent-Injunction.pdf> [<https://perma.cc/Z67R-FPZS>].

elections be “free and frequent,”²⁴² along with the state constitution’s equal protection and free speech guarantees, provided the basis for a Maryland appellate court, in the case of *Szeliga v. Lamone*, to hold the gerrymandered U.S. House map to be in contravention of the state constitution.²⁴³

Although the *Szeliga* plaintiffs’ challenge to the 2021 U.S. House map in Maryland was sustained, ultimately resulting in the passage of an alternative U.S. House map, Maryland’s highest court never had the opportunity to weigh in on the *Szeliga* court’s reasoning. In addition, a separate challenge to the state’s maps for its own legislature post-2020 census was rejected by the Maryland Court of Appeals.²⁴⁴ But let us imagine that after the 2030 Census, Maryland’s Democratic legislators decide to try their hand at partisan gerrymandering again, this time by tinkering with the maps for the State House of Delegates. It is more than likely that aggrieved Republican voters will again mount a partisan gerrymandering challenge, perhaps, like the *Szeliga* plaintiffs, citing the Maryland Constitution’s “free and frequent” elections clause and its equal protection and free speech guarantees.

If such a claim were to be made, and a state court, like that in *Szeliga*, were to agree that the Maryland Constitution prohibits the offending plan, what remedy could the court order? One option, of course, would be to send it back to the legislature to try again, but this strategy would encounter major obstacles. There might be limited time remaining before the election for another map to be drawn, or the legislature might dig in its heels and refuse to draw a fairer map. Although the court could hire an expert to draw her own maps of the state, it will not surprise readers of this Note that there is an alternative option: STV. Since Maryland already has three-member House districts, all that would be required would be an order mandating the election to be held using ranked-choice voting rules; this would effectively render the House of Delegates election an STV election. Although the maps would remain exactly the same, the democratic harms posed by partisan gerrymandering would be dramatically reduced, as each district would be likely to elect candidates from more than one political camp, and the overall result would be likely to show rough proportionality to the votes of the population as a whole. As with the real-life case of Eastpointe,

²⁴² *Id.* at 24.

²⁴³ *Id.* at 93–94.

²⁴⁴ *In re 2022 Legis. Districting of the State*, 282 A.3d 147, 211–12 (Md. 2022) (finding that petitioners did not present compelling evidence that redistricting plans adopted by the Maryland General Assembly violated provisions of either the U.S. Constitution or that of Maryland).

Michigan,²⁴⁵ a court enacting this remedy would be freed of the burden of drawing (or appointing someone to draw) its own maps in place of those created by the legislature, while simultaneously honoring the state constitution's mandate of fairness in elections.

Until the next census and the next round of redistricting across the nation, this thought experiment will remain just that—a thought experiment. Moreover, Maryland, with its neatly pre-packaged three-member legislative districts, is an outlier among the states; only a minority of the states allow multi-member districts in their state legislative elections, and the majority of those allow a maximum of two seats per district²⁴⁶—too few for STV to be an effective proportional voting system. But two simple choices would be enough to make this thought experiment a reality. First, states would have to shift towards electing their legislatures using multi-member districts, as many states did, in not-too-distant memory.²⁴⁷ Second, and perhaps most importantly, plaintiffs must be prepared to use their state constitutions to challenge partisan gerrymandering in future cycles, and also to demand a novel remedy: the single transferable vote.

CONCLUSION

Changing the voting system used in U.S. elections may seem like a tall order. Politicians, pundits, and voters in most places in the country have only ever witnessed elections conducted under one voting system: FPTP. But, as this Note has argued, the mere fact that FPTP is the standard today should not dictate how states and localities administer their elections tomorrow. As a matter of policy, switching to a proportional voting system like STV would help to improve the health of our democracy by mitigating the harms of partisan polarization, racial vote dilution, and gerrymandering. As a matter of constitutional law, the federal and state constitutions should be understood as posing no barrier to adopting STV for state and local elections. In many localities and in the states whose constitutions already provide for multi-member districts in state legislative elections, like Maryland, STV could be adopted by statute or by court order at any moment. In the rest, state constitutional amendments providing for the use of multi-member districts, common in the recent past, would pave the way for the adoption of STV there as well.

²⁴⁵ See *supra* Section IV.A.2.

²⁴⁶ See *Multi-Member Districts*, *supra* note 173.

²⁴⁷ See *supra* Section III.B.2.

Finally, this Note has presented the case that the state and federal courts have a key role to play in shaping a better future for U.S. elections. In the resolution of claims under the Voting Rights Act, state voting rights statutes, and the federal and state constitutions, courts can and should look to STV. STV has the potential to serve as a highly effective remedy for an array of harms already recognized as unlawful under federal and state law, including vote dilution and racial and partisan gerrymandering. Although the relative novelty of STV as a remedy may cause courts to hesitate, the recent cases discussed in this Note—such as the adoption of STV through negotiated settlements in Eastpointe and Palm Desert—give reason to be hopeful. Moreover, the growing recognition of the benefits of STV as a voting system by the public, as evidenced by the choice of the voters in Portland in 2022, should also speak loudly, not only to policymakers and voters in other jurisdictions, but also to the courts. STV is on the rise in the United States because there is growing awareness of its potential to make a radical, positive contribution to the functioning of American democracy. If they are serious about fulfilling the promise of our Constitution and laws to guarantee the fundamental right to vote, the courts should make use of their power to help catalyze this change.