THE DEMOCRATIC IMPERATIVE TO MAKE MARGINS MATTER

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Many commentators lament that American democracy is in crisis. It is becoming a system of minority rule, wherein a party with a minority of the national vote can control the national government. Partisan gerrymandering in the House of Representatives fuels this crisis, as does the equal representation of small and large states in the Senate. But altering these features of the legislature would not end minority rule. Indeed, it has long been held that majority rule cannot be guaranteed within any district system, as a minority of voters nationwide can be efficiently distributed such that a minority party wins a majority of districts by narrow margins.

This Article offers a way to save majority rule. Since the way a party can gain control of the legislature with a minority of the vote is to win a majority of districts by narrow margins of victory and lose a minority of districts by large margins of victory, the solution is to make margins matter. *Hence, this Article proposes that we preserve electoral districts in which the candidate with the most votes wins, while making the weight of their vote in the legislature (a representative's "legislative power") a function of margins of victory. The first goal of this Article is to outline how this proposal, which I call "weighted voting by margin of victory" ("WVMV"), retains the democratic virtues of district systems while ending minority rule. This is the first basis for the democratic imperative to make margins matter.*

There is, however, a second basis for that same imperative, which turns on the political equality of voters. The U.S. Supreme Court has long held that democratic equality should be understood in terms of equal voting power (one person, one vote). But when margins of victory do not matter, the power of a vote lies exclusively in its potential decisiveness. A vote that changes the margin of victory without changing the victor is "wasted." But it is an

electoral reality that votes in competitive districts are more likely to be decisive, and votes in uncompetitive districts are more likely to be wasted. As a result, candidates and parties are more responsive to some voters than others. So voters are not political equals; they do not have equal voting power, except in an empty formalistic sense.

By contrast, WVMV gives votes a second type of power. In addition to the power to potentially decide who wins, a vote has the power to actually change the legislative power of the victor. Each vote, in effect, transfers a unit of political power to a democratic representative. This "transference" power can be meaningfully equalized between voters. A voter in an uncompetitive district is far less likely to change who wins but is equally likely to change the margin of victory, such that their vote is no longer wasted. Under this system, candidates and parties have stronger reasons to be more equally responsive to all voters. Hence, there is a democratic imperative to make margins matter, in order to give voters a meaningfully equal form of voting power.

The final goal of this Article is to explain how we can implement WVMV in modern democracies, focusing on three particularly challenging cases: the U.S. Senate, the Parliament of the United Kingdom, and the U.S. House of Representatives. These cases are challenging for several reasons, the most pertinent of which turn on the ways we should understand margins of victory when electorates are of unequal sizes (as in the U.S. Senate); are contested by more than two parties (as in the U.K.); or are conducted under different voting procedures (as in many districts in the U.S. House). I argue that WVMV should be considered feasible in all such contexts, and hence offers a practical, rather than purely theoretical, alternative to the status quo.

INTRODUCTION

> *[T]o sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.*[1]

> *[I]f we could identify a majority party, we would find it impossible to ensure that that party wins a majority of seats—unless we radically revise the States' traditional structure for elections. In any winner-take-all district system, there can be no guarantee, no matter how the district lines are drawn, that a majority of party votes statewide will produce a majority of seats for that party.*[2]

Many commentators lament that American democracy faces a crisis.[3] As Levitsky and Ziblatt, two Harvard political scientists and authors of *How Democracies Die*, wrote in October 2020:

Democracy is supposed to be a game of numbers: The party with the most votes wins. In our political system, however, the majority does not govern. Constitutional design and recent political geographic trends—where Democrats and Republicans live—have

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1. Reynolds v. Sims, 377 U.S. 533, 565 (1964).

2. Vieth v. Jubelirer, 541 U.S. 267, 289 (2004).

3. *See, e.g.*, Mara Liasson, *Democrats Increasingly Say American Democracy Is Sliding Toward Minority Rule*, NPR (June 9, 2021, 5:00 AM), https://www.npr.org/2021/06/09/1002593823/how-democratic-is-american-democracy-key-pillars-face-stress-tests; Damon Linker, *The GOP's Minority Rule*, WEEK (July 20, 2018), https://theweek.com/articles/785710/gops-minority-rule; Jesse Jackson, *American Democracy Is Under Siege*, JOPLIN GLOBE (Dec. 22, 2021), https://www.joplinglobe.com/opinion/jesse-jackson-american-democracy-is-under-siege/article_295835d2-5f42-11ec-95b0-a7387a4eea25.html; David Sirota, *Just How Severe Will America's Minority Rule Become?*, GUARDIAN (Mar. 26, 2021, 6:20 AM), https://www.theguardian.com/commentisfree/2021/mar/26/just-how-severe-will-americas-minority-rule-become; Vann R. Newkirk II, *How the Minority Wins*, ATLANTIC (Dec. 12, 2018), https://www.theatlantic.com/politics/archive/2018/12/gop-maneuvers-rule-minority-party/577948/; Adam Jentleson, *How to Stop the Minority-Rule Doom Loop*, ATLANTIC (Apr. 12, 2021), https://www.theatlantic.com/ideas/archive/2021/04/how-stop-minority-rule-doom-loop/618536/. Notably, those commentators typically do not point to evidence of majoritarian principles being violated *within* districts, focusing mainly on violations of the principle *across* districts.

unintentionally conspired to produce what is effectively becoming minority rule. . . . In America today, then, the majority does not govern. This disjuncture cries out for reform. We must double down on democracy.[4]

Levitsky and Ziblatt's position draws on a long line of thought[5]—echoed by the U.S. Supreme Court in the first epigraphic quote above—that minority rule is undemocratic, so "ending minority rule [would] be inherently democratic."[6]

How can we end minority rule and thereby save majority rule? In the House of Representatives, minority rule is often attributed to partisan gerrymandering.[7] In the Senate, it is attributed to the equal representation of large and small states, which presently advantages less populous rural states.[8] As such, Levitsky and Ziblatt discuss a "democratic reform agenda," which includes "requir[ing] independent redistricting commissions to draw congressional maps" and "offer[ing] . . . statehood to the District of Columbia and to Puerto Rico."[9] But even this ambitious agenda cannot end minority rule. Another long line of thought—echoed by the U.S. Supreme Court in the second epigraphic quote above—holds that no district system can guarantee majority rule.[10] Imagine we changed how the boundaries of electoral districts are drawn (by using independent redistricting commissions in the House) and added new districts (by adding States and thereby expanding the Senate). Doing so cannot change the fact that if one party's voters are more efficiently distributed, they can win a majority of seats with a minority of voters nationwide.

The first main goal of this Article is to offer a solution to the urgent problem of minority rule. To find the cure, we must start with a proper diagnosis. The reason why Party A can win a majority of districts with a minority of the vote is that it can win with (on average) narrower margins of victory. By contrast, Party B can win a minority of districts with a majority of the vote by winning with (on average) larger margins of victory. And the reason why Party A rather than Party B will govern in that scenario is that

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4. Steven Levitsky & Daniel Ziblatt, *End Minority Rule*, N.Y. TIMES (Oct. 23, 2020), https://www.nytimes.com/2020/10/23/opinion/sunday/disenfranchisement-democracy-minority-rule.html.

5. *See infra* Section I.A.

6. Levitsky & Ziblatt, *supra* note 4.

7. *See, e.g.*, Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1765 (2021); Christian R. Grose et al., *The Worst Partisan Gerrymanders in U.S. State Legislatures*, UNIV. S. CAL. SCHWARZENEGGER INST. FOR STATE & GLOB. POL'Y 12–13 (2019), http://schwarzeneggerinstitute.com/theworstpartisangerrymanders/; Liasson, *supra* note 3.

8. *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 50–52 (2006).

9. Levitsky & Ziblatt, *supra* note 4.

10. *See infra* Section I.C.

winning districts is what determines a party's total power in the legislature; put otherwise, the number of victories matters, but the margins of victory do not. Hence, to end minority rule, we need to make margins of victory matter. This Article proposes a way to do just that. We can retain electoral districts in which the candidate with the most votes wins, while making *how much* legislative power parties and candidates win (i.e., the weight of votes in the legislature) a function of margins of victory. Call this proposed system "weighted voting by margin of victory" ("WVMV"). There is a democratic imperative to make margins matter, by adopting WVMV, to end minority rule.

To be clear, adopting WVMV would be a radical change. But it would not "radically revise the States' traditional structure for elections."[11] It leaves intact the district system. WVMV is compatible with district systems because the irrelevance of margins of victory is not a necessary feature of systems that group voters into districts. It is a feature of the common conception of voting, according to which the power of a vote lies exclusively in its *potential decisiveness*. Hence, votes that change the margin of victory without changing the victor are "wasted." WVMV expands what votes do. It creates a new kind of voting power. Under WVMV, along with potentially deciding who wins, votes actually determine how much legislative power the victor receives. Each vote transfers a unit of political power to democratic representatives.

The second main goal of this Article is to offer a further basis for the democratic imperative to make margins matter. We need to do so to give votes this additional "transference" power in order to better realize the political equality of voters. The power to be potentially decisive cannot be meaningfully equalized, so in the status quo each vote is equal only in an empty, formalistic sense. We know that many votes will be wasted in uncompetitive districts, and as a result, political campaigns are most responsive to a small subset of voters who reside in competitive districts. But transference power *can* be meaningfully equalized. A voter in an uncompetitive district is far less likely to change who wins, but is equally likely to change the margin of victory, such that their vote is no longer wasted. So WVMV better instantiates the political equality of voters—it makes "one person, one vote" ("OPOV") more than an empty formalism.[12] And by doing so, WVMV gives candidates and parties a strong reason to be

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11. Vieth v. Jubelirer, 541 U.S. 267, 289 (2004).

12. *See* Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."). *See generally* Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269 (2002) (exploring some ways that OPOV may fail to instantiate political equality).

more equally responsive to all voters in all districts, since each voter is equally capable of changing the margin of victory.

In short, then, this Article offers two interlocking lines of argument for a common conclusion. We need a new conception of voting power so that we can make margins matter, and thereby end minority rule. And we need to make margins matter so that we can have a new conception of voting power, and thereby make each vote meaningfully equal. Both paths lead to WVMV.

These two interlocking lines of argument make WVMV theoretically significant. But if WVMV cannot be feasibly adopted in real-world democracies, its significance would be merely speculative. Hence, the final goal of this Article is to argue that WVMV can be realistically implemented. I will focus on three particularly challenging examples: the U.S. Senate, the Parliament of the United Kingdom, and the U.S. House of Representatives. These cases are challenging for several reasons, the most pertinent of which turn on how we should understand margins of victory.

The U.S. Senate is a district system with profound differences in the size of districts. As many commentators note, the equal representation of unequally sized states makes the risk of minority rule in the Senate more pronounced.[13] But it also makes the risk more complicated, in ways that are rarely recognized. In the U.S. Senate in the 117th Congress, the average Democratic Senator beat the second-place candidate in their election by a larger *number* of votes (roughly 470,000, compared to 300,000 for the average Republican) but the average Republican Senator beat the second-place candidate in their election by a larger *share* of the total vote (20.85%, compared to 17.37% for the average Democrat).[14] Should a Senator's weighted vote be the function of the number of votes cast, or the share of the votes cast? How we navigate this point also has constitutional implications, since the Entrenchment Clause of Article V guarantees each State "equal [s]uffrage in the Senate."[15]

By contrast, the challenge posed by modern democracies like the U.K. is that they involve several prominent parties (Labour, Conservatives, Liberal Democrats, the Scottish National Party) within a winner-take-all district system. Since this Article is mostly concerned with the U.S., which is a two-party system, the impact of third parties will be set aside until Part IV. It may seem that third parties generate serious problems with WVMV. That is, when votes are split between more than two candidates, it may seem that we create perverse democratic outcomes if we make the victor's weighted vote a function of the gap between the victor and the second-place candidate in their

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13. *See, e.g.*, Jentleson, *supra* note 3.

14. These calculations are my own, based on the data presented *infra* in Section IV.A.

15. U.S. CONST. art. V.

election. I argue, however, that this appearance is misleading. The realistic problems that we encounter in such contexts are not a product of WVMV itself; they are generated by other aspects of the district systems. By contrast, the only scenario in which WVMV arguably generates a unique problem (where a party wins a majority of the vote across districts without winning a majority within any district) is so improbable as to be fairly regarded as a strictly hypothetical concern. Thus, WVMV remains feasible in multi-party systems.

Finally, the U.S. House of Representatives poses a more technical challenge. Since States have the power to set the "[t]imes, [p]laces and [m]anner" of elections,[16] to implement WVMV would require comparing margins of victory in elections that use different voting procedures. I argue that WVMV remains feasible in such contexts too. The upshot of these three examples is that WVMV is not just of theoretical significance—there is a democratic imperative to make margins matter.

This Article proceeds in four Parts. Part I considers why we should adopt WVMV to end minority rule, outlining why majority rule is a core democratic principle and explaining how it is threatened by district systems, with a focus on the U.S. Congress. Part II details how we can make margins of victory matter to end minority rule, outlining the central and distinctive tenets of WVMV. Part III considers why we should adopt WVMV to give each voter a meaningfully equal form of voting power, explaining why OPOV can only be an empty formalism unless votes have transference power, and why electoral campaigns need to be incentivized to be equally responsive to all voters rather than to target pivotal voters in competitive districts. Part IV considers how WVMV can be implemented in complex modern democracies, focusing on the U.S. Senate, the U.K. Parliament, and the U.S. House. The final Part concludes.

I. ENDING MINORITY RULE

This Part considers why we should adopt WVMV to end minority rule. First, I outline majority rule as a core democratic principle, note the distinction between applying majority rule within and across districts, and point out that insofar as majority rule is understood to guarantee government by the majority it should be understood to apply across districts.[17] Second, I explain why minoritarian governments are prevalent in the U.S. House of Representatives and Senate due to partisan gerrymandering and natural sorting.[18] Third, I outline the influential position that minoritarian

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16. U.S. CONST. art. I, § 4.
17. *See infra* Section I.A.
18. *See infra* Section I.B.

government cannot be prevented within a district system, as the conflict between majority rule and districting systems is ineliminable.[19]

A. *Majority Rule and Minoritarian Government*

Majority rule has been considered an essential democratic principle throughout the long history of democratic theory, from Aristotle to Locke, from Rousseau to Jefferson, from De Tocqueville to Lincoln.[20] Subject to certain constraints (most notably to protect the constitutional rights of minorities),[21] it is plausible that a significant condition for being a democracy is not violating the principle that the majority rule.

I will not take a stand on *why* we should endorse this principle. To many, the centrality of majority rule to democracy is self-evident, or even definitional.[22] As Ben Saunders notes, "such is the apparent obviousness of majority rule that it has been an alleged necessity, scarcely even argued for."[23] But Mathias Risse notes that there are six standard arguments for the principle.[24] The most popular argument is that majority rule is required in order to respect the political equality of voters.[25] The simplest argument for majority rule turns on the perversity of the alternative—minority rule.[26] As

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19. *See infra* Section I.C.

20. *See* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 34–35 (1956) (collecting historical perspectives).

21. As Dahl argues, the assertion of both absolute majority rule and "absolute minority rights" comes "at the price of logical consistency." *Id.* at 36.

22. *See, e.g.*, E.F. CARRITT, ETHICAL AND POLITICAL THINKING 150 (1947) (defining democracy in terms of majority rule).

23. Ben Saunders, *Why Majority Rule Cannot Be Based Only on Procedural Equality*, 23 RATIO JURIS 113, 114 (2010).

24. Mathias Risse, *Arguing for Majority Rule*, 12 J. POL. PHIL. 41, 44–45 (2004). Risse goes on to explore alternatives to these six arguments. *Id.*

25. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 17 (1996) (arguing that democracy "requires . . . majoritarian procedures out of a concern for the equal status of citizens, . . . not out of any commitment to the goals of majority rule" for their own sake); *see also* THOMAS CHRISTIANO, THE RULE OF THE MANY: FUNDAMENTAL ISSUES IN DEMOCRATIC THEORY 55 (1996) (for a different egalitarian defense of majority rule). Some counter that we can envision systems in which voters' political equality is respected without majority rule. Saunders's lottery system was a case in point. *See generally* Ben Saunders, *The Equality of Lotteries*, 83 PHILOSOLHY 359 (2008); Alexander A. Guerrero, *Against Elections: The Lottocratic Alternative*, 42 PHIL. & PUB. AFFS. 135 (2014). This issue is not purely theoretical. The U.S. Supreme Court's jurisprudence on partisan gerrymandering has partly turned on whether violations of majority rule are also violations of OPOV. Gray v. Sanders, 372 U.S. 368, 379–81 (1963). For further discussion and criticism, see DAN S. FELSENTHAL & MOSHÉ MACHOVER, THE MEASUREMENT OF VOTING POWER: THEORY AND PRACTICE, PROBLEMS AND PARADOXES 87 (1998).

26. Risse, *supra* note 24, at 44.

Justice Breyer has noted, entrenched minority rule is hard to defend on any principled ground.[27]

But what exactly does the principle of majority rule commit us to? Saunders offers a simple definition: "The option that gets the most votes should be the group decision."[28] Some may prefer to call this *plurality rule*, since "the most votes" may not be an absolute majority. Requiring an absolute majority is more demanding. For example, Douglas Amy calculates that in three consecutive U.S. Congressional elections (1996, 1998, and 2000), the Republican Party won a majority of seats while winning less than 50% of the national vote.[29] But the Republican party received *the most votes* in each of those elections.[30] This Article will set aside such cases and focus on the less demanding definition of majority rule, which is only violated where the winner received fewer votes than a rival.

Majority rule, so understood, is enshrined in U.S. electoral practices,[31] especially in the widespread use of plurality voting or first-past-the-post voting ("FPTP") within districts.[32] If Alice and Barry are the only candidates in a district, and Alice receives more votes than Barry, it would be undemocratic for Barry to win. Plausibly, the best explanation for why it is undemocratic is that it violates majority rule, which justifies using FPTP.[33]

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27. Vieth v. Jubelirer, 541 U.S. 267, 361 (2004) (Breyer, J., dissenting) ("The need for legislative stability cannot justify entrenchment, for stability is compatible with a system in which the loss of majority support implies a loss of power. The need to secure minority representation in the legislature cannot justify entrenchment, for minority party representation is also compatible with a system in which the loss of minority support implies a loss of representation. Constitutionally specified principles of representation, such as that of two Senators per State, cannot justify entrenchment where the House of Representatives or similar state legislative body is at issue. Unless some other justification can be found in particular circumstances, political gerrymandering that so entrenches a minority party in power violates basic democratic norms and lacks countervailing justification."). By "entrenchment," Breyer meant "a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power." *Id.* at 360.

28. Ben Saunders, *Democracy, Political Equality, and Majority Rule*, 121 ETHICS 148, 149 (2010).

29. DOUGLAS J. AMY, REAL CHOICES/NEW VOICES: HOW PROPORTIONAL REPRESENTATION ELECTIONS COULD REVITALIZE AMERICAN DEMOCRACY 39 (2d ed. 2002).

30. *Id.* For example, in the closest of those elections, in 2000, Republicans won 47.96% of the national vote, just more than the Democrats' 47.94%. *See id.*

31. This is notwithstanding the ways in which the Framers of the Constitution sought "to impede the operation of majority rule." *See* ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL 190 (1982).

32. In a FPTP district, the candidate with the most votes wins. *See Electoral Systems in the United States*, FAIRVOTE, https://fairvote.org/resources/electoral-systems/ (explaining how plurality voting works in the United States and comparing it to other voting systems used elsewhere in the world).

33. *See* AREND LIJPHART, PATTERNS OF DEMOCRACY 130 (2d ed. 2012); AMY, *supra* note 29, at 171; G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS 124–44 (2000).

"The plurality and majority single-member district methods," as Arend Lijphart put it, "are winner-take-all methods—the candidate supported by the largest number of voters wins, and all other voters remain unrepresented—and hence a perfect reflection of majoritarian philosophy."[34]

However, Lijphart has also noted that such district systems "can lead to seat victories for parties that are mere runners-up in vote totals," and described this as their "gravest democratic defect."[35] Similarly, in the influential work *Elections as Instruments of Democracy*, G. Bingham Powell, Jr., describes single-member district systems as part of a "majoritarian vision" of politics, then notes that it allows "vote-seat distortion that delivers a legislative majority to a plurality vote loser."[36] Powell describes this as "an unmitigated failure," as well as "a disaster from the majoritarian point of view, subjecting the larger number of voters to unchecked domination by the representatives of the smaller group."[37] The irony here is well-captured by Douglas Amy: "[T]his system can actually violate the principle of majority rule that it values so much."[38] How can district systems simultaneously "perfectly reflect" majoritarianism and yet still violate majority rule?[39]

The key is to distinguish majority rule *within* districts from majority rule *across* districts. A party can win a majority of votes in a majority of nationwide districts without winning a majority of voters nationwide. The same can happen in statewide elections. FPTP perfectly reflects majority rule within districts. But it can violate majority rule across districts. This raises an important question. Should the majority rule principle only apply within districts, or should it apply across districts too?

There is a compelling reason to think that we should apply majority rule across districts. It is suggested in the language from Lijphart and Powell above: By winning a "seat majority" or a "legislative majority" a party gains the capacity to *govern*.[40] Many defenses of majority rule turn on the perversity of *minoritarian governments*. A minoritarian government occurs when a party is elected to control a branch of government despite not winning the most votes in total. As Lijphart writes, "the majoritarian model of democracy . . . has great appeal because government by the majority and in accordance with the majority's wishes obviously comes closer to the democratic ideal of 'government by and for the people' than government by

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34. LIJPHART, *supra* note 33, at 130.

35. Arend Lijphart, *First-Past-the-Post, PR, Michael Pinto-Duschinksy, and the Empirical Evidence*, 36 REPRESENTATION 133, 134 (1999).

36. POWELL, JR., *supra* note 33, at 124, 144.

37. *Id.* at 144.

38. AMY, *supra* note 29, at 46.

39. *See* LIJPHART, *supra* note 33, at 130.

40. *See supra* notes 33–37 and accompanying text.

and responsive to a minority."[41] If we understand majority rule to guarantee *government by the majority* of voters, rather than merely government by a majority of voters in a majority of districts, then it must apply across districts.

Our understanding of majority rule as guaranteeing government by the majority has deep roots in American democracy. James Madison describes "[r]epublics" as being "where the people govern themselves, and where, of course, the majority govern."[42] Madison explicitly compared "a republican [g]overnment in which the majority rule the minority, and a government in which a lesser number or the least number rule the majority," and declared that the former is best, so "the vital principle of republican government is the *lex majoris parties*, the will of the majority."[43] If what matters is that the majority *govern*, then majority rule must apply across districts for the U.S. to be a republic in Madison's sense.[44] To apply majority rule only within districts is to sanction minority control of the government. Hence, as Akhil Amar argues, many of the Founding Fathers were clearly committed to the view "[t]hat a majority within a polity should rule, regardless of geographic distribution."[45] Consider how their "preeminent popular sovereignty theorist,"[46] James Wilson, responded to a concern at the Federal Convention of 1787 that some states might become far more populous than others: "The majority of people wherever found ought in all questions to govern the minority. If the interior Country should acquire this majority they will not only have the right, but will avail themselves of it whether we will or no."[47]

The clearest (and most notorious) recent illustrations of how a minority government can result from a district system comes from the U.S.

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41. LIJPHART, *supra* note 33, at 2.

42. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 36 (2001) (quoting Letter from James Madison, to Thomas Ritchie (1825), *in* THE FORGING OF AMERICAN FEDERALISM: SELECTED WRITINGS OF JAMES MADISON 46 (Saul K. Pandover ed., 1953)).

43. *Id.* at 37 (quoting THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 523, 525, 530 (Marvin Meyers ed., 1973)).

44. Likewise, consider Robert Dahl: "[A] democratic government provides an orderly and peaceful process by means of which a majority of citizens can induce the government to do what they most want it to do and to avoid doing what they most want it not to do." ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 95 (1989). This requires majority rule to be applied across districts, not just within districts. Similarly, Downs defines a democracy in part as a political system in which "[t]he party (or coalition of parties) winning a majority of votes gains control of the governing apparatus until the next election." Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135, 137 (1957).

45. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 506 (1994).

46. *Id.* at 474.

47. *Id.* at 506 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 605 (Max Farrand ed., rev. ed. 1937)); *see also* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 758 (1994).

presidential elections in 2000 and 2016. In both elections, the candidate who won the presidency lost the national popular vote.[48] Control over the executive branch of government was given to a candidate who did not receive the most votes. Many hold that these electoral outcomes were undemocratic because they violated majority rule.[49] Indeed, these examples have motivated the concerted effort to ensure that the presidency is held by a candidate who wins the national popular vote via implementing the National Popular Vote Interstate Compact.[50] Notice, however, that these electoral results are only inconsistent with the principle of majority rule if it applies across, not just within, the districts that constitute the Electoral College.

The National Popular Vote campaign argues that we should redesign presidential elections to bring them in line with majority rules, applied across districts. But should we do the same for the legislature? We can illustrate this issue by considering a simple hypothetical election between two parties, Blue and Red, in eight equally sized districts, A–H. Imagine this electoral result:

Table 1

	A	B	C	D	E	F	G	H	Total
Blue	4,998	4,998	4,998	4,998	4,998	9,900	9,900	9,900	54,690
Red	5,002	5,002	5,002	5,002	5,002	100	100	100	25,310

Assume that a party wins a district only with a majority of the districtwide vote and governs only by winning a majority of districts. The Red party will govern. It won a majority of the districts (62.5%) despite the Blue party winning two-thirds of the popular vote (68.4%). This example may seem extreme. But it is possible to generate even more lopsided electoral outcomes: "Even if all districts are perfectly equal in population, just over

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48. *See, e.g.*, Allyson Waller, *The Electoral College Explained*, N.Y. TIMES (Jan. 5, 2021), https://www.nytimes.com/article/the-electoral-college.html; *see also* DAHL, *supra* note 43, at 31 ("[T]he electoral college . . . preserved features that openly violated basic democratic principles," including that "a candidate with the largest number of popular votes might lose the presidency because of a failure to win a majority in the electoral college."); *id.* at 80 ("[W]inning the presidency with only a minority of popular votes has been a fairly common occurrence.").

49. *See, e.g.*, Michael Geruso et al., *Inversions in US Presidential Elections: 1836–2016*, at 30 (Nat'l Bureau of Econ. Rsch., Working Paper 26247, 2020); John M. Carey et al., *The Effect of Electoral Inversions on Democratic Legitimacy: Evidence from the United States*, 52 BRIT. J. POL. SCI. 1891, 1898 (2021).

50. For an explanation of the goals and recommendations of the National Popular Vote Interstate Compact, see *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/written-explanation.

25% of the voters can elect a majority of the legislators."[51] This is an instance of what is known in social choice theory as *the compound majority paradox* or *the referendum paradox*,[52] and is known elsewhere as an *election inversion* or *majority reversal*.[53]

Do such electoral results like the one just illustrated violate the principle of majority rule? I believe so.[54] Some may resist this point.[55] But as one commentator wrote, "[b]ecause the power to legislate vests in the legislative body as a whole, we should view the elections of individual legislators as subsidiary."[56] And if we do so, then some discussions of district systems are "precisely backwards."[57] By focusing on the election of individual legislators in individual districts, these discussions ignore cumulative effects on the legislative body as a whole. In other words, if majority rule is to guarantee legislative government by the majority, we need to apply majority rule to "the legislative body as a whole," just as we need to apply majority rule nationwide to the election of the U.S. President.[58]

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51. John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 166 n.13 (1984); *see also* ENID LAKEMAN, HOW DEMOCRACIES VOTE: A STUDY OF MAJORITY AND PROPORTIONAL ELECTORAL SYSTEMS 39–42 (3d ed. 1970).

52. Despite the name, the referendum paradox is not confined to referenda. The U.S. Presidential Election of 2000 is an oft-cited example of the paradox, as are cases of legislative results where a party wins a majority of districts despite receiving fewer votes than a rival. This is a relatively new paradox in social choice theory. The literature on it dates back to Hannu Nurmi, *Voting Paradoxes and Referenda*, 15 SOC. CHOICE & WELFARE 333, 336–38 (1998). A stronger version of the paradox was found by Hayrullah Dindar, Gilbert Laffond & Jean Laine, *The Strong Referendum Paradox*, 51 QUALITY & QUANTITY 1707, 1712–13 (2017). Recent discussions on how to quantify the probability of such paradoxical electoral results under different assumptions can be found in Pavlo Blavatskyy, *The Likelihood of the Referendum Paradox for a Given Referendum Result*, EUR. J. OF POL. ECON. 1 (2022), as well as Marc R. Feix et al., *The Probability of Conflicts in a U.S. Presidential Type Election*, 23 ECON. THEORY 227 (2004). And a sophisticated discussion of how the size of electoral districts affects the likelihood of such paradoxical results in the U.S. can be found in Nicholas R. Miller, *The House Size Effect and the Referendum Paradox in U.S. Presidential Elections*, 35 ELECTORAL STUD. 265 (2014).

53. For discussion, see especially Nicholas R. Miller, *Election Inversions by the U.S. Electoral College*, *in* ELECTORAL SYSTEMS: PARADOXES, ASSUMPTIONS, AND PROCEDURES (Dan S. Felsenthal & Moshé Machover eds., 2012). Miller notes at page 94 that this problem has received several names, and "the first theoretical work on election inversions" was by Kenneth May, *Probabilities of Certain Election Results*, 55 AM. MATHEMATICAL MONTHLY 203 (1948).

54. This accords with the common view that "it is direct democracy (either actual or ideal) that is used as a measuring rod for the success of representative government." John R. Chamberlin & Paul N. Courant, *Representative Deliberations and Representative Decisions: Proportional Representation and the Borda Rule*, 77 AM. POL. SCI. REV. 718, 719 (1983).

55. *See* Niko Kolodny, *What, If Anything, Is Wrong with Gerrymandering?*, 56 SAN DIEGO L. REV. 1013, 1024–28 (2019); Charles R. Beitz, *How Is Partisan Gerrymandering Unfair?*, 46 PHIL. & PUB. AFFS. 323, 331–44 (2019).

56. Akhil Reed Amar, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1307 (1984).

57. *Id.*

58. *Id.*

B. Minoritarian Government and Gerrymandering

We have just seen that enshrining majority rule within districts could generate minoritarian legislatures for the same reason that it has generated minoritarian presidencies.[59] But to see this as a democratic crisis, we need to know whether this problem is real and prevalent, rather than just theoretically possible.

It is. Like Levitsky and Ziblatt, many recent commentators have lamented that in America today, the majority does not govern.[60] The simplest examples of minority rule within legislatures involve state assemblies. In the election of the Wisconsin State Assembly in 2018, Democratic candidates received over 50% of the popular vote, but Republicans won over 60% of the seats.[61] In 2018, Democratic candidates also received the majority of the statewide popular vote in Pennsylvania (54%), Michigan (53%), and North Carolina (51%), but Republicans won a majority of seats in the state assemblies in all three states.[62] There are many other examples.[63]

In many of these examples, minoritarian state legislatures result from partisan gerrymandering—drawing district boundaries to increase the power of a political party. Partisan gerrymandering also plays a considerable role in producing minoritarian control of the U.S. House of Representatives. Consider the electoral outcomes that followed recent U.S. Supreme Court cases on this issue. In June 2018, the U.S. Supreme Court found that the plaintiffs in *Gill v. Whitford*[64] did not have legal standing to challenge the constitutionality of Wisconsin's districting scheme.[65] In November of that year, Republican candidates won five of the eight congressional districts in Wisconsin, despite Democratic candidates having won 53% of the statewide vote.[66] Similarly, in 2019, the Court considered partisan gerrymandering in

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59. *See supra* Section I.A.

60. *See supra* note 3 and accompanying text; *supra* Section I.A.

61. Josh Klemons, *Wisconsin's Undemocratic Result from a Democratic Election*, MILWAUKEE INDEP. (Nov. 14, 2018), http://www.milwaukeeindependent.com/syndicated/wisconsins-undemocratic-result-from-a-democratic-election/.

62. 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/.

63. Amy offers plenty more. *See, e.g.*, AMY, *supra* note 29, at 45 ("In the 1982 Indiana state elections the Democratic candidates for the Indiana House received 51.9 percent of the votes, but were given a minority—43 percent—of the seats.").

64. 138 S. Ct. 1916 (2018).

65. *Id.* at 1933–34.

66. *See Election Results Archive*, WIS. ELECTIONS COMM'N (Nov. 30, 2022), https://elections.wi.gov/elections/election-results/results-all#accordion-859 (under tab "2018 Fall General Election Results"); *Wisconsin*, CNN (Dec. 21, 2018),

North Carolina in *Rucho v. Common Cause*.[67] Despite holding that excessive partisan gerrymandering "leads to results that reasonably seem unjust" and is "incompatible with democratic principles," the Court ruled that it presents "political questions beyond the reach of the federal courts."[68] In November 2020, North Carolina's congressional elections proceeded with gerrymandered districts. Republican candidates won eight of thirteen congressional districts (61.5%), despite Democratic candidates having won a majority of statewide votes.[69] North Carolina's gerrymandered districts are currently before the Court again in *Moore v. Harper*,[70] the resolution of which could make it more difficult to challenge any districting schemas imposed by state legislators in state courts.

In a particularly important case for present purposes, *Vieth v. Jubelirer*,[71] the Court considered a majoritarian constraint on partisan gerrymandering. The appellants argued that Pennsylvania's districting scheme violated the following proposed test: "(1) the plaintiffs show that the districts systematically '"pack"' and '"crack"' the rival party's voters, and (2) the court's examination of the '"totality of circumstances"' confirms that the map can thwart the plaintiffs' ability to translate a majority of votes into a majority of seats."[72]

The Court rejected this proposed test in 2004, and Pennsylvania continues to have gerrymandered districts.[73] The map thwarts the ability of Democrats to translate a majority of votes into a majority of seats. Indeed, in 2012, Democratic congressional candidates received 50.3% of the statewide vote, but won only 27.8% of its districts.[74] And in 2018, Democratic candidates received 55% of Pennsylvania's statewide vote, but still did not

https://www.cnn.com/election/2018/results/wisconsin/house (presenting district-by-district results).

67. 139 S. Ct. 2484 (2019).

68. *Id*. at 2506−07 (quotations and citations omitted).

69. Democratic candidates won 49.96% of statewide vote (to the Republican's 49.4%). *See* CHERYL L. JOHNSON, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, 117TH CONG., STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 3, 2020, at 55 (2021), https://history.house.gov/Institution/Election-Statistics/2020election/.

70. 142 S. Ct. 1089 (2022).

71. 541 U.S. 267 (2004).

72. *Id.* at 286−87 (emphasis omitted) (footnote omitted) (quoting Brief for Appellants at 20, *Vieth*, 541 U.S. 267 (No. 02-1580)).

73. *See Pennsylvania*, Gerrymandering Project, PRINCETON UNIV. (Feb. 23, 2022), https://gerrymander.princeton.edu/redistricting-report-card?planId=recT95YHHudtpR3Fc (evaluating the latest Pennsylvania map and finding that Republicans have a +8.8% "partisan bias").

74. KAREN L. HAAS, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, 112TH CONG., STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 6, 2012, at 52–53 (2013), https://history.house.gov/Institution/Election-Statistics/2012election/; *2012 Pennsylvania House Results*, POLITICO (Nov. 19, 2012, 2:48 PM), https://www.politico.com/2012-election/results/house/pennsylvania/.

win a majority of seats.[75] In these cases, then, one party has won a majority of the House districts in a state with a minority of the statewide vote, partly due to Court rulings that allowed partisan gerrymandering.[76]

Of course, some may object to such electoral results on strictly partisan grounds.[77] But if the objection is that these outcomes are *undemocratic*, it should hinge on the fact that one party is favored, regardless of which it happens to be. And historically, such outcomes have favored both Democrats and Republicans.[78] And there is an obvious reason to hold that increasingly pervasive and sophisticated[79] use of partisan gerrymandering in statewide delegations to the federal legislature is undemocratic. It contributes to the

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75. CHERYL L. JOHNSON, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, 115TH CONG., STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 6, 2018, at 43–45 (2019), https://history.house.gov/Institution/Election-Statistics/2018election/; *Pennsylvania House Election Results 2018*, POLITICO (Dec. 14, 2018, 5:11 PM), https://www.politico.com/election-results/2018/pennsylvania/house/.

76. In *Rucho* the Court also left in place Maryland's districting schema, under which Democratic candidates in 2020 won 87.5% (seven out of eight) of the Congressional Districts, with 64.75% of the statewide vote. *See Official 2020 Presidential General Election Results for Representatives in Congress*, MD. STATE BD. OF ELECTIONS (Dec. 4, 2020), https://elections.maryland.gov/elections/2020/results/general/gen_results_2020_4_008X.html; JOHNSON, *supra* note 69, at 34. This result is compatible with majority rule (and the proposed test in *Vieth*), so those who object that it is undemocratic need to appeal to a more demanding principle.

77. An unusually earnest and explicit instance of this comes from Kolodny, *supra* note 55, at 1018 ("To be sure, I think that partisan gerrymandering, in particular, has led to worse results for most of the current decade. But to a great extent, I think this for partisan reasons. It has led to Republican control of Congress.").

78. *See, e.g.*, AMY, *supra* note 29, at 45–46 ("[I]n the 1994 elections for the U.S. House of Representatives in California, the Democrats won 52 percent of the seats even though they came in second place with 47 percent of the statewide vote. That same year, the Democrats pulled off the same political coup in Louisiana and Michigan as well. In the 1996 House races in Washington State, the Republicans trailed the Democrats with only 47 percent of the vote, but won 67 percent of the seats. In 1998, Florida Republicans came in second in the vote to the Democrats, but won 65 percent of the U.S. House seats. In Pennsylvania and Virginia that year it was the Democrats who benefited from this unfair representation. And in 2000, Democrats in Texas, Wisconsin, and Arkansas all placed second to Republicans in terms of votes, and yet they won the majority of their states' U.S. House seats. That same year in New Mexico, the Republican's second place finish in the vote gave them a majority of that state's House seats. The main point, of course, is that in all these cases the majority voters in those states were forced to watch helplessly as most of their representatives in the U.S. House pursued policies at odds with their wishes. This is not the way democracy is supposed to work."); Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 AM. POL. SCI. REV. 1251, 1262 (1987) (finding partisan biases for Democrats and Republicans in different states including Texas, where they describe finding "severe biases toward the Democrats, permitting them to win a majority of the seats with less than 30% of the votes"); STEVEN HILL, FIXING ELECTIONS: THE FAILURE OF AMERICA'S WINNER TAKE ALL POLITICS 216 (2002).

79. *See, e.g.*, Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, ATLANTIC (Oct. 28, 2017), https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/ (noting that "the proliferation of new tools," such as election simulation software, "has seemingly increased . . . the rate of gerrymandering").

minoritarian governance in Congress,[80] by contributing to the *partisan bias* of Congress,[81] which is at "historic highs."[82]

But partisan gerrymandering is not the sole cause of minoritarian governance in Congress.[83] It plays no role in the Senate, which is a multi-member district system: Each State is an electoral district represented by two Senators, and State boundaries are not subject to regular redistricting. The geographical distribution of voters along partisan lines is what advantages Republicans in the Senate.[84] Democratic voters are concentrated in dense urban areas. Republican voters are spread across rural and exurban areas.[85] This "natural sorting" of voters predictably gives one party a more efficient distribution of voters and is often called *unintentional gerrymandering*.[86] Partisan and unintentional gerrymandering both violate majority rule, and many regard both as undemocratic. However, minoritarian government does not become unobjectionable in a district system when it is unintentionally produced "by something as capricious as where people happen to live and vote."[87]

A distinct feature of the Senate is also relevant to the prevalence of minority rule. The Senate guarantees equal representation to each State regardless of its population. There are almost sixty-eight Californians to every one Wyomingite, but Wyoming and California each elect two

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80. That is, winning a majority of statewide districts with a minority of the statewide vote helps a party to win a majority of the national districts with a minority of the national vote.

81. For discussion, see Barry Burden & Corwin Smidt, *Evaluating Legislative Districts Using Measures of Partisan Bias and Simulations*, 10 SAGE OPEN, Dec. 22, 2020, at 1, 2.

82. David Wasserman, *The Congressional Map Has a Record-Setting Bias Against Democrats*, FIVETHIRTYEIGHT (Aug. 7, 2017, 5:54 AM), https://fivethirtyeight.com/features/the-congressional-map-is-historically-biased-toward-the-gop/ ("We can quantify the partisan bias of Congress over time by measuring the distance between each *national* presidential result and each year's presidential result in the *median* House and Senate seats. So in 2008, for example, Barack Obama won the popular vote by 7.3 percentage points, but Democrats won the median House seat by 4.4 points — a pro-GOP bias of 2.9 points. . . . In 2016, Trump lost the national popular vote by 2.1 percentage points, but Republicans won the median House seat by 3.4 points and the median Senate seat by 3.6 points — that's the widest Senate gap in at least a century and tied with 2012 for the widest House disparity in the last half-century.")

83. There is some debate about whether natural sorting or partisan gerrymandering is a bigger contributor to the partisan bias in the House. *See generally* Richard J. Powell, Jesse T. Clark & Matthew P. Dube, *Partisan Gerrymandering, Clustering, or Both? A New Approach to a Persistent Question*, 19 ELECTION L.J. 79 (2020).

84. JONATHAN RODDEN, WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE 166 (2019).

85. *Id.* at 3–5, 5 fig.1.

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

87. AMY, *supra* note 29, at 50.

Senators.[88] Many object that this is a "profound violation of the democratic idea of political equality among all citizens"[89] that "makes an absolute shambles of the idea that in the United States the majority of the people rule."[90] If one party's voters are more concentrated in larger states, as is the case today, a minority party can easily capture the Senate.[91]

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88. *Compare QuickFacts: California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/CA (last visited Nov. 25, 2022) (estimating 39,237,836 Californians in July 2021), *with QuickFacts: Wyoming*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/WY (last visited Nov. 25, 2022) (estimating 578,803 Wyomingites in July 2021), for a ratio ~67.79 Californians per Wyomingite.

89. DAHL, *supra* note 42, at 49.

90. LEVINSON, *supra* note 8, at 58.

91. Unfortunately, many conflate this majoritarian objection to the Senate with an entirely distinct complaint. Consider Levitsky and Ziblatt's *End Minority Rule* from October 2020 once more: "Democrats easily won more overall votes for the U.S. Senate in 2016 and 2018, and yet the Republicans hold 53 of 100 seats. The 45 Democratic and two independent senators who caucus with them represent more people than the 53 Republicans. This is minority rule." Levitsky & Ziblatt, *supra* note 4. In the first sentence, the objection is to a party controlling the Senate without *winning the most votes*. In the second, read in context, it is to a party controlling the Senate without *representing the most people*. These are distinct, and the principle of majority rule is only concerned with the first complaint, not the second. Notice that Levitsky and Ziblatt also suggest that Trump's election was undemocratic since he "lost the popular vote." *Id.* But while Trump did not win the most votes in 2016, Trump did represent the most voters. The total populations of the Electoral College districts that Trump won was 173,763,090; for Clinton, that number was 134,982,448. These calculations were made using the 2010 Census figures, combined with official 2016 election results. *See Decennial Census by Decade*, U.S. CENSUS (Aug. 4, 2022), https://www.census.gov/programs-surveys/decennial-census/decade.2010.html; *Election Results for the U.S. President, the U.S. Senate and the U.S. House of Representatives*, U.S. FED. ELECTION COMM'N 6 (2017), https://www.fec.gov/resources/cms-content/documents/federalelections2016.pdf. The same complaint can be raised about other political commentary. *See, e.g.*, Mara Liasson, *Democrats Increasingly Say American Democracy Is Sliding Toward Minority Rule*, NPR (June 9, 2021, 5:00 AM), https://www.npr.org/2021/06/09/1002593823/how-democratic-is-american-democracy-key-pillars-face-stress-tests. The Supreme Court engaged in reasoning that is similarly ambiguous in the reapportionment cases. Some of their concerns regard whether a party *wins the most voters,* and some whether it *represents the most voters*. Low-Beer provides examples. Low-Beer, *supra* note 51, at 166–67 (first citing Reynolds v. Sims, 377 U.S. 533, 569 (1964); then citing WMCA, Inc. v. Lomenzo, 377 U.S. 633, 647 (1964); and then citing Gaffney v. Cummings, 412 U.S. 735, 744 n.9 (1973)). But Low-Beer does not note the ambiguity above. Malapportioned districts allow a party to control the legislature without winning the most votes *or* representing the most voters.

Perhaps one reason why commentators fall back on the complaint that one party *represents fewer votes* in the Senate is due to the complexities in calculating which party has won more votes (we must consider all three relevant electoral cycles, as well as special elections). And as Amy notes more generally, violations of majority rule across districts are a "hidden problem" because media reporting of electoral results in the legislature rarely provides "the total vote that the parties win in local, state, and federal legislative elections." AMY, *supra* note 29, at 42. Accordingly, I provide a detailed margin of victory analysis for the Senate in Part IV, *infra.*

C. The Dilemma

If minoritarian government is the problem, what is the solution? There is no National Popular Vote Compact for Congress. If the problem stemmed only from partisan gerrymandering, we could consider familiar measures such as giving the power to redistrict to independent commissions.[92] But as we just saw, eliminating partisan gerrymandering on its own cannot end minority rule.[93] Indeed, according to a view that is influential in academia and the courts, the threat of minority rule is not posed by partisan redistricting, but by the district system itself. This was the position expressed by Justice Scalia in the second epigraphic quote above. As Enid Lakeman put it, since a minority party can be victorious due to the "concentration of the majority's strength in certain districts," this undemocratic outcome "cannot be prevented if each constituency elects only one member."[94] In slogan form, if majority rule is desired, district systems must be avoided.[95] We can appreciate this point further by noting that minority rule arises in other district systems,[96] including those which do not involve single-member districts, partisan gerrymandering, or malapportionment. They also arise in district systems which use voting rules other than FPTP.[97]

There appears, then, to be a deep conflict between district systems and majority rule. This conflict between lies at the heart of Scalia's reasoning in

92. Several states have recently taken this route. And it accords with the objection to gerrymandering, as Mitch Berman put it, that "voters should choose their representatives, not the other way around." Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 781 (2005). Though, the track records of these commissions are questionable. Critics hold that independent commissions have become "bogged down in political trench warfare." Nick Corasaniti & Reid J. Epstein, *How a Cure for Gerrymandering Left U.S. Politics Ailing in New Ways*, N.Y. TIMES (Nov. 17, 2021), https://www.nytimes.com/2021/11/17/us/politics/gerrymandering-redistricting.html; *see also* Nathaniel Rakich, *Did Redistricting Commissions Live Up to Their Promise?*, FIVETHIRTYEIGHT (Jan. 24, 2022, 6:00 AM), https://fivethirtyeight.com/features/did-redistricting-commissions-live-up-to-their-promise/.

93. *See supra* Sections I.A, I.B.

94. LAKEMAN, *supra* note 51, at 16, 76.

95. Here I paraphrase Felsenthal and Machover: "*if majority rule is desired*, two-tier systems must be avoided as far as possible." FELSENTHAL & MACHOVER, *supra* note 25, at 87. Their discussion of two-tier systems is intended to cover congressional district systems and the Electoral College (the election of statewide electors is considered one tier, and the election of the President is a second tier). *Id.* at 81–82; *see also* Kolodny, *supra* note 55, at 1024–25.

96. As Amy notes, "[i]ncidents of the second-place party winning the majority of seats in the national legislature have taken place in almost all [single-member plurality] countries, including Canada, Great Britain, and New Zealand." AMY, *supra* note 29, at 16, 44.

97. For example, Australia uses instant runoff voting ("IRV"). But in the Australian federal election of 1998, the Coalition government led by John Howard was reelected with 80 seats (to the Labour Party's 67) despite winning 49.02% of the vote (to Labour's 50.98%). *See House of Representatives - Two Party Preferred Results 1949–Present*, AUSTRALIAN ELECTORAL COMM'N (July 20, 2022), https://www.aec.gov.au/Elections/federal_elections/tpp-results.htm (providing percentages); Ian McAllister, *Tax Reform not Race Debate: The October 1998 Australian Federal Election*, 34 GOV. & OPPOSITION 44, 55 (1999) (providing seat totals).

Vieth. Scalia starts by noting an important difference between racial and partisan gerrymandering.[98] While race is an immutable characteristic, political affiliation is not. Scalia notes that the latter:

> [M]ay shift from one election to the next; and even within a given election, not all voters follow the party line. We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold. These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy.[99]

Scalia's point is that any concerted effort to redraw districts so that the party with the most votes won the most seats would have dim prospects. We could use past voting behavior to predict the future, but even card-carrying partisans sometimes switch parties between elections.[100] Because future voter behavior is unpredictable, it is not clear how any actor—however well-intentioned and well-informed—can redraw boundaries *ex ante* to guarantee *ex post* that the party that receives the most votes in the election wins the most seats. Hence Scalia's conclusion: "[R]equiring judges to decide whether a districting system will produce a statewide majority for a majority party casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon."[101]

The upshot of this argument is that the conflict between majority rule and districting systems is ineliminable. So we seem to face a dilemma.

One way to resolve the dilemma is to give up on district systems. Some take this route, typically opting for a form of proportional representation.[102] Indeed, this line of reasoning is so common that Scalia wrote in *Vieth* that the appellant's majoritarian "standard rests upon the principle that groups (or at least political-action groups) have a right to proportional representation."[103] Since this is one of Scalia's arguments for rejecting the majoritarian standard, it is worth pausing to note that his claim is hard to defend. Many arguments

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98. Vieth v. Jubelirer, 541 U.S. 267, 284–95 (2004).

99. *Id.* at 287 (citation omitted).

100. *See, e.g.*, Steve Peoples, *More than 1 Million Voters Switch to GOP, Raising Alarm for Democrats*, PBS NEWS HOUR (June 27, 2022, 4:30 PM), https://www.pbs.org/newshour/politics/more-than-1-million-voters-switch-to-gop-raising-alarm-for-democrats ("More than 1 million voters across 43 states have switched to the Republican Party over the last year, according to voter registration data analyzed by The Associated Press.").

101. *Vieth*, 541 U.S. at 290.

102. For examples, see AMY, *supra* note 29, at 186; ANTHONY J. MCGANN ET AL., GERRYMANDERING IN AMERICA: THE HOUSE OF REPRESENTATIVES, THE SUPREME COURT, AND THE FUTURE OF POPULAR SOVEREIGNTY 201 (2016); ANTHONY MCGANN, THE LOGIC OF DEMOCRACY: RECONCILING EQUALITY, DELIBERATION, AND MINORITY PROTECTION 35–36 (2006).

103. *Vieth*, 541 U.S. at 288.

for majority rule neither rest on nor entail arguments for proportional representation.[104] Proportional representation does not even guarantee majority rule, in that it allows for election inversions.[105] Even proponents of proportional representation regard minority rule as more seriously undemocratic than a majority party with an "exaggerated" majority of seats in the legislature.[106] Minoritarian gerrymandering is similarly regarded as especially undemocratic, even when it is no less a violation of a putative right to proportional representation.[107]

The other option is to appeal to the democratic virtues of district systems to justify giving up the principle of majority rule (at least, across districts).[108] Two virtues of district systems are most prominently mentioned. One is that district systems make political representatives more responsive to voters in geographical localities.[109] The other is that district systems generate more stable, durable political coalitions.[110] If these virtues make district systems democratically permissible, but they do not guarantee majority rule across

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104. *See, e.g.*, Risse, *supra* note 24, at 60.

105. *See, e.g.*, LIJPHART, *supra* note 33, at 155 ("[A]ny manufactured majorities in [proportional representation] systems tend to be produced from popular votes that are closer to 50 percent instead of the popular votes closer to 40 percent that are typical in plurality countries."); *see also* Dan S. Felsenthal & Nicholas R. Miller, *What to Do About Election Inversions under Proportional Representation?*, 51 REPRESENTATION 173 (2015) (exploring the obstacles for preventing election inversions under proportional representation).

106. AMY, *supra* note 29, at 36–37. Amy considers "exaggerated majorities" to be the "the least objectionable result" of district systems, considers "manufactured majorities" ("when election procedures give a party that receives less than 50 percent of the vote more than 50 percent of the seats in the legislature") to be "more unfair and undemocratic," and considers the unfairness to be extreme when a party who received fewer votes than a rival wins more than 50% of the seats in the legislature. *Id.*

107. This is consistent with holding, as Nicholas Stephanopoulos and Erin McGhee do, that "gerrymandering is harmful even when it does not produce a legislative majority for a party that receives a minority of the statewide vote." Nicholas O. Stephanopoulos & Erin M. McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 STAN. L. REV. 1503, 1515 (2018).

108. *See* Beitz, *supra* note 55, at 331–32; *see also* Kolodny, *supra* note 55, at 1024–25.

109. Amy explains the common argument:

> [Single-member plurality] elections typically involve small geographic districts, each of which has its own legislative representative. This system is thought to encourage a close identification between the voters and their representatives. Legislators can be trusted to understand and represent the interests of voters in their particular neighborhood, city, county, or district. Proportional representation, it is argued, weakens this relationship.

AMY, *supra* note 29, at 210–11. Notably, Amy, like some other proponents of proportional representation, prefers a mixed system that also provides "the geographical representation and close constituency ties of single-member plurality voting." *Id.* at 20.

110. For an overview of this argument, see LIJPHART, *supra* note 33, at 62 (this factor "further explains the majoritarians' strong preference for plurality, instead of proportional representation"). There are, of course, other alleged benefits of district systems. *See* AMY, *supra* note 29, at 187–88 (summarizing the main objections to proportional representation, including that it results in small parties wielding too much power, reduces accountability, and encourages political extremism).

districts, then we should not require majority rule across districts.[111] Minority rule is only objectionable within districts. Those like Madison who defend majority rule as a system of *government* by the majority are just confused.

Some readers may be sympathetic to one of these positions. For my purposes, that is fine. My point is not that neither position is satisfactory. It is that we need not choose between them. The choice between majority rule across districts and the district system itself is really a false one. District systems can guarantee majority rule within districts *and* across districts. Because I aim to defend this position as a way to defuse this dilemma, I am not going to spend more time arguing for majority rule, let alone arguing against rivals to district systems. With that said, showing *how* a district system can guarantee majority rule within and across districts is relevant to whether we should endorse both district systems and the principle of majority rule. Such is the aim of the next Part.

II. MAKING MARGINS MATTER

In this Part, I explain how a district system can guarantee majority rule by making margins matter. First, I argue that the alleged incompatibility of district systems with majority rule stems from a false diagnosis of the underlying problem.[112] There is only a conflict between district systems and majority rule if we assume that margins of victory are irrelevant to legislative power. If the irrelevance of margins of victory is the problem, a natural solution is to make margins matter. Second, I explain how we can make margins matter by adopting WVMV, which is a novel form of weighted voting (as extant forms of weighted voting involve weighting by population, not by margins of victory).[113] I show how WVMV can be developed to preserve the virtues of electoral district systems while guaranteeing majority rule within and across districts. Finally, I turn to how WVMV provides an answer to a powerful objection from *Vieth* against applying the majority rule principle across districts—that doing so would ignore the distinctive features of separate candidates in separate districts and instead treat their party affiliation as all that matters.[114]

A. *The Irrelevance of Margins of Victory*

Consider the election between Red and Blue once more. Each district is of the exact same size. Red candidates win a majority of districts (62.5%)

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111. *See* Kolodny, *supra* note 55, at 1024–28; Beitz, *supra* note 55, at 331–44.

112. *See infra* Section II.A.

113. *See infra* Section II.B.

114. *See infra* Section II.C; Vieth v. Jubelirer, 541 U.S. 267, 288–89 (2004); *see also* Beitz, *supra* note 55, at 335.

despite the Blue candidates receiving 68.4% of the vote. How? The answer is obvious. The victorious Red candidates had narrow margins of victory (5,002 to 4,998) compared to the victorious Blue candidates (9,900 to 100). By winning five seats in squeakers and losing three seats in landslides, they won a majority of seats with a third of the vote.

This answer is not only obvious, but inevitable. Without inequalities in district sizes, the only way to win a majority of districts with a minority of the vote is to win a majority of districts with narrow margins and lose others by large margins.

This answer is also not new. It was noted by Ruth Silva in 1964,[115] Lakeman in 1970,[116] and by Thomas Christiano in 1996.[117] Indeed, the answer forms the basis for prominent measures of partisan bias in elections. Since gerrymandering involves the manipulation of margins of victory to maximize victories, standard measures of partisan bias in elections involve measures of differences in margins of victory,[118] including the currently

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115. In explaining how Republicans won majorities in statewide elections over a decade in New York without winning a majority of the statewide vote, Silva noted that part of the explanation lay with malapportionment, and the other part lay with how "district lines are drawn so that Democratic electoral strength is concentrated in certain districts. Consequently, the Democrats roll up large electoral majorities in these districts while they lose other districts by a narrow margin." Ruth C. Silva, *Relation of Representation and the Party System to the Number of Seats Apportioned to a Legislative District*, 17 W. POL. Q. 742, 743 (1964) (footnote omitted).

116. LAKEMAN, *supra* note 51, at 73–75. Lakeman notes that:

> Many people find difficulty in believing that if the result of an election is as fair as it can be made in each constituency individually, the result over the whole country can yet be very unfair—especially that if each seat be contested only by two parties it is possible for the smaller of the two to win.

Id. at 73. After providing historical examples of minoritarian governments (from South Africa in 1948 and 1953), Lakeman wrote:

> What then did account for the victory of the minority on both occasions? It becomes obvious if we arrange the successful candidates in the order of their majorities: most United Party candidates polled many votes that were wasted in piling up huge majorities, while most Nationalist candidates slipped into their seats by small majorities.

Id. at 75. And Lakeman clearly expressed that the irrelevance of margins of victory was part of the explanation: "Since one majority, no matter how large or how small, returns one candidate, a party whose votes are so distributed as to give small majorities in many places will win more seats than a larger party whose votes are concentrated in a few places." *Id.*

117. In the most recent edition of the book, *The Rule of the Many: Fundamental Issues in Democratic Theory*, Christiano made the point in the following objection to single-member district representation:

> There can be citizens of a certain point of view who are a majority in the society but who are represented in such a legislature by a minority of legislators. These citizens may be a very large majority in a few districts and very large minorities in the rest, making them a majority of the population overall but giving them a minority of representatives in the legislature.

THOMAS CHRISTIANO, THE RULE OF THE MANY: FUNDAMENTAL ISSUES IN DEMOCRATIC THEORY 225 (Routledge 2018).

118. Stephanopoulos & McGhee, *supra* note 107, at 1506–07.

prominent measure known as the "efficiency gap."[119] Indeed, the reason why votes which "do not contribute to a candidate's election"[120] are *wasted*, and the gap in wasted votes is a gap in *efficiency*, is that the number of electoral victories is what matter for legislative power, not the margins of victory. Gerrymandering converts a total number of statewide votes into a more efficient share of statewide victories.

This observation undermines the common narrative that district systems are incompatible with majority rule (across districts).[121] There is no conflict between the two *per se*. The conflict only arises when we presuppose that margins of victory do not matter; that is, when votes that change the margin of victory, but do not change who wins, are wasted. So the irrelevance of margins of victory to legislative power must be central to any diagnosis of the problem of minoritarian governance. That's why we should reject the view that if majority rule is desired, district systems must be avoided. Instead, we should hold that if majority rule and district systems are desired, we should make margins of victory matter. Once we see this diagnosis of the underlying issue, it is unclear what other solution there could be.[122]

B. Weighted Voting by Margins of Victory

But how can we make margins matter? And how can doing so prevent minority rule without abandoning district systems (contrary to the common narrative that this is impossible)? The key initial insight is that prevailing district systems operate with a binary approach to legislative power: A candidate either receives one vote in Congress (if they win their district) or zero votes in Congress (if they lose). But the legislative power of

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119. Nicholas Stephanopoulos and Eric McGee are the main proponents of the efficiency gap. They explain it as follows:

> The efficiency gap is rooted in the insight that partisan gerrymandering is always carried out in one of two ways: the *cracking* of a party's supporters across many districts, in which their preferred candidates lose by relatively narrow margins, or the *packing* of a party's backers into a few districts, in which their preferred candidates win by overwhelming margins. Both cracking and packing produce what are known as *wasted votes*—votes that do not contribute to a candidate's election. In the case of cracking, all votes cast for the losing candidate are wasted; in the case of packing, votes cast for the winning candidate above the 50% (plus one) threshold needed for victory are wasted. The efficiency gap is simply one party's total wasted votes in an election, minus the other party's total wasted votes, divided by the total number of votes cast.

Id. at 1506 (footnotes omitted).

120*. Id.*

121. For an explanation of this narrative, see *supra* Section I.C.

122. For example, Christiano notes several reasons why we cannot solve the problem through reapportionment. CHRISTIANO, *supra* note 117, at 226–27.

representatives can instead be *gradable*. Victorious candidates can receive *more* or *less* legislative power, in the form of votes of varying weights.[123]

This points to a way out of the dilemma. We can guarantee majority rule *within districts* by requiring that a candidate win the most votes to win an election (and receive any legislative power at all). And at the same time, we can guarantee majority rule *across districts* by making how much legislative power parties and candidates receive (i.e., the weight of votes) a function of margins of victory. In doing so, we can make margins of victory matter within and across districts. This idea is novel, though not unprecedented.[124]

The best way to introduce this proposal is to start with the fundamentals. The most fundamental notion is a *weighted vote*. The "weight" of one's vote means the number of votes one controls, which may be fractional. In a system with weighted votes, one voter may control one vote, another may control two votes, and a third may control 0.75 votes. Weighted voting systems could

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123. Concerns about the idea of giving representatives votes of unequal weight have been addressed by proponents of weighted voting by population. *See, e.g.*, Jurij Toplak, *Equal Voting Weight of All: Finally One Person, One Vote from Hawaii to Maine*, 81 TEMP. L. REV. 123, 149–51 (2008).

124. This idea was initially inspired by a part of Alexander Guerrero's *The Epistemic and Metaphysical Roles of Voting: Addressing the Dual-Role Dilemma*. Towards the end, Guerrero briefly proposes that as part of an approval voting system, we should make "the approval level of the eventual winning candidate tied to the moral and legal powers of that candidate," and then elaborates: One way of implementing this would be to "give individuals different powers, depending on their levels of support," while another would be to "give each elected representative an approval score, tied to the percentage of eligible voters who cast a vote for them" and then make "votes on some particularly significant issues . . . be weighted" depending on the representative's approval score. Alexander Guerrero, *The Epistemic and Metaphysical Roles of Voting: Addressing the Dual-Role Dilemma* (manuscript at 23–24), https://bcourses.berkeley.edu/courses/1467146/files/72627125/download?verifier=rxi3pgy66EAU zqQfjjjRRubbY24qB4L4M8fNmrEe&download_frd=1. The latter idea is very different from mine and is framed as part of a solution to a different problem (one similar to the problem I discuss in Daniel Wodak, *The Expressive Case Against Plurality Rule*, 27 J. POL. PHIL. 363 (2019)). But reading this interesting proposal is what initially catalyzed my thinking about the idea I develop in this section.

   Just prior to publishing this piece, I came across Dan S. Felsenthal and Nicholas R. Miller's *What to Do About Election Inversions under Proportional Representation?*, *supra* note 105, who offer the following as a "radical solution" to election inversions: "[E]ach party is assigned a *voting weight* precisely equal to the number of votes it received in the election." They explain the idea as follows:

> Corporate entities commonly assign to every shareholder a number of votes equal to the number of shares he or she holds. Since parliaments under [proportional representation] arguably resemble an assembly of shareholders, every party in parliament might be assigned a number of votes that is exactly equal to the number of valid votes it received in an election. This idea is so simple and natural that it is striking that it has rarely been proposed.

Felsenthal & Miller, *supra* note 105, at 179. This idea is very similar in its form to mine, though it is less developed, and they go on to claim that the "voting weight solution to the problem of election inversions under PR cannot avoid inversions under 'majoritarian' electoral systems" such as those used in the U.S. *Id.* at 185 n.13.

involve giving citizens weighted votes in elections, but my proposal will not take that form. Instead, it will involve giving representatives weighted votes in the legislature. For ease of reference, I will sometimes refer to how many votes a legislator controls in the legislature as her "legislative power" (and likewise to how many votes a party controls in the legislature as its cumulative "legislative power"), though this phrase should be understood as a shorthand for referring to the weight of votes.[125] But what determines how much weight a representative's vote has in the legislature? In the forms of weighted voting used in the U.S., the answer is *population*: The weight of representatives' votes is determined by the population of their electorate.[126]

A good illustration of these forms of weighted voting comes from *Korman v. Giambra*.[127] In this case, the United States District Court for the Western District of New York instituted a system of weighted voting as a remedy for malapportioned districts in Erie County.[128] That is, instead of redrawing the county's seventeen districts to make them roughly equal, the court ordered that prior district boundaries be preserved and each legislator's vote be weighted by the size of their electorate.[129] Districts had unequal sizes, and the weight of their representative's vote was determined (to three decimal

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125. While the phrase is helpful for connoting the weight of votes *cast in the legislative body*, it is potentially misleading in three respects. First, such votes do not always concern legislation; they may also concern appointments, hearings, or other matters delegated to the legislative body. Second, not all of legislators' powers are powers they exercise by voting (and hence not all of them can be weighted under any form of weighted voting). Even non-voting members of the House of Representatives have "proposal power." For related discussion, see James M. Snyder, Michael M. Ting Jr. & Stephen Ansolabehere, *Legislative Bargaining under Weighted Voting*, 95 AM. ECON. REV. 981 (2005). And third, as discussed in Part III, a vote's weight is not equivalent to a vote's power. Though this is a minor point, since when quantifying "the voting power of individual representatives (whose numbers are relatively great, typically in the hundreds), the Penrose Limit Theorem suggests that voting power is approximately equal to voting weight." Felsenthal & Miller, *supra* note 105, at 181.

126. For example, John F. Banzhaf III defines weighted voting as follows: "Under such systems, in lieu of actual redistricting or reapportionment so that legislators represent substantially equal numbers of constituents, districts of substantially unequal population are preserved, and each legislator casts a number of votes proportional to the population of his district." John F. Banzhaf III, *Weighted Voting Doesn't Work: A Mathematical Analysis*, 19 RUTGERS L. REV. 317, 317–18 (1965). Toplak notes that the term:

> [W]eighted-voting systems. . . . is used to describe two different types of voting schemes[:] [T]he representation scheme in which voters have equal weight and representatives' voting weight is proportional to the number of people they represent,"
> and "elections in special districts in which voters have an unequal number of votes, depending on their property or other characteristics.

Toplak, *supra* note 123, at 146 n.175. WVMV does not fit either description. *See also* Keith R. Wesolowski, *Remedy Gone Awry: Weighing in on Weighted Voting*, 44 WM. & MARY L. REV. 1883, 1902 (2003).

127. No. 01-CV-0369E(Sr), 2001 U.S. Dist. LEXIS 12818, at *1 (W.D.N.Y. Aug. 8, 2001).

128. *Id.* at *3–*4.

129. *Id.* at *3–*5.

places) by the proportion of the county's total population that resided in their district.[130]

Since Erie County has seventeen districts, the court reasoned, there are seventeen units of voting weight to be distributed, with each unit being equivalent to one-seventeenth of the county's total population.[131] With that stipulation, one commentator explains the system as follows:

> The results of the 2000 Census indicate that one-seventeenth of Erie County's population is 55,898. A hypothetical district with a population of exactly 55,898 would, under the *Korman* formula, be represented by a legislator with exactly 1.000 vote in the legislature. One would calculate a legislator's weighted vote by taking the 2000 Census population for his district and dividing it by the average of 55,898. According to the 2000 Census, the least populated district is the Third District, containing 44,334 persons. This district's representative, therefore, would receive a weighted vote of 0.793. The most populous district is the Seventeenth District; its 61,227 citizens would be represented by a weighted vote of 1.192.[132]

Control over the county legislature would then be determined by representatives' weighted votes. This is just one example of the use of weighted voting in the United States, where voting weight is determined by the population of the representative's electorate.[133]

On the system proposed here, we should instead weight votes by *margins of victory* (hence, WVMV). The reason why the proposal takes this novel form is that weighting votes by population is at best a remedy for malapportionment, not for minoritarian government.[134] It does not guarantee majority rule. The Electoral College, after all, can be understood as a form of weighted voting: The number of electors in each state gives the "weight" of that state's vote and is a function of the population of the state.[135] It is possible for a candidate to win the presidency while receiving a minority of the popular vote, so long as their vote share is more "efficiently" distributed across states. The Electoral College could be redesigned to reduce the odds

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130. *Id.* at *4–*5.

131. *Id.* at *4.

132. Wesolowski, *supra* note 126, at 1888–89 (footnotes omitted).

133. For some early examples, see Banzhaf, *supra* note 126, at 317–18. For more recent U.S. and international examples, see generally Ashira Pelman Ostrow, *One Person, One Weighted Vote*, 68 FLA. L. REV. 1839, 1852–53, 1865–67, 1870 (2016).

134. *But see* Toplak, *supra* note 123; Ostrow, *supra* note 133; Wesolowski, *supra* note 126.

135. Felsenthal and Machover note this in *The Measurement of Voting Power*. FELSENTHAL & MACHOVER, *supra* note 25, at 88. I referred only to states, ignoring the District of Columbia, for the sake of simplicity of exposition.

of minoritarian executive governance. But unlike WVMV, it does not and cannot guarantee majority rule.[136]

Indeed, weighted voting by population also would not help in the simple hypothetical electoral result we considered earlier in Table 1, for the simple reason that each of the eight districts (A–H) had exactly the same population. As we saw, even then the distribution of voters can produce grave violations of majority rule. So let us consider how a system could weight votes by margins of victory. We can do so by focusing on our hypothetical election in Table 1. We need to ask:

(a) What are the cumulative weights of Red and Blue representatives' votes, respectively?

(b) What is the weight of each Red representative's vote?

(c) What is the weight of each Blue representative's vote?

One can develop different versions of WVMV.[137] Some, for example, may prefer a straightforward approach on which each representative's weighted vote is a simple function of their own margin of victory. But this will only make margins of victory matter within districts, so it will not guarantee majority rule across districts.[138] To make margins matter within and across districts, we need a more complex two-step system. For convenience, I will follow the stipulation from *Korman*—since there are eight districts in the jurisdiction, there are eight total units of voting weight to be distributed.

The first step of this version of WVMV answers question (a): We make the cumulative weight of each party's elected representatives equivalent to that party's cumulative vote share. Cumulatively, Red candidates received 31.6% of the vote, so they receive 31.6% of eight (the total weight of all votes within the jurisdiction), which is a total of 2.528 total votes. Blue candidates received 68.4% of the vote, so they receive 68.4% of eight, which is 5.472. The second step of this version of WVMV answers questions (b) and (c): We

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136. *Id.* ("[A] reallocation [of Electoral votes] can minimize its mean majority deficit, but cannot possibly eliminate [it].").

137. That is to say, we should understand WVMV as a *family* of electoral systems. Branches of this family will each share the feature that the weight of representatives' votes is a function of margins of victory. But they will disagree about the details—which function to use, and how to quantify margins of victory, and so forth. Some branches will ultimately prove more fruitful than others.

138. To illustrate, give each representative's vote a weight between 0 and 1 that is equivalent to their percentage share of the popular vote in their district. On this approach, the answer to (b) is 0.5002, the answer to (c) is 0.99, and the answer to (a) is 2.501 (Red) and 2.97 (Blue). Notice that this approach cannot guarantee majority rule. We can see why by switching 2,000 voters in Districts *F*, *G*, and *H* from the Blue party to the Red party. The answer to (b) is still .5002, since we have not changed any votes in Districts *A–E*. But the answer to (c) is now .79, since the three Blue representatives now win with 79% of the vote. So the answer to (a) is 2.501 (Red) to 2.37 (Blue), even though Blue would have won 22,380 more votes than Red.

distribute party's vote shares to their elected representatives, according to each representative's relative contribution to the party total. Since each district is the same size and each Red representative won with the same margin of victory, the Red party's share of the total vote (2.528) will be dispersed equally among five Red representatives. For the same reason, the Blue party's share of the total vote (5.472) will be dispersed equally among three Blue representatives. This yields the distribution of weighted votes depicted in Table 2.

Table 2

District	Representative's Party	Margin of Victory	Weighted Vote
A	Red	0.4%	0.506
B	Red	0.4%	0.506
C	Red	0.4%	0.506
D	Red	0.4%	1.741
E	Red	0.4%	0.538
F	Blue	98%	1.824
G	Blue	98%	1.824
H	Blue	98%	1.824

To illustrate the effect of this proposal, suppose it was implemented and a bill then went before the legislative body. It can only pass with a majority of the weighted vote. That is, it can only pass with the support of representatives whose votes have a cumulative weight above 4. Under this system, there are three coalitions where representatives are individually necessary and jointly sufficient for the bill to pass: two Blue and one Red representative vote for it (4.154); one Blue and five Red representatives vote for it (4.305); three Blue representatives vote for it (5.472).[139]

But the proposal so far is incomplete. To see why, imagine that we changed the distribution of votes for the three successful Blue party candidates, as follows:

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139. This matters if we wish to measure a representative's voting power using the method proposed by Banzhaf, wherein the voting power of X is a function of the number of possible coalitions of voters in which X is pivotal. For a clear explanation of this approach, see FELSENTHAL & MACHOVER, *supra* note 25, at 38–52.

Table 3

	A	B	C	D	E	F	G	H	Total
Blue	4,998	4,998	4,998	4,998	4,998	9,801	9,900	9,999	54,690
Red	5,002	5,002	5,002	5,002	5,002	199	100	1	25,310

Now the Blue representatives have different margins of victory, so they should have votes with different weights. How should the relative weights of Blue representatives' votes be determined? That is, how should the Blue party's total power be dispersed? There are many options, but the one I prefer is to make the weight of a representative's vote a function of *their contribution to the party's cumulative vote*. There are two ways to implement this. The first starts with the *number* of votes by which each representative won their district. In F, it is 9,602, in G, it is 9,800, and in H, it is 9,998. Combined, their vote margin is 29,400. The representative from F contributed 32.6% to that vote margin, and so receives 32.6% of 5.472 (1.78), while the representative from G contributed 34%, and so receives a vote of 1.86. The second option starts with the *share* of the vote by which each representative won their district. In F, it is 96.02%, in G it is 98%, and in H it is 99.98%. Combined, their margin of victory is 294%. In this example, these two approaches give us the same results in this case because the district sizes are exactly equal. So, for now, the difference does not matter.

But the two approaches will generate different results in examples where representatives are elected from districts with unequal numbers of voters. This makes a difference in all real-world electoral systems, and I discuss the issue in relation to the U.S. Senate in Part IV. I want to defer those complexities for now. But I can offer a real-world illustration of the proposal without delving into those details by returning to the 2018 election of the Wisconsin State Assembly.[140] In that election Democratic candidates received 53.75% of the popular vote, but Republicans won 63 of the 99 seats.[141] Under the status quo, Republicans had a supermajority in the State Assembly. But under WVMV, Democrats would control the Assembly. This is what the distribution of weighted votes across the state would look like, using the version of WVMV described in Part IV below.

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140. *See supra* note 61 and accompanying text.

141. *See supra* note 61 and accompanying text.

Figure 1[142]

2018 Wisconsin State Assembly Elections

This map reflects the 2018 Wisconsin State Assembly election results under a system of weighted voting by margin of victory. Color reflects the relative weight of each representative's vote.

Party	Total Districts	Total Voting Power
D	36	53.75
R	63	45.25
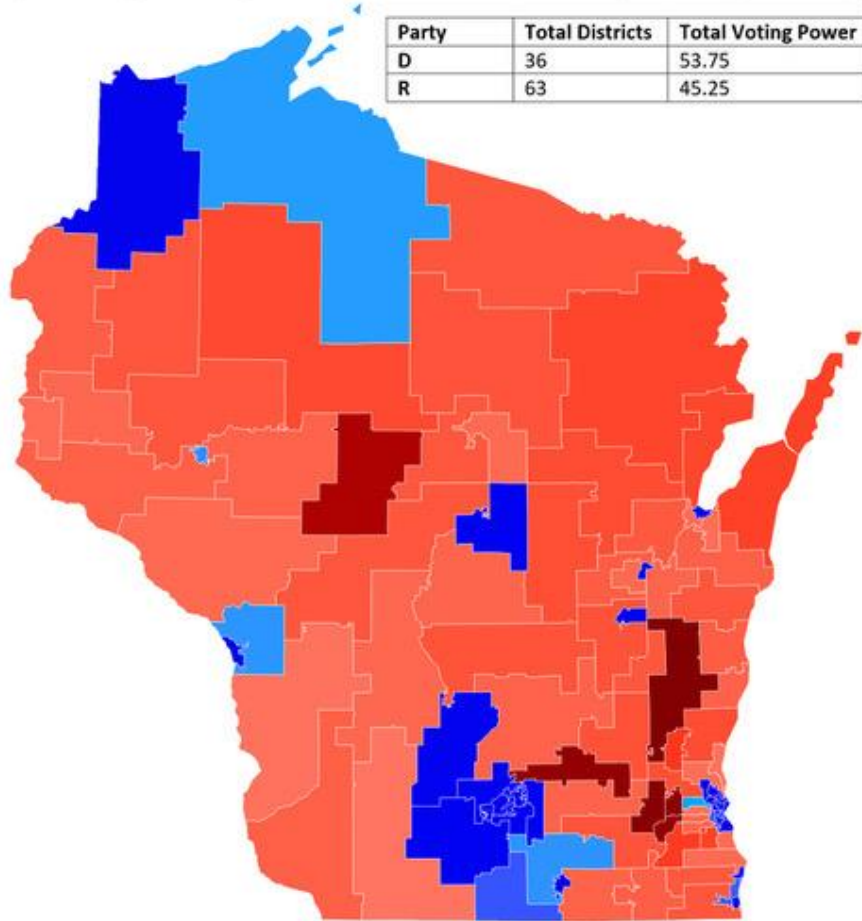
Map: Wodak, 2022

Figure 1 makes vivid two core points about WVMV. The first is that margins of victory will matter *within* districts: how much a representative wins by makes a difference to how much legislative power they receive.

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142. For the election data used to create Figure 1, see *Election Results Archive*, *supra* note 66 (under tab "2018 Fall General Election Results").

Districts with deeper red or blue reflect larger margins of victory, and larger weighted votes in the State Assembly. The second is that margins of victory will matter *across* districts: How many votes a party receives cumulatively makes a difference to the cumulative power they receive. In Wisconsin, the Democrats won fewer districts but more votes. So while there are more red districts than blue, the red districts tend to be lighter, and blue districts tend to be darker. We can aggregate the reds and blues, and when we do, the map is bluer than it is red (though this is obscured somewhat by the relative geographical size of the districts).[143] As a result, the Democratic representatives wield more power in total.

This example shows how WVMV guarantees majority rule within districts and across districts. It thereby manages to achieve something that was held to be impossible. We can see how by recalling Scalia's opinion in *Vieth*.[144] By adopting WVMV, we do not aim to ensure that the party that receives the most votes wins the most *seats*—that venture would cast us "forth upon a sea of imponderables."[145] Instead, we ensure that the party that receives the most votes wins the most legislative *power*. This means that factors such as partisan and unintentional gerrymandering cannot allow a party to control a legislative body by merely winning a majority of districts. A party can only do so by winning a majority of voters. WVMV requires government by the majority.

Before moving on, I want to emphasize that the version of WVMV developed here will inevitably be in many respects too simple. Versions of weighted voting by population have become far more sophisticated in the half-century of academic and judicial scrutiny that they have received.[146] Likewise, simple versions of WVMV will likely face objections that push us to consider and perhaps prefer more complex and sophisticated versions of the view than can be developed and defended here. My goal here is not to offer a perfect system, but to explain the broad structure of WVMV and the overarching reasons why it promises to be more democratic.

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143. As in many states, in Wisconsin, Republicans tend to win more sparsely populated rural areas, and Democrats tend to win more densely populated urban areas. *See* David Weigel & Lauren Tierney, *The Seven Political States of Wisconsin*, WASH. POST (Aug. 16, 2020), https://www.washingtonpost.com/graphics/2020/politics/wisconsin-political-geography/.   This makes the map seem redder.

144. *See supra* notes 98–101 and accompanying text.

145. Vieth v. Jubelirer, 541 U.S. 267, 290 (2004).

146. The most sophisticated versions of this approach stem from the pivotal contributions made by Banzhaf. For a discussion of why Banzhaf's contributions were pivotal, see FELSENTHAL & MACHOVER, *supra* note 25, at 91–95.

C. The Separateness of Candidates

Earlier, I wrote that showing *how* a district system can guarantee majority rule within and across districts is relevant to whether we should endorse district systems and majority rule. Having now outlined WVMV, I can now provide a concrete illustration of this by turning to a final point from *Vieth*. Justice Scalia articulates a compelling argument for rejecting the principle of majority rule across districts:

> To begin with, how is a party's majority status to be established? Appellants propose using the results of statewide races as the benchmark of party support. But as their own complaint describes, in the 2000 Pennsylvania statewide elections some Republicans won and some Democrats won. . . . Moreover, to think that majority status in statewide races establishes majority status for district contests, one would have to believe that the only factor determining voting behavior at all levels is political affiliation. That is assuredly not true. As one law review comment has put it:
>
>> "There is no statewide vote in this country for the House of Representatives or the state legislature. Rather, there are separate elections between separate candidates in separate districts, and that is all there is."[147]

Let us call this the *separateness of candidates* argument. This argument seems promising because it offers a reason to accept majority rule within districts while rejecting majority rule across districts. Within a district, each voter casts a ballot for a specific candidate, but that is all they do. There is no point at which voters across all districts cast a ballot for a political party as a whole, so majority rule is not a meaningful principle when it is applied across districts (or to the "jurisdiction as a whole").[148] Applied to Tables 1 through 3 above, majority rule requires that Red candidates must win in Districts A–E because each of those specific candidates won the majority of votes in those districts, and the same is true of Blue candidates in Districts F–H. But majority rule does not require that the Blue party govern, as this was not a

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147. *Vieth*, 541 U.S. at 288–89 (quoting Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, 33 UCLA L. REV. 1, 59–60 (1985)). This point has also been taken up in recent work in political philosophy. Consider Charles Beitz:

> [Partisan gerrymandering only violates] majority rule if we take the entire jurisdiction as the unit of analysis, with all the voters considered as a single electorate and the set of winning candidates as, in effect, its single, collective representative. But it is a basic fact about [single-member districting] that the competition for seats takes place separately in each district. No candidate or set of candidates contends for votes in the whole jurisdiction. There is no point at which the voters in the jurisdiction as a whole express a preference for one or another slate of candidates for all the seats in the jurisdiction.

Beitz, *supra* note 55, at 335.

148. Beitz, *supra* note 55, at 335.

choice that voters faced. No voters cast ballots for 'Blue Governance' or 'Red Governance.' That was never an electoral option for any voter. So, the fact that the Blue party has a majority in the *Total* column is and should be irrelevant to how much power either party receives. If majority rule is not violated in any district election, and "that is all there is," then majority rule is not violated at all.[149]

Prima facie, this seems to provide a compelling majoritarian rationale for preserving district systems even though they do not guarantee majority rule across districts. But I think we should ultimately reject this argument.

First, notice that the argument makes many explanations and defenses of majority rule either confusing or misleading. As I discussed in Part I, majority rule is often defended via an appeal to the importance of *government* by the majority.[150] But which party governs is a function of the composition of the legislative body as a whole. Government by a majority of majorities (a majority of voters in a majority of districts) is not equivalent to government by the majority. It is consistent with government by one-quarter of voters, or even fewer in multi-party systems.

Second, it is not clear why the same argument could not be made for minoritarian executive governments. Plausibly, it is equally undemocratic when a candidate wins the Electoral College while losing the popular vote and when a party wins control of the House or Senate while losing the popular vote.[151] Initially, it might seem that the separateness of candidates argument offers a reason to treat these cases differently. Each voter casts a ballot for or against a single candidate to be president, but they only cast a ballot for a single candidate to represent their district (not for a party to control the legislature).

However, this puts too much stock into whose names appear on ballots, rather than how elections actually operate. The Electoral College is still a district system, and it operates such that no voter within it elects a candidate to be president. That is not an electoral option for *voters*. Instead, votes elect electors to the Electoral College, and those electors vote for the president.[152] By parity of reasoning, then, we would have to say there is no nationwide vote for the president, but just separate elections over separate electors in separate states, and that is all there is. There may be a pedantic sense in which that claim is true, but it is a poor defense of minoritarian governance. When

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149. Lowenstein & Steinberg, *supra* note 147, at 59–60.

150. *See supra* Part I.

151. AMY, *supra* note 29, at 44. Granted, opposition is more frequently aired to minoritarian executive control. But this is largely an artifact of how rarely news media report on "manufactured majorities," as Amy notes. *Id.* at 42; *see also* Matthew Yglesias, *Minority Rule in America*, VOX (Sept. 21, 2020, 2:30 PM), https://www.vox.com/21448334/republicans-supreme-court-ginsburg-democracy.

152. U.S. CONST. art. II, § 1.

a candidate wins the presidency despite their electors cumulatively receiving a minority of the vote, we have a meaningful violation of majority rule. If this is true, we should be able to say the same when a candidate is elected to be the Speaker of the House or the Leader of the Senate despite their party having received a minority of the nationwide vote—i.e., we should be able to say the same for minority rule of the executive or either chamber of the legislature. Notably, any rationale for preserving district systems even though they do not guarantee majority rule across districts will face this second challenge, in that it must explain why it is undemocratic for the president to rule without a majority of the national popular vote.[153]

Third, upon reflection, it is just false that in district systems "there are separate elections between separate candidates in separate districts, and that is all there is."[154] District systems involve separate elections between separate candidates in separate districts. But those candidates appear on the ballot with their name *and their party affiliation*. Their party affiliation is undeniably important to how many voters cast ballots.[155] Some may cast a ballot for a candidate they support despite their party affiliation, but some voters cast a ballot for a candidate they do not support because of their party affiliation.[156] Moreover, many voters know little about the individual qualities of candidates themselves, and vote solely based on party affiliation.[157] But this is not just an electoral reality. It is key to a core defense of district systems in the first place. If it were true that there were just separate elections between separate candidates in separate districts, and that is all, we should not expect district systems to produce more durable coalition governments. These depend on party affiliation. And that is *why* party affiliation should be meaningful to voters. Anthony Downs influentially argued that a major cost of proportional representation systems is that they "make it impossible for

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153. To illustrate, some may posit that all voters in a district are equally represented by their legislator (regardless of how they cast their vote), and hence, as long as Congress is governed by a party with the majority of legislators, there is no violation of majority rule. For critical discussion and references for such an argument, see Low-Beer, *supra* note 51, at 176 n.63. But the same argument could be made for the executive. We could also posit that all voters in a district are equally represented by Electors.

154. Lowenstein & Steinberg, *supra* note 149, at 59–60.

155. *Large Shares of Voters Plan to Vote a Straight Party Ticket for President, Senate and House*, PEW RSCH. CTR. (Oct. 21, 2020), https://www.pewresearch.org/politics/2020/10/21/large-shares-of-voters-plan-to-vote-a-straight-party-ticket-for-president-senate-and-house/ ("In an era of increasing partisanship, split-ticket voting continues to be rare in U.S. politics.").

156. For more on the complex relationship between voting for a candidate and supporting that candidate, see Alexander A. Guerrero, *The Paradox of Voting and the Ethics of Political Representation*, 38 PHIL. & PUB. AFFS. 272, 300–06 (2010).

157. For a recent demonstration of this, see Eric Lach, *Why New Jersey Voters Picked a Truck Driver over the State Senate President*, NEW YORKER (Nov. 15, 2021), https://www.newyorker.com/news/our-local-correspondents/why-new-jersey-voters-picked-a-truck-driver-over-the-state-senate-president.

[voters] to choose a government at all," because they do not know what coalitions will be formed.[158] Downs held "that single-member district representation ultimately does a better job at this task since at least one knows that the party one is voting for will take [control] of government if it wins."[159] This defense of district systems undermines the claim that in such systems "there are separate elections between separate candidates in separate districts, and that is all there is."[160] And more generally, it makes it hard to object to taking the cumulative total of votes cast for candidates of the same party to be meaningful in how we apply the principle of majority rule. Those votes were cast for candidates who presented themselves as members of a political coalition that sought to govern and were elected partly on that basis.

Finally, while WVMV treats parties' cumulative vote totals as meaningful, it does so without denying the separateness of candidates within districts. This is because it disperses the power of political parties in accordance with the vote margins of each separate candidate within their district. That is, it makes margins of victory meaningful across districts and within districts. We can demonstrate this point by considering two examples from the U.S. Senate.[161]

One example demonstrates how WVMV respects the precise extent to which voters responded to distinct features of local candidates, independently of their party affiliation. The reason we can draw such examples from the Senate is that it is a multi-member district system: Each State elects two Senators. Usually those elections are staggered, but sometimes a general election and a special election are concurrent. This occurred in January 2021 with the simultaneous election of two Senators from Georgia. Jon Ossoff won by a margin of 0.83% (36,766 votes).[162] At the same time and with the same pool of voters, Raphael Warnock won by a margin of 1.68% (74,611 votes).[163] As a result, under WVMV, Warnock would have won more legislative power than Ossoff. That is a clear sense in which WVMV respects that they are separate candidates, rather than merely fungible members of a nationwide political party.

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158. ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 156 (1957). As Christiano notes, Downs is not alone in making this point. CHRISTIANO, *supra* note 25, at 235.

159. This is how Downs' view is paraphrased by CHRISTIANO, *supra* note 117, at 235 (I substituted "the reigns" for "control" in quoting the latter). I am not endorsing all that Downs says here. My point is simply that it is important to defenders of district systems that voters vote for parties to form governments, not just for individual candidates.

160. Lowenstein & Steinberg, *supra* note 149, at 59–60.

161. For further discussion of WVMV in the U.S. Senate context, see *infra* Section IV.A.

162. These numbers are sourced from *United States Senate Elections, 2020*, BALLOTPEDIA (Jan. 6, 2021), https://ballotpedia.org/United_States_Senate_elections,_2020.

163. *Id.*

The other example demonstrates how WVMV respects the extent to which voters respond to ideological features of specific candidates, independently of party affiliation. Just as we can compare the electoral performance of different individuals within the same district, we can compare the electoral performance of different ideological factions of the same party and Senate class. From 2021 to 2023, of all Senators who caucus with Democrats, two of the least liberal (Joe Manchin, WV-D, and Kyrsten Sinema, AZ-D) and two of the most liberal (Bernie Sanders, VT-I and Elizabeth Warren, MA-D) are all members of Senate Class I.[164] These Senators have very different margins of victory. Sinema and Manchin have two of the *lowest* margins of victory in the Senate, regardless of whether we use the number of votes by which they won or their share of the vote.[165] By contrast, Warren won by 24.16% of the vote (654,032 votes) and Sanders won by 39.93% of the vote (108,858 votes).[166] In other words, the most moderate faction of the Democratic party in the Senate would, under WVMV, have little legislative power in the 117th United States Congress, for the simple reason that they won by smaller margins than their colleagues. Indeed, as we will see in Part IV, their votes would no longer have been necessary for Democrats in 2021 to 2023 to have a total weighted vote above 50 (which is the minimum sufficient to pass legislation through reconciliation and confirm nominees).[167]

I will discuss the implementation of WVMV in the Senate in more detail in Part IV. The point, for now, is just that WVMV does not require us to ignore the distinctive features of separate candidates in separate districts and treat their party affiliation as all that matters. To the contrary, it treats as meaningful how many ballots are cast for separate candidates within districts and for parties across districts.

III. POLITICAL EQUALITY

So far, I have argued that we should adopt WVMV to make margins matter, and thereby end minority rule. I turn to the second argument for

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164. This classification of their status among the most and least liberal senators in the Democratic caucus comes from a respected measure of Senators' ideology, which primarily uses their roll call behavior to calculate the relevant measure. *Roster: 117th Congress (2021–2023)*, UCLA DEP'T OF POL. SCI.: VOTEVIEW, https://voteview.com/congress/senate/-1/text.

165. Using vote share, Sinema's 2.34% is the eighth lowest overall, and Manchin's 3.31% is the thirteenth lowest overall. *United States Senate Elections, 2018*, BALLOTPEDIA, https://ballotpedia.org/United_States_Senate_elections,_2018 (last visited Nov. 29, 2022). Using the number of votes by which they won, Manchin's 19,397 is third lowest overall, and Sinema's 55,792 is tenth lowest.

166. *Id.*

167. Based on the model developed in Part IV, Manchin and Sinema's votes together have a weight of 0.275, while the other 48 Democratic Senators' votes have a weight of 54.806.

WVMV in this Part, which concerns political equality, and in particular equal voting power. I will begin by explaining how, by making margins matter, we give citizens' votes a new type of power—under WVMV, votes retain the power to potentially decide who wins (decisiveness power), while also determining how much power is wielded by whoever wins (transference power).[168] I argue that this change should be preferred on democratic grounds, as it better instantiates OPOV. Transference power can be meaningfully equal in a crucial respect that decisiveness power cannot. Second, I argue that in equalizing voting power, WVMV produces a better incentive structure.[169] Most importantly, it makes political parties and their candidates more responsive to all voters who are likely to change the margin of victory, rather than just those voters who are likely to change the candidates that win. Finally, I consider the objection that WVMV may have expected costs.[170] I argue, however, that there is a strong general reason to consider those costs to be outweighed.

A. Equal Voting Power

Again, we should start with the fundamentals. Before we know what it means to equalize voting power, we need to understand the notion of a vote's *power*, and how it is distinguished from the notion of a vote's *weight*. The weight of one's vote is the number of votes one controls (which, as I noted, may be fractional). By contrast, the power of one's vote is a measure of the extent to which one can, by voting, control the outcome of the vote.[171] These are distinct notions. Indeed, for citizens or representatives, the weight of a vote may not even bear a proportionate relationship to the power of a vote.[172]

With this clarification of voting power, we are in a better position to understand how making margins matter will change what votes do *and* change voting power. More specifically, we are in a better position to

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168. *See infra* Section III.A.

169. *See infra* Section III.B.

170. *See infra* Section III.C.

171. This follows the definition from FELSENTHAL & MACHOVER, *supra* note 25, at 1–2. A vote's power is equivalent to what Ronald Dworkin calls its "impact," as distinct from "influence." "[S]omeone's impact in politics is the difference he can make, just on his own, by voting for or choosing one decision rather than another." RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 191 (2000). This is in part because the power of a vote excludes its informal effects, such as its expressive significance.

172. *See, e.g.*, William F. Lucas, *Measuring Power in Weighted Voting Systems*, in POLITICAL AND RELATED MODELS 184 (Steven J. Brams, William F. Lucas & Philip D. Straffin Jr. eds., 1983) ("It is fallacious to expect that one's voting power is directly proportional to the number of votes he can deliver."); Banzhaf, *supra* note 126, at 318 ("*[V]oting power is not proportional to the number of votes a legislator may cast.*"). This is in part why I stressed that the phrase "legislative power" connotes the *weight* of votes in the legislature and should not be understood as equivalent to the *power* of votes cast in the legislature.

understand how giving representatives' votes unequal weights gives citizens' votes an additional type of power. The reason why is that the power of a citizen's vote is a measure of the extent to which they can, by voting, control the outcome of the vote. Under current district systems, the outcome of an election is which representatives win in each district. Hence, a vote's power lies in its potential *decisiveness*. A vote in a district can control who wins the election in that district. This is why votes that do not change who wins but only change the margin of victory are "wasted," and why standard measures of voting power are measures of the potential for a vote to be decisive.[173]

By contrast, WVMV expands the outcomes of the vote. One outcome is which representatives will be elected. The other is how representatives' votes will be weighted. Hence, under WVMV, a citizen's vote has two powers, which reflect the extent to which one can by voting decide who wins (decisiveness power) and control how representatives' votes will be weighted (transference power).[174] In other words, votes now have a second formal effect in an election: Each vote potentially changes who wins, and actually changes the weight of the votes controlled by the victor and their party.[175] Since votes have the second effect via changing margins of victory, votes that change the margin of victory without changing who wins are no longer wasted.

I now want to argue that we should adopt WVMV in order to give votes this second type of power in order to better realize the core principle of political equality, understood in terms of OPOV. We cannot make voters political equals within district systems by giving them equal decisiveness power, as equal decisiveness power can only be an empty formalism or an infeasible ideal. But we can adopt WVMV and thereby give voters a meaningfully equal form of political power in the form of an equal ability to transfer political power to representatives.

For the sake of this argument, I assume that political equality is a core democratic principle and should be understood in terms of OPOV.[176] There

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173. *See supra* Section II.A.

174. I use this locution because under WVMV each vote can be understood as a transference of a unit of political power to legislators. Though it should be noted that a unit of *political* power is not equivalent to a unit of *voting* power. It should be understood as a unit of *legislative* power.

175. This feature of WVMV reflects a point just made in Part II; namely, that voters cast a ballot for a specific candidate with their party affiliation. *See supra* Section II.C.

176. I also leave aside whether political equality and majority rule are separate principles. Many have thought that the two come hand in hand. *See, e.g*., ROBERT A. DAHL & CHARLES E. LINDBLOM, POLITICS, ECONOMICS, AND WELFARE: PLANNING AND POLITICO-ECONOMIC SYSTEMS RESOLVED INTO BASIC SOCIAL PROCESSES 44 (1976) ("To say that the votes of the greater number should not prevail is to say that political equality is impossible, or that it is undesirable, or both. . . . For unless government policy responds to the preferences of the greater number, the preferences of some individuals (the lesser number) must be weighted more heavily than the preferences of some other individuals (the greater number)."). Similar reasoning has been

is plenty of precedent for this. "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments," the Supreme Court has held, "can mean only one thing—one person, one vote."[177] It is also standard to hold that OPOV should be understood to require that voters have (roughly) equal voting *power*, notwithstanding the fact that the Court has offered no formal definition or quantification of such power.[178]

My core contention will be that in a district system, *decisiveness* power (however it is quantified) cannot alone instantiate OPOV, except in any empty formalistic sense. To see why, let's first consider what it means for votes to be decisive. Under majoritarian systems like FPTP, a vote changes who wins by changing who has the most votes. Thus, a vote can only be *actually* electorally decisive only when all other voters for the top candidates are tied. This is extremely rare.[179] But even when it is not actually decisive, a vote can still be *potentially* decisive, in that it can have a probability of being decisive. Hence, the standard definitions and quantifications of voting power understand it as a measure of the probability of a vote being electorally decisive (or "pivotal").[180]

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entertained by the U.S. Supreme Court in *Gray v. Sanders*, 372 U.S. 368, 380–81 (1963). But the reasoning faces considerable criticism. *See, e.g.*, FELSENTHAL & MACHOVER, *supra* note 25, at 87 ("Majority rule and OPOV are not at all the same thing, as the Supreme Court apparently supposed.").

177. *Gray*, 372 U.S. at 381.

178. *See* FELSENTHAL & MACHOVER, *supra* note 25, at 86. The "Court intended to equalize the 'worth' of citizens' votes. If this is to mean anything at all, it must mean equalizing their voting power." The authors further contend that equal voting power is not "generally defined or quantified," as the Court "approached the matter intuitively, using their common sense." *Id.* Banzhaf also takes this view. Banzhaf, *supra* note 126, at 321 ("Throughout the opinions in the reapportionment cases, the Court uses such language as 'equal voting weight,' 'diluting the vote,' the 'effect' of a vote being unequal, the 'worth' of a vote, and similar words without clearly explaining how these effects are to be measured and evaluated.").

179. Many note this in discussions of equal voting power. "'[A]ctual influence'—what I call 'actual decisiveness'—is almost always equally zero. One person's vote almost never makes a difference, whether she is in the minority or the majority." Niko Kolodny, *Rule over None II: Social Equality and the Justification of Democracy*, 42 PHIL. & PUB. AFFS. 287, 322 (2014). To illustrate the point, note that even in the remarkably close 2020 election for Iowa's second congressional district, which Mariannette Miller-Meeks won by four votes, it was still not the case that any voter was electorally decisive. IOWA SEC'Y OF STATE, GENERAL ELECTION – 2020 CANVASS SUMMARY 31 (Nov. 2020), https://sos.iowa.gov/elections/pdf/2020/general/canvsummary.pdf; Zachary Oren Smith & Brianne Pfannenstiel, *Iowa Certifies Republican Mariannette Miller-Meeks Won Iowa's 2nd Congressional District Seat—by 6 Votes*, DES MOINES REG. (Nov. 30, 2020, 3:52 PM), https://www.desmoinesregister.com/story/news/politics/2020/11/30/iowa-panel-certifies-2nd-congresssional-district-2020-election-results/6464892002/ (final canvassing numbers show a four-vote margin).

180. That is, these measures are all "based on the probability of casting a decisive ballot in an election," or "the probability that a voter . . . is pivotal—that is, casts a vote that would change the outcome of the election." Andrew Gelman, Jonathan N. Katz & Joseph Bafumi, *Standard Voting Power Indexes Do Not Work: An Empirical Analysis*, 34 BRIT. J. POL. SCI. 657, 658–59 (2004).

Of course, since actual decisiveness is extremely rare, the odds that a vote is decisive are extremely low. This is one of the points that Robert Nozick illustrated nicely in two cases of a 10,001-person electorate (call it *X*). In one case:

> [T]he 10,000 allow you to vote if they are deadlocked; they commit themselves to this procedure. After the discussion you mark your vote on a slip of paper, and they go off and vote. In the eventuality that they divide evenly on some issue, 5,000 for and 5,000 against, they look at your ballot and count it in. This has never yet happened; they have never yet had occasion to open your ballot.[181]

In the other case:

> They throw your vote in with theirs. If they are exactly tied your vote carries the issue. Otherwise it makes no difference to the electoral outcome.[182]

Nozick illustrates that your vote *either* makes no difference at all to the electoral outcome *or* "carries the issue," but it only does the latter when all other votes are exactly tied.[183] This is as good as having your vote counted only in the extremely improbable event that everyone else turns out to be deadlocked.

By adding a variant to Nozick's scenarios, I can provide an initial, less technical version of the egalitarian case for WVMV. Imagine a distinct 10,001-person electorate (call it *Y*), which is exactly the same as *X*, except here the other 10,000 voters are regularly deadlocked. Your vote often carries the issue. There is an obvious sense in which you would have much more decisiveness power in *Y* than in *X*. The only way to deny this is to adopt a measure of voting power that is so formalistic that it is meaningless, in that it is too divorced from electoral realities to be a measure of your actual political equality. But it is also obvious that it would be extremely hard to equalize the decisiveness of votes cast in *X* and *Y*. Elections will always be closer in some electorates than others. So, if we are to equalize voting power, then voting power cannot be exhausted by decisiveness. By contrast, if we gave voters in these scenarios a second type of power—transference power— then your vote would need to be counted and would count equally regardless of whether the group was deadlocked, because it would still make a difference to the margin of victory even when it is not decisive. That is why WVMV better instantiates OPOV. It gives us a meaningfully equal form of voting power.

Now I will provide the fuller, more technical version of this same argument. Here is its basic structure. Assume for the sake of the argument

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181. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 291–92 (2013).

182. *Id.* at 292.

183. *Id.* at 291–92.

that a democracy must instantiate political equality by giving voters at least roughly equal voting power (i.e., assume OPOV). If we understand voting power in terms of decisiveness alone, a democracy needs to give each vote at least a roughly equal probability of being decisive. There are two ways that we can understand this requirement. The first makes the requirement feasible, but turns it into an empty formalism. The second makes the requirement meaningful, but one that cannot be realistically satisfied. The best solution is to give votes transference power by adopting WVMV.

The argument should be clear up to the point where we distinguish two ways of understanding the requirement that each vote should have at least a roughly equal probability of being decisive, which is where it gets technical. The first way understands the relevant probabilities as being *a priori*. The key assumption here is known as *random voting* (a.k.a. "impartial culture").[184] *A priori* measures of voting power "use the *random voting model* as their assumption of electoral behaviour under a given electoral rule," which means they assume that each voter is "equally likely to choose any of the alternatives on the ballot."[185] The reason that these are called "*a priori*" measures is that they quantify probabilities on the basis of ignorance about how voters are disposed to vote. Indeed, one helpful way to think about *a priori* measures of voting power, from Zach Barnett, is that they treat each vote like an independent, fair coin toss.[186] Assume for simplicity that the election is between two candidates. If we do so, then on *a priori* approaches "each voter's decision is modeled as an independent coin toss, with a 50 percent chance of producing a vote for either candidate."[187] Since a vote is decisive only when all other votes are tied, we can now say that the probability that a vote is decisive in an election with *n+1* voters is equivalent to the probability that in flipping *n* coins exactly half would land heads and exactly half would land tails.

If OPOV just requires that each vote has a roughly equal probability of being decisive in this sense, then meeting such a requirement is feasible. An implication of *a priori* measures is that the voting power of two voters in the same electorate is exactly equal, and the voting power of two voters in different electorates is exactly equal so long as their electorates have the exact same number of voters. It only changes when electorates differ in size, as voting power diminishes when the size of electorates is increased. If you

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184. *See* Dominique Lepelley & Vincent Merlin, *Scoring Run-Off Paradoxes for Variable Electorates*, 17 ECON. THEORY 53 (2001); WILLIAM V. GEHRLEIN & DOMINIQUE LEPELLEY, VOTING PARADOXES AND GROUP COHERENCE: THE CONDORCET EFFICIENCY OF VOTING RULES (2011).

185. Gelman et al., *supra* note 180, at 659.

186. Zach Barnett, *Why You Should Vote to Change the Outcome*, 48 PHIL. & PUB. AFFS. 422, 430 (2020).

187. *Id.*

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flipped 250 coins, the odds that 125 land on heads and 125 would land on tails is 1 in 20.[188] If you flipped 500 coins, the odds that 250 land on heads and 250 would land on tails is 1 in 28.[189] If you flipped 1000 coins, the odds that 500 land on heads and 500 land on tails is 1 in 40.[190] And so on.

Of course, districts will not have the exact same number of voters, so exact equality of voting power will be infeasible. But the U.S. Supreme Court has held that OPOV only requires rough equality of voting power: "[A]s nearly as . . . practicable[,] one man's vote in a congressional election is to be worth as much as another's."[191] That said, it should be noted that congressional elections involve quite significant differences in district sizes, and hence significant differences in voting power even on *a priori* models. In the 2020 House elections, the largest district (Montana's at-large District) was approximately twice the size of the smallest (Rhode Island's 2nd District).[192] In the Senate, the largest district (California) is almost sixty-eight times the size of the smallest (Wyoming).[193] Perhaps this is as close to "practicable" as we can get to equal voting power, but it is not very close at all.[194]

The bigger problem with relying on these *a priori* measures of voting power, however, is that they turn OPOV into a fairly empty formalism. *A priori* measures are divorced from electoral realities, as elections do not resemble a sequence of fair coin tosses. One way to see this is to consider an empirically testable prediction of *a priori* measures. Namely, the larger the electorate, the more likely the election is to be close. If you flip n coins, the odds of exactly half landing heads goes down as n becomes larger, but the

188. These results were generated with WolframAlpha. WOLFRAMALPHA, https://www.wolframalpha.com/input?i=odds+that+in+250+coin+flips+125+land+heads (last visited Sept. 19, 2022).

189. These results were generated with WolframAlpha. WOLFRAMALPHA, https://www.wolframalpha.com/input?i=odds+that+in+500+coin+flips+250+land+heads (last visited Sept. 19, 2022).

190. These results were generated with WolframAlpha. WOLFRAMALPHA, https://www.wolframalpha.com/input/?i=odds+that+in+1000+coin+flips+500+land+heads (last visited Sept. 6, 2022).

191. Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964); *see also* Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969) (stating that "a good-faith effort to achieve precise mathematical equality" must be made).

192. *See My Congressional District*, U.S. CENSUS BUREAU, https://www.census.gov/mycd/ (last visited Jan. 23, 2023) (choose "Rhode Island" in the "Select a State" dropdown; then choose "Congressional District 2" in the "Select a District" dropdown; then choose "Montana" in the "Select a State" dropdown; then choose "Congressional District (At Large)" in the "Select a District" dropdown).

193. U.S. CENSUS BUREAU, *supra* note 88.

194. Toplak argues on this basis that we need weighted voting by population to instantiate OPOV even in House elections. Toplak, *supra* note 123.

odds of close to half landing heads go up slightly.[195] Proponents of *a priori* approaches endorse this implication.[196] But it has been tested empirically, and falsified.[197] If we compare actual U.S. state house elections, state senate elections, congressional elections, and presidential elections, electoral results are not more likely to be close in districts or states with more voters. Instead, the empirical evidence suggests that "the distribution of the vote share . . . is approximately independent of the number of voters."[198] What, then, is the democratic value of giving voters roughly an equal quantum of a measure of voting power that we know to be empirically divorced from electoral realities?

The trouble with *a priori* approaches does not end there. Consider electorates which vary in their partisan lean. On November 3, 2020, Nikema Williams (D) defeated Angela Stanton King (R) in the general election for Georgia's 5th Congressional District (a deep blue district) with 85.1% of the vote.[199] That same day, Hal Rogers (R) defeated Matthew Ryan Best (D) in the general election for Kentucky's 5th Congressional District (a deep red district) with 84.2% of the vote.[200] If we assume that each voter votes at random, then each candidate is equally likely to win. So, on *a priori* approaches, prior to the ballots being counted, Williams and King were equally likely to win Georgia's 5th, and Rogers and Best were equally likely to win Kentucky's 5th. Such implications are not just counterintuitive—they "are inconsistent with modern models of public opinion and electoral politics."[201] It is hard to even understand how the courts could countenance the phenomenon of partisan gerrymandering if they accepted a model on which voters are expected to vote at random.[202] How would we understand

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195. Barnett, *supra* note 186, at 440 ("A notable feature of coin tosses is that, the more of them there are, the more tightly the results will tend to cluster around the most likely outcome. For example, if you flip six fair coins, the chance of obtaining an outcome that heavily favors one side (e.g., 5 to 1) is relatively high; if you flip a million fair coins, you can be virtually certain that the final outcome will not be so skewed.").

196. *See generally* John F. Banzhaf III, *One Man, 3.312 Votes: A Mathematical Analysis of the Electoral College*, 13 VILL. L. REV. 304 (1968); Steven J. Brams & Morton D. Davis, *The 3/2's Rule in Presidential Campaigning*, 68 AM. POL. SCI. REV. 113 (1974).

197. Gelman et al., *supra* note 180, at 673.

198. *Id.* at 669.

199. *Georgia's 5th Congressional District Election, 2020*, BALLOTPEDIA, https://ballotpedia.org/Georgia%27s_5th_Congressional_District_election,_2020 (last visited Nov. 29, 2022).

200. *Kentucky's 5th Congressional District Election, 2020*, BALLOTPEDIA, https://ballotpedia.org/Kentucky%27s_5th_Congressional_District_election,_2020 (last visited Nov. 29, 2022).

201. Gelman et al., *supra* note 180, at 659.

202. Beitz, *supra* note 55, at 339 ("We see the effects of gerrymandering only when we move from the *a priori* to the *ex ante* perspective. This, of course, is the perspective of the gerrymanderers themselves.").

the way parties redistrict to maximize wins if we modeled each vote as a flip of a fair coin? But to see the heart of the matter, we should now compare the two races just mentioned to purple districts—i.e., to competitive races. In 2020, forty-one House districts were considered to be "battleground seats," and in 2018, twenty-seven ended up being decided by less than a 5% margin of victory.[203] In one of these purple districts, New Jersey's 7th Congressional District, Tom Malinowski (D) defeated Thomas Kean Jr. (R) with a margin of 1.2% (219,629 votes to 214,318).[204] If we recognize that Williams had a higher chance of winning than King in Georgia's 5th, and that Rogers had a higher chance of winning than Best in Kentucky's 5th, we should also recognize that Williams and Rogers each had a higher chance of winning than Malinowski or Kean Jr. in New Jersey's 7th. But if this is true, we must recognize that the vote was *more likely to be tied* in New Jersey's 7th than in Georgia's 5th or Kentucky's 5th. Which is to say that each voter in New Jersey's 7th was *more likely to be decisive* than any voter in Georgia's 5th or Kentucky's 5th. In that sense, we must recognize something that *a priori* models cannot: Voters in competitive districts have more voting power.

We've just seen that democracies can give voters roughly equal *a priori* voting power by making districts roughly equal, but that doing so amounts to an empty formalism. Having equal voting power in this sense is too divorced from electoral realities to be a meaningful instantiation of political equality. So, if OPOV requires a roughly equal probability of decisiveness, we cannot understand this as a roughly equal *a priori* probability of decisiveness.[205] We need a measure tethered to reality.

This brings us to the second way of quantifying the probability of decisiveness, which is tethered to electoral realities. It gives up on the random voter assumption (which underpins *a priori* measures) and factors in "some information about the likely voting behavior of the other voters,"[206] usually based on polling and past voting behavior. Doing so yields *ex ante* measures of voting power. One way to adopt such a measure is to treat each vote like an independent biased coin toss: "[I]f Daisy is projected to earn 52 percent of the vote, we can represent each voter's decision as an independent toss of

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203. *U.S. House Battlegrounds, 2020*, BALLOTPEDIA (Jan. 26, 2021), https://ballotpedia.org/U.S._House_battlegrounds,_2020.

204. *New Jersey's 7th Congressional District Election, 2020*, BALLOTPEDIA, https://ballotpedia.org/New_Jersey%27s_7th_Congressional_District_election,_2020 (last visited Nov. 29, 2022).

205. A related argument is offered by Alvin I. Goldman in *What Is Democracy (and What Is Its Raison d'Etre)?*, 1 J. AM. PHIL. ASS'N 233, 245 (2015), though Goldman is particularly concerned with the Shapley-Shubik index.

206. Beitz, *supra* note 55, at 339 ("[In a district system] that affords voters equal *a priori* voting power, *ex ante* power might and probably will be unequal.").

a biased coin which has a 52 percent chance of landing in Daisy's favor."[207] But those details are not crucial for present purposes.

What's crucial is this: If we understand OPOV to require a roughly equal probability of *ex ante* decisiveness, then what it requires is infeasible. Equalizing *ex ante* decisiveness is far more demanding than equalizing *a priori* decisiveness.[208] Equalizing district sizes would not suffice. Districts need to be roughly equal in *competitiveness*, so that they are roughly equally likely to generate an electoral tie, and hence a voter in those districts is roughly equally likely to be decisive. But how could we redistrict to produce even rough equality in districts' competitiveness? Consider the Atlas of Redistricting.[209] It used computer modeling to produce a House map that aimed to "promote highly competitive elections."[210] But in doing so, it still only generated a map where 242 of 435 House districts were "highly competitive."[211] Even on this map, district competitiveness varied dramatically within highly competitive districts, and between competitive and non-competitive districts.[212]

The reason why it is infeasible to make districts roughly equally competitive is natural sorting.[213] Democrats tend to choose to live near other Democrats, and ditto for Republicans, so some geographical areas are deep red, some are deep blue, and some are purple. This makes it impossible to carve up the geography with a map in which each district is roughly equally competitive and each voter has a roughly equal *ex ante* chance of being decisive.[214] Unless we forcibly relocate citizens to combat natural sorting, any division of the electorate into geographical districts will involve vast differences in competitiveness, and hence in *ex ante* voting power.

How, then, can we make OPOV both meaningful and feasible? How can this core conception of political equality that underpins the Declaration of Independence, Lincoln's Gettysburg Address, and the Fifteenth, Seventeenth

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207. Barnett, *supra* note 186, at 431. Barnett goes on to make the related objection that this model underestimates the probability of electoral upsets. *Id.*

208. Beitz, *supra* note 55, at 339.

209. Aaron Bycoffe et al., *The Atlas of Redistricting*, FIVETHIRTYEIGHT (Jan. 25, 2018, 6:00 AM) [hereinafter Bycoffe et al., *The Atlas of Redistricting*], https://projects.fivethirtyeight.com/redistricting-maps/.

210. Which it defined using a fairly low bar ("the number of districts where both parties have at least a 1-6 chance of winning"*). Id.* And it did so while ignoring other important constraints (such as "what shape those districts require"). *Id.*; *see also* Aaron Bycoffe et al., *We Drew 2,568 Congressional Districts by Hand. Here's How.*, FIVETHIRTYEIGHT (Jan. 25, 2018, 5:59 AM), https://fivethirtyeight.com/features/we-drew-2568-congressional-districts-by-hand-heres-how/.

211. Bycoffe et. al., *The Atlas of Redistricting*, *supra* note 209.

212*. Id.*

213*. See* Beitz, *supra* note 55, at 340–41.

214. This is leaving aside the obvious additional infeasibility of redrawing the district lines in the Senate.

and Nineteenth Amendments be more than an empty formalism, and yet realistic in light of natural sorting?[215] The answer lies in giving votes a power that is independent of decisiveness, one that can be meaningfully and feasibly equalized even when districts differ in competitiveness. And that's exactly what WVMV provides. It gives votes the power to transfer a unit of political power by changing margins of victory.

We can appreciate how WVMV gives each vote a meaningfully equal form of political power in two ways. First, we can consider the effect of a vote within its district. Recall the earlier example of the November 2020 House races in a deep blue district (Georgia's 5th), a deep red district (Kentucky's 5th), and a purple district (New Jersey's 7th).[216] We cannot meaningfully equalize the probability that votes in these three districts are decisive. But we can meaningfully equalize the chance that they change the margins of victory. And since WVMV ties the margin of victory within a district to the quantity of legislative power held by the representative of that district, voters in competitive and uncompetitive districts have a roughly equal chance of changing the quantity of legislative power held by their representative. They exercise this power regardless of whether they vote for or against the victor.

The second way to appreciate how WVMV gives each vote a meaningfully equal form of political power is to consider the effect of a vote on the legislative body as a whole. Few districts are competitive (in the weak sense that each party has at least a 1-in-6 chance of winning).[217] But under the status quo, neither party can control the legislature through winning uncompetitive districts alone, so the outcome of competitive districts is what almost always decides who controls the legislature. In other words, voters in uncompetitive districts—which is the vast majority of voters—are typically irrelevant to determining who governs in the legislature. They have a miniscule *ex ante* probability of being decisive in determining which party governs. But under WVMV, each voter has an equal chance of determining whether a party receives a majority of the national vote, and they have this power regardless of whether they live in a competitive district. In that sense, they are political equals.

For these two reasons, we should prefer WVMV on egalitarian grounds. If democratic equality means equal voting power, we need votes to have a power that can be meaningfully equalized when districts differ in competitiveness. In other words, we need a way of making voters' contributions to margins of victory matter. That is, of course, precisely what WVMV is designed to do.

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215. *See supra* text accompanying note 177.

216. *See supra* notes 199–204 and accompanying text.

217. *See supra* note 210 for a discussion of this metric of competitiveness.

B. Democratic Incentives

I just argued that WVMV gives voters a meaningfully equal form of voting power. This matters in and of itself, insofar as the political equality of voters is a core tenet of democracy. But it also matters to how we should expect democracy to function. Agents within a democratic system are responsive to incentive structures, and so one way to evaluate an electoral system is to consider whether it generates more democratic incentives, rather than more perverse incentives.

This basic idea is not new. Some influential defenses of majority rule turn on considering how it generates more democratic incentives than minority rule. Consider the following key passage from Sir George Cornewall Lewis, from 1849:

> It seems scarcely necessary to prove that, if the decision is not to be unanimous—if the concurrence of all the members of the body is not required—it must be made by a majority, and not by a minority, however determined. If a minority could prevail over the majority, those who were in favour of a proposition would vote against it, or would abstain from voting, in order to insure a majority to their side of the question. Besides, there would be no inducement to discuss a question, if, by converting a person to your opinion, you did not strengthen your side in the division when the votes came to be counted. It would be unprofitable to pursue this argument further, as it is obvious that the hypothesis of the minority of a political body prevailing, by their votes, over the majority, leads to all sorts of practical absurdities.[218]

I want to note three things about this argument. First, Lewis's defense of the decision rule turns transparently on the perverse incentives of minority rule (how it "leads to all sorts of practical absurdities"). Second, those perverse incentives arise with both voting ("those who were in favour of a proposition would vote against it") and campaigning ("there would be no inducement to discuss a question"). And finally, if these considerations justify applying majority rule within districts, we should expect them to justify applying majority rule across a jurisdiction too. Consider briefly the incentives for campaigning. If a minority within a district can elect a representative to the legislature, there's little inducement for those campaigning to convert voters who do not support that representative. And if a minority across a jurisdiction can elect a party to govern, there's similarly little inducement for those campaigning to convert voters who do not support that party, except where those voters happen to be located in competitive districts.

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218. GEORGE CORNEWALL LEWIS, AN ESSAY ON THE INFLUENCE OF AUTHORITY IN MATTERS OF OPINION 207 (1849).

We can appeal to similar considerations to produce a strong case that WVMV generates more democratic incentives. Let's start with voters. It has long been argued that voting to change the outcome is irrational in large-scale democracies, as the probability of being electorally decisive is far too low (this is the "paradox of voting").[219] This view is a near-orthodoxy, despite being subject to some sustained criticism.[220] One line of response has been that voters should vote to change the margin of victory, insofar as larger margins give victors larger *electoral mandates*,[221] where having a larger mandate is thought to increase the elected official's capacity efficacy in office. This argument has been dogged by empirical problems: "A winning candidate's ability to get things done is generally not affected by how small or large of a margin she wins by."[222] But WVMV offers a way of developing a similar response to the paradox of voting without relying on the idea of mandates at all. Under WVMV, there is a formal mechanism where a winning candidate's ability to get things done is determined by how small or large of a margin they win by.[223] So WVMV gives voters who lack a reason to vote to change *who wins* stronger reasons to vote to change *the margin of victory*, and makes these reasons publicly transparent. By making margins of victory matter, we give voters better reasons to vote.

An even more important consideration comes from how WVMV changes the incentive structure for political parties and candidates. By making margins of victory matter, we give parties and candidates stronger reasons to be responsive to voters, and to be more equally responsive to voters, as well as remove perverse incentives that make parties and candidates generally unresponsive to voters. By contrast, under the status quo, the behavior of "vote-maximizing parties" is widely understood to be "determined by *the distribution of voters*."[224]

To see this, note first that WVMV removes the perverse incentive that drives minoritarian gerrymandering. Under the status quo, a party that lacks a popular majority could campaign to change voters' minds. But if it controls redistricting, it could instead just redraw the map to ensure a more efficient distribution of voters (maximizing the number of seats won, given its total vote share). By allowing minority rule, we allow parties to govern without

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219. Most famously diagnosed by Downs. *See supra* note 44, at 146.

220. *See, e.g.*, Barnett, *supra* note 186, at 439 (arguing that voting to change the outcome is rational when certain easily-satisfied conditions about voting difficulty and population size are met).

221. For a sophisticated recent version of this argument, see Guerrero, *supra* note 156, at 277 n.13.

222. Jason Brennan, *The Ethics and Rationality of Voting*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE (Dec. 4, 2020), https://plato.stanford.edu/archives/win2020/entries/voting/.

223. Indeed, as we've seen, the same is true for political parties: Under WVMV, their ability to get things done is determined by their share of the total vote.

224. HILL, *supra* note 78, at 208.

being responsive to the majority. But under WVMV, a party gains the power to govern only by winning the majority of votes, so parties have stronger reasons to persuade voters rather than redistribute them. Consider, for example, the Wisconsin State Assembly.[225] It has 99 districts. In 2018, Republican candidates won 63 seats, and Democratic candidates won 36. Under the status quo, the Republican party won control of the Wisconsin state legislature. But they did so with a minority of the popular vote: Their candidates won 45.71% of the statewide vote, to the 54.29% of the statewide vote won by Democrats. These margins matter under WVMV. We can stipulate that there are 99 units of political power in Wisconsin. Since they won 54.29% of the total vote, Democratic candidates would have collectively won 53.75 votes; with 45.71%, Republicans would have won 42.25. The minority can no longer govern. So, the perverse incentive that drives the Wisconsin Republicans to engage in partisan redistricting is substantially reduced if we implement WVMV.

The second point is a corollary to the first. When district lines are fixed (such as U.S. state boundaries, for the U.S. Senate), redistricting is not possible. But parties do not have strong incentives to be equally responsive to all voters; they have stronger reasons to focus their campaigns on *pivotal* voters. This is common knowledge. As Gelman, Katz, and Bafumi write, we can "expect campaign efforts to be proportional to the [*ex ante*] probability of a vote being decisive, multiplied by the expected number of votes changed per unit of campaign expense, although there are likely strategic complications since both sides are making campaign decisions."[226]

In deep red and deep blue states and districts, the *ex ante* probability of any vote being decisive is much lower than in purple districts.[227] So, we can expect campaign efforts to be inequitably distributed among voters. Subject to some complications, campaign efforts are concentrated in a small number of competitive districts.[228] We should regard this as a profoundly undemocratic force within the American electoral system. Campaign efforts include campaign promises, and campaign promises influence government policy (the "program-to-policy linkage").[229] So, forcing candidates to target

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225. The numbers presented in this example are collected from the following sources: *Wisconsin State Assembly Elections, 2018*, Bᴀʟʟᴏᴛᴘᴇᴅɪᴀ, https://ballotpedia.org/Wisconsin_State_Assembly_elections,_2018 (last visited Nov. 29, 2022); *Election Results Archive*, *supra* note 66 (under tab "2018 Fall General Election Results").

226. Gelman et al., *supra* note 180, at 660.

227. *See supra* notes 199–204 and accompanying text.

228. *See* Jay Goodliffe & David B. Magleby, *Campaign Finance in U.S. House Primary and General Elections*, *in* Cᴏɴɢʀᴇssɪᴏɴᴀʟ Pʀɪᴍᴀʀɪᴇs ᴀɴᴅ ᴛʜᴇ Pᴏʟɪᴛɪᴄs ᴏꜰ Rᴇᴘʀᴇsᴇɴᴛᴀᴛɪᴏɴ 62–63, 66 (Peter F. Galderisi, Marni Ezra & Michael Lyons eds., 2001).

229. Robert Thomson et al., *The Fulfillment of Parties' Election Pledges: A Comparative Study on the Impact of Power Sharing*, 61 Aᴍ. J. Pᴏʟ. Sᴄɪ. 527, 528 (2017).

voters in competitive states and districts with their promises makes resultant government policies more responsive to the interests of some voters based on where they happen to reside.[230] More generally, one attractive understanding of the value of democracy frames democracy, in part, as an accountability mechanism. But in uncompetitive districts, it is harder to hold representatives to account. This is not just because it is harder to vote them out of office.[231] If a candidate has less reason to campaign to win (because their district is not competitive), they have less reason to hold campaign events such as town halls, which are an essential means of holding representatives accountable to the electorate.[232] Hence, if campaign efforts are inequitably distributed (based on the competitiveness of districts),[233] then citizens have unequal access to accountability mechanisms.

Third and finally, by giving parties stronger reasons to care about vote margins, WVMV counteracts one way in which the decline of competitive districts may drive political polarization: "[T]he safer the seat, the more partisan the legislator."[234] Where the general election is not competitive, the election that counts is the primary. Extremist candidates are often better positioned to win the primaries in deep red or deep blue districts, even when they underperform more moderate candidates in the general election (in terms of the expected margin of victory).[235] Again, this makes parties less

230. *See* HILL, *supra* note 78, at 235–36.

231. As Lijphart also empirically documents, in a FPTP district system that only applies majority rule within districts, "elections in which a majority of voters vote against the incumbent government 'do not always "send the rascals packing,"'" but rather, "more often than not, the rascals happily continue to rule." Lijphart, *supra* note 35, at 134–35.

232. As Elizabeth Anderson writes in discussing democracy as an accountability mechanism:

> Everyday accountability of decision makers requires the institutionalization of mechanisms for raising claims and judging their worth. The institutionalized feedback mechanisms of democracy . . . —periodic elections, a free press, petitions to government, and so forth—serve both epistemic and accountability functions on a regularized basis. Yet even these mechanisms may often lack an important feature of effective accountability mechanisms: face-to-face interaction between those who make claims and those who are held accountable for meeting them.

ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 102 (2010).

233. As Scott L. Althaus, Peter F. Nardulli, and Daron R. Shaw note, "[c]andidate appearances represent an important and scarce campaign resource." Scott L. Althaus, Peter F. Nardulli & Daron R. Shaw, *Candidate Appearances in Presidential Elections, 1972–2000*, 19 POL. COMMC'N. 49, 50 (2002). They find competitiveness to be a significant factor in explaining patterns of candidate appearances, albeit one complicated by the size of local media markets. *Id.* at 64–66.

234. HILL, *supra* note 78, at 209. The role of the decline in competitiveness in driving polarization is what concerns me here. The role of gerrymandering in driving polarization is more disputed. *Compare* Nolan McCarty, Keith T. Poole & Howard Rosenthal, *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666 (2009), *with* Christopher P. Chambers et al., *Flaws in the Efficiency Gap*, 33 J.L. & POL. 1, 3, 26 (2017).

235. The 2022 Congressional elections provided plenty of examples of far-right (or far-left) candidates who defeated moderates handily in primaries and then went on to underperform in deep red (or deep blue) districts. *See* Jonathan Weisman & Katie Glueck, *Extreme Candidates and*

responsive to voters depending on their districts. And it has other costs on how democratic institutions function: As Downs wrote, "democracy does not lead to effective, stable government when the electorate is polarized."[236] But under WVMV, that dynamic would impose a significant cost on parties. Extremist candidates who can win the general election by lower margins cost their party overall (in terms of its total vote share) and cost their districts (as the district has a weaker representative in Congress). As such, parties have stronger incentives to select candidates who are best positioned to campaign to change minds in the general election, and thereby reduce polarization.

C. The Costs of Competitiveness

The preceding arguments follow from a simple and general observation. By making margins matter, WVMV would make all districts more like current competitive districts. This is good news, insofar as in competitive districts voters have better reasons to vote and parties have better reasons to be responsive to voters. But it is not all good news. There are costs associated with the current state of competitive districts, and there are predictable ways in which WVMV may impose costs of its own.

The simplest illustration of this point involves thinking about financial costs. Campaigning is expensive, so when parties campaign more in competitive races, they spend more in those races.[237] If all districts were treated like current competitive districts, then, perhaps the general cost of elections would increase. Once we see this point, it's easier to see how other costs might increase too. In competitive districts, parties have stronger reasons to disenfranchise voters and engage in negative campaigning to drive down the opposing party's vote share. Under WVMV, they may have stronger reasons to engage in such nefarious practices in all districts to reduce the opposing candidate's and party's margin of victory.

These issues are worth taking seriously and warrant more careful investigation. We need to determine whether all of these costs above would actually eventuate, and if so, then to what degree. For instance, it is not clear how much total campaign expenditure would actually increase under WVMV. Political parties may increase overall expenditure so that expenditure in all districts matches current levels of campaign expenditure in competitive districts, but they may also redistribute overall expenditure so that it is equalized across competitive and uncompetitive districts. Which route they take may depend on a range of factors, but there are reasons to think the latter is more likely. The most expensive component of

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Positions Came Back to Bite in Midterms, N.Y. TIMES (Nov. 14, 2022), https://www.nytimes.com/2022/11/14/us/politics/gop-far-right-election-voters.html.

236. Downs, *supra* note 44, at 143.

237. *See* Goodliffe & Magleby, *supra* note 228, at 62–63, 66.

campaigning, political advertising, is generally ineffective, and a large body of work in political science suggests that higher campaign spending does not cause more campaign victories.[238] Moreover, it is likely that additional campaign expenditure would have diminishing utility in media markets that are already saturated with costly political advertisements around election time.[239]

I cannot resolve these empirical matters here. But there is a general reason to think that even if WVMV comes with increased costs, those costs are outweighed by its democratic promise. To put the point simply, if we really believe that the costs of competitiveness outweigh the benefits, then we should be glad about the decline in competitive districts overall. But most take the opposite view. The decline in competitiveness is widely held to be a democratic tragedy.[240] For instance, in the latest round of redistricting, many commentators have lamented the further decline in competitive districts in states like Texas.[241] This suggests that many take the benefits of competitiveness to outweigh the costs. If so, by giving parties and candidates strong reasons to treat the average district more like current competitive districts, we should expect WVMV to produce a healthier democracy overall, despite the costs we may incur on the way.

IV. IMPLEMENTATION

I've now offered two interlocking lines of argument for WVMV. We need a new conception of voting power so that we can make margins matter and thereby end minority rule. And we need to make margins matter so that

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238. This research is helpfully summarized by Maggie Koerth. *See* Koerth, *How Money Affects Elections*, FIVETHIRTYEIGHT (Sept. 10, 2018, 5:56 AM), https://fivethirtyeight.com/features/money-and-elections-a-complicated-love-story/.

239. The Congressional candidate who spends most usually wins. *See Did Money Win?*, OPENSECRETS, https://www.opensecrets.org/elections-overview/winning-vs-spending (last visited Sept. 18, 2022). But recently, political advertisements have saturated television and digital markets in both competitive races and certain high-profile non-competitive races. This rate of spending may show diminishing returns. Of the top-five highest spending Senate candidates on Google and Facebook in 2020, three were Democratic candidates who lost their elections. *Compare, e.g.*, *Ad Volumes in Congressional Races Smash Records*, WESLEYAN MEDIA PROJECT (Aug. 13, 2020), https://mediaproject.wesleyan.edu/releases-081320 (listing Jaime Harrison, Amy McGrath, and Sara Gideon in the top five spenders in this category), *with, e.g.*, *Senate Results*, CNN, https://www.cnn.com/election/2020/results/senate (last visited Nov. 29, 2022) (showing that each of those candidates lost their election).

240. Most pertinently, many political scientists argue that declines in competitiveness result in declines in responsiveness to voters. *See, e.g.*, Morris P. Fiorina, *Electoral Margins, Constituency Influence, and Policy Moderation: A Critical Assessment*, 1 AM. POL. Q. 479, 491–94 (1973); John D. Griffin, *Electoral Competition and Democratic Responsiveness: A Defense of the Marginality Hypothesis*, 68 J. POL. 911 (2006).

241. Jesse Crosson, *Texas Redistricting Makes 2022 Elections Less Competitive*, SAN ANTONIO REP. (Jan. 11, 2022), https://sanantonioreport.org/texas-redistrictin-2022-elections-jesse-crosson/.

we can have a new conception of voting power and thereby make each vote meaningfully equal. But for all that I have said so far, WVMV may seem to be a purely theoretical solution to a real-world crisis. For us to have a democratic imperative to make margins matter, we must be able to implement WVMV in complex modern democracies. The goal of this Part is to argue that WVMV is feasible in such contexts. This is not to deny that there are challenges in implementing such a system. Instead, it is to contend that the challenges are surmountable.

To make the case for this, I will focus on three electoral contexts, each of which poses particularly important challenges for WVMV, insofar as each raises a deep question about how we think about margins of victory in elections. I will consider the U.S. Senate first, and at the most length, in part because the challenge posed by different district sizes is most important, and in part because the Senate is especially powerful and relatively small.[242] Second, I will focus on the U.K. House of Commons and consider the challenge posed by multi-party systems.[243] Finally, I will consider the U.S. House and the challenge posed when members of one legislative body are elected using different voting procedures.[244]

A. Margins of Victory and District Sizes

The most important case to consider is the implementation of WVMV in the U.S. Senate. There are four reasons for this. First, the Senate is relatively small. It is easier for readers to digest the weighted votes of 100 Senators than the 650 members of the U.K. House of Commons or the 435 Representatives in the U.S. House. This means that I can provide a very concrete analysis of WVMV's implementation in the Senate. Second, the U.S. Senate is an extremely powerful legislative chamber in an extremely powerful modern democracy.[245] So, changing the relative power of parties and Senators using WVMV is highly consequential. Third, the Senate is unusually procedurally complex. It is a multi-member district system (each state elects two Senators), which uses staggered elections (Senators are divided into three classes who are elected in different cycles). This already poses complications, which will be addressed below. But fourth, and most important, the Senate is a district system with profound inequalities in district sizes. The largest district, California, is almost sixty-eight times the size of

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242. *See infra* Section IV.A.

243. *See infra* Section IV.B.

244. *See infra* Section IV.C.

245. For example, the Senate is entrusted with the powers to conduct and judge impeachment trials, U.S. CONST. art. I § 3; to confirm executive and judicial appointments, U.S. CONST. art. II § 2; and to approve treaties with other nations, U.S. CONST. art. II § 2.

the smallest, Wyoming.[246] This makes the risks of minority rule and unequal voting power especially pronounced.[247] But it also raises important but neglected issues in how we quantify margins of victory within WVMV, issues which have significant Constitutional implications.

Before addressing the issues posed by staggered elections and unequal district sizes, let me mention one other complication so that we can set it aside until it is discussed at length in Section IV.B.: Third parties. I will treat the Senate as if all Senators are Democrats or Republicans, and I will ignore votes cast for other parties. These assumptions are defensible. Angus King and Bernie Sanders, the only Independents in the Senate, both caucus with Democrats.[248] And it may seem odd to ignore votes cast for third parties, but recall that WVMV retains the district system. In the U.S., third parties receive a small fraction of the total vote, and do not win the majority in any given district.[249] Under WVMV, as under the status quo, a party cannot gain any power at all except by winning the most votes within a district. Without winning a district, a party has no representative in whom they could vest any legislative power. As such, in the U.S. Senate, votes for third parties are ignored and all legislative power is divided between Republicans and Democrats.[250]

Now let's consider the complications that the Senate poses for WVMV. To illustrate the general points made below I will focus on the composition of Senate during the 117th United States Congress (2021–2023). At the end

246. U.S. CENSUS BUREAU, *supra* note 88.

247. As Adam Jentleson notes:

Although it was always theoretically possible for a party to control a majority in the Senate despite representing a minority of the population, it did not happen with any frequency in the 20th century. By contrast, in the 21st century, every time Republicans have controlled the Senate, they have represented a *minority* of the population.

Jentleson, *supra* note 3.

248. If you do not wish to treat them as Democrats, see *infra* Section IV.B for how WVMV works when we introduce third parties.

249. Patrick Dunleavy, *Duverger's Law Is a Dead Parrot. Outside the USA, First-Past-the-Post Voting Has No Tendency at All to Produce Two Party Politics*, LONDON SCH. OF ECON. BLOG (June 18, 2012), https://blogs.lse.ac.uk/politicsandpolicy/duvergers-law-dead-parrot-dunleavy/ (noting that, in American elections, there is often "zero support for third parties" and that "[w]hen there is any degree of support for third and subsequent parties, it is almost always tiny or very minimal").

250. The same will be true in the House of Representatives. Consider the elections of 2020. Given its 435 districts, we can stipulate that there are 435 units of voting weight to be distributed in the House. A party's share of that total is determined by its share of the popular vote. In 2020, Democratic candidates to the House of Representatives won 50.3% of total the national vote (218.805 votes), while Republican candidates won 47.2% (205.32 votes)—but only unsuccessful candidates won the remaining votes, so that division leaves some legislative power undistributed. JOHNSON, *supra* note 69, at 78. Excluding the votes for those candidates and distributing the remaining power, Democratic candidates won 51.6% of the vote (224.46 votes), to Republicans' 48.4% (210.54 votes). *Id.*

of this section, I will briefly illustrate the implications of WVMV for the 118th Congress (2023–2025), based on the results of the 2022 mid-term elections.

The first complication to consider is that the Senate uses staggered elections. This legislative chamber is divided into three Classes (I, II, or III). Every two years, one Class is elected for a six-year term, though special elections are held outside of these cycles. How can WVMV address this? Using the model developed in Part II, we can start by stipulating that since there are 100 elected Senators, there are 100 units of legislative power to be divided between the two parties.[251] But since elections are staggered, they should be divided further—we should determine each party's total legislative power within a class of Senators by the votes cast for the candidates within that class. This is depicted in Table 4 below[252]:

Table 4

	Votes Received	Share of Vote	Share of Power
Republican Party CII (2021–2027)	36,001,145	51.42%	16.970
Democratic Party CII (2021–2027)	34,006,336	48.58%	16.030
Republican Party CI (2019–2025)	33,303,646	39.49%	13.032
Democratic Party CI (2019–2025)	51,028,000	60.51%	19.968
Republican Party CIII (2017–2023)	41,180,146	43.87%	14.915
Democratic Party CIII (2017–2023)	52,690,578	56.13%	19.084

We can then aggregate these totals from these staggered elections. The Republican party has cumulatively received 44.918 units of legislative

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251. I am ignoring one complication here. The Vice President is the President of the Senate. What about their vote? Is it weighted, and if so, how? Thankfully, this complication is easy to resolve since the Vice President can only cast a tie-breaking vote in the Senate. A vote of any weight above 0 has the same effect as a tie-breaker. So, the question is ultimately inconsequential.

252. The margins of victory in Table 4 below are compiled from numbers reported in Ballotpedia for the 2020, 2018, and 2016 Senate elections. *United States Senate Elections, 2020*, *supra* note 162; *United States Senate Elections, 2018*, *supra* note 165; *United States Senate Elections, 2016*, BALLOTPEDIA, https://ballotpedia.org/United_States_Senate_elections,_2016 (last visited Nov. 29, 2022). These numbers reflect the most recent electoral results for each Senate seat within each Class.

power, to the 55.082 units of legislative power cumulatively received by the Democratic party.[253]

We then need to determine how this is dispersed, to determine each representative's legislative power (i.e., their weighted vote). As before, this is a function of the contribution of each representative's margin of victory to their party's total, calculated to three decimal places.[254] But again, since elections are staggered, each Senator's legislative power should be determined by their contribution to their party's performance in the election of their Senate Class. In other words, only the voters for and against Republican candidates in the election of Class I Senators should affect the power of Republican Class I Senators. Nothing else, including the electoral performance of Class II or Class III Senators, should affect their legislative power. As such, I assume that appointed Senators (such as Padilla, CA-D) inherit the vote margin of their predecessor. And I assume that vote margins for the special election of a Class II Senator can change the legislative power of Senators in Class II, as with the special election of Warnock (GA-D) in January 2021.[255] Some might prefer a different way to implement WVMV. If so, that is fine. My goal here is to demonstrate how WVMV can be feasible in complex democracies, in this case handling the complication posed by staggered elections in the U.S. Senate.

The more difficult and important complication posed by the Senate, however, lies in its profound inequalities in district sizes. This raises a question: Should we consider the margin of victory within districts to be the *number* of votes by which a candidate won, or the *share* of the vote by which a candidate won? We need to choose, and the choice has consequences. Given the scale of the size disparities between states, a Senator who wins in a smaller state by 100,000 votes will win by a larger share of the vote than a Senator who wins in a larger state by 200,000 votes. Which of these Senators should gain more legislative power under WVMV?

One factor that may make this issue seem particularly vexing is that smaller states are disproportionately represented by Republican Senators. Among Senators in the 117th United States Congress, the average Democratic Senator beat the second-place candidate in their election by a larger *number* of votes (470,000, compared to roughly 300,000 for the average

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253. *Id.*

254. Because the weighted vote of each legislator must be rounded, the total does not add up to 100 unless more decimal places are used. But I set aside that complication here.

255. *United States Senate Special Election in Georgia, 2020 (Loeffler vs. Warnock Runoff)*, BALLOTPEDIA (Jan. 5, 2021), https://ballotpedia.org/United_States_Senate_special_election_in_Georgia,_2020_(Loeffler_vs._ Warnock_runoff).

Republican),[256] while the average Republican Senator beat the second-place candidate in their election by a larger *share* of the total vote (20.85%, compared to 17.37% for the average Democrat). A surprising implication of this is that some measures of partisan bias that are based on relative vote shares entail that the Senate is biased against Republicans, rather than against Democrats.[257] In light of this, it may seem that how we understand margins of victory will favor one party.

Thankfully, this is not true if we adopt the version of WVMV developed in Part II. Indeed, I take this to be a primary virtue of the version of WVMV defended here.[258] How we quantify margins of victory cannot make any difference to the cumulative power of parties. It only makes a difference to how that power is dispersed among representatives. The reason why is that the total power of a party is fixed by their cumulative share of the total vote. It is already fixed before we consider each representative's margin of victory within a district. And when we consider each representative's margin of victory, we do not compare *Democratic* representatives' margins of victory to *Republican* representatives' margins of victory. We compare apples to apples, and oranges to oranges. In other words, each representative's legislative power is not a function of their margin of victory, but a function of *the contribution of their margin of victory to their party's total*. To determine this, we need to compare Democrats to Democrats, and Republicans to Republicans.

For the sake of concreteness, then, below I have calculated the weighted vote of each Senator under WVMV where their margin of victory is determined by their *share* of the vote. I present this first in three data visualizations (one for each class of senators), then in a table (which also lists each senator's margin of victory in terms of the number of votes by which they beat their nearest rival, for comparison).

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256. The exact numbers are 473561.72 and 302139.18. These calculations are my own, based on the data presented below in Table 5. *See infra* note 259.

257. This would be the case if we applied Samuel S.H. Wang's lopsided margins test. Samuel S.H. Wang, *Three Practical Tests for Gerrymandering: Application to Maryland and Wisconsin*, 15 ELECTION L.J. 367, 371 (2016). Since Republicans have higher margins of victory in terms of vote shares, they would be the "disadvantaged" party. Similar concerns arise for measures of partisan bias due to differential turnout in districts, as Stephanopoulos and McGhee note. Stephanopoulos & McGhee, *supra* note 107, at 1514–15, 1529–31.

258. In Part II, I distinguished between "straightforward" versions of WVMV on which each representative's weighted vote is a simple function of their own margin of victory and "two-step" systems in which a party's total weighted vote is a function of their cumulative share of the vote (the first step) and each representative's weighted vote is a function of their margin of victory as a contribution to their party's total (the second step). On the straightforward but not two-step version of WVMV, how we understand margins of victory favors one party in the U.S. Senate.

Figure 2

Senate Class I Elections

This map reflects the 2018 U.S. Senate election results under a system of weighted voting by margin of victory. Color reflects the relative weight of each representative's vote.

Party	Total Seats	Total Vote Power
D	23	19.968
R	10	13.033

Map: Wodak, 2022.

Figure 3

Senate Class II Elections

This map reflects the 2020 U.S. Senate election results under a system of weighted voting by margin of victory. Color reflects the relative weight of each representative's vote.

Party	Total Seats	Total Vote Power
D	13	16.029
R	20	16.967

Map: Wodak, 2022.

Figure 4

Senate Class III Elections

This map reflects the 2016 U.S. Senate election results under a system of weighted voting by margin of victory. Color reflects the relative weight of each representative's vote.

Party	Total Seats	Total Vote Power
D	14	19.084
R	20	14.914

Map: Wodak, 2022.

Table 5[259]

State	Name	MOV (number)	MOV (share)	Class	Weighted Vote
ND-R	Kevin Cramer	35353	10.84%	I	0.990
WY-R	John Barrasso	74980	36.86%	I	3.368
FL-R	Rick Scott	98280	0.12%	I	0.011
NE-R	Deb Fischer	133207	19.06%	I	1.741
IN-R	Mike Braun	134443	5.89%	I	0.538
MO-R	Josh Hawley	141896	5.81%	I	0.531
MS-R	Roger Wicker	178068	19.02%	I	1.738
TX-R	Ted Cruz	215151	2.57%	I	0.235
TN-R	Marsha Blackburn	242099	10.79%	I	0.986
UT-R	Mitt Romney	336725	31.68%	I	2.895
AK-R	Daniel S. Sullivan	45044	12.70%	II	0.490
MT-R	Steve Daines	60711	10.02%	II	0.386
ME-R	Susan Collins	70422	8.60%	II	0.332

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259. The margins of victory in the table below are compiled from numbers reported in Ballotpedia for the 2020, 2018, and 2016 Senate elections. *See supra* note 252.

NC-R	Thom Tillis	95633	1.75%	II	0.067
IA-R	Joni Ernst	110138	6.59%	II	0.254
WY-R	Cynthia Lummis	125334	46.09%	II	1.778
MS-R	Cindy Hyde-Smith	130820	9.98%	II	0.384
SD-R	Mike Rounds	132245	31.47%	II	1.214
KS-R	Roger Marshall	156432	11.44%	II	0.441
ID-R	Jim Risch	252582	29.38%	II	1.133
SC-R	Lindsey Graham	258309	10.27%	II	0.396
WV-R	Shelley M. Capito	337145	43.28%	II	1.669
NE-R	Ben Sasse	356316	38.31%	II	1.478
AR-R	Tom Cotton	394481	33.06%	II	1.275
KY-R	Mitch McConnell	417058	19.53%	II	0.753
OK-R	Jim Inhofe	469377	30.16%	II	1.163
AL-R	Tommy Tuberville	471598	20.36%	II	0.785
TN-R	Bill Hagerty	800235	27.04%	II	1.043
LA-R	Bill Cassidy	834859	40.30%	II	1.554
TX-R	John Cornyn	1074219	9.64%	II	0.372
AK-R	Lisa Murkowski	47339	15.20%	III	0.493
MO-R	Roy Blunt	78473	2.80%	III	0.091
PA-R	Pat Toomey	84725	1.40%	III	0.045
WI-R	Ron Johnson	100209	3.40%	III	0.110
SD-R	John Thune	161539	43.70%	III	1.417
LA-R	John Kennedy	188293	21.30%	III	0.690
ND-R	John Hoeven	210638	61.50%	III	1.994
ID-R	Mike Crapo	260714	38.40%	III	1.245
AR-R	John Boozman	261375	23.60%	III	0.765
IN-R	Todd Young	265056	9.70%	III	0.314
NC-R	Richard Burr	267394	5.70%	III	0.185

KY-R	Rand Paul	276002	14.50%	III	0.470
KS-R	Jerry Moran	352198	29.90%	III	0.969
IA-R	Chuck Grassley	376012	24.40%	III	0.791
UT-R	Mike Lee	458504	41.10%	III	1.332
SC-R	Tim Scott	483774	23.60%	III	0.765
AL-R	Richard Shelby	586571	28.10%	III	0.911
OK-R	James Lankford	625556	43.20%	III	1.400
FL-R	Marco Rubio	716227	7.70%	III	0.250
OH-R	Rob Portman	1123200	20.90%	III	0.677
AZ-D	Kyrsten Sinema	55792	2.34%	I	0.114
CA-D	Dianne Feinstein	925743	8.33%	I	0.405
CT-D	Chris Murphy	279864	20.18%	I	0.980
DE-D	Tom Carper	80241	22.13%	I	1.075
HI-D	Mazie Hirono	164272	42.30%	I	2.055
MA-D	Elizabeth Warren	654032	24.16%	I	1.174
MD-D	Ben Cardin	794611	34.55%	I	1.678
ME-I	Angus King	121045	19.08%	I	0.927
MI-D	Debbie Stabenow	275846	6.51%	I	0.316
MN-D	Amy Klobuchar	625847	24.10%	I	1.171
MT-D	Jon Tester	17905	3.55%	I	0.172
NJ-D	Bob Menendez	354328	11.18%	I	0.543
NM-D	Martin Heinrich	164216	23.56%	I	1.144
NV-D	Jacky Rosen	48898	5.03%	I	0.244
NY-D	Kirsten Gillibrand	2058751	34.00%	I	1.652
OH-D	Sherrod Brown	302146	6.85%	I	0.333
PA-D	Bob Casey, Jr.	657734	13.13%	I	0.638

RI-D	Sheldon Whitehouse	87064	23.11%	I	1.123
VA-D	Tim Kaine	536219	16.00%	I	0.777
VT-I	Bernie Sanders	108858	39.93%	I	1.940
WA-D	Maria Cantwell	520636	16.87%	I	0.819
WI-D	Tammy Baldwin	288109	10.84%	I	0.527
WV-D	Joe Manchin III	19397	3.31%	I	0.161
CO-D	John Hickenlooper	301622	9.32%	II	0.792
DE-D	Chris Coons	105750	21.54%	II	1.830
GA-D	Jon Ossoff	36766	0.83%	II	0.070
IL-D	Dick Durbin	959060	16.07%	II	1.365
MA-D	Edward Markey	1180044	33.11%	II	2.813
MI-D	Gary Peters	92335	1.69%	II	0.144
MN-D	Tina Smith	168377	5.25%	II	0.446
NH-D	Jeanne Shaheen	124549	15.65%	II	1.330
NJ-D	Cory Booker	724126	16.31%	II	1.386
NM-D	Ben Ray Luján	56000	6.11%	II	0.519
OR-D	Jeff Merkley	408233	17.59%	II	1.494
RI-D	Jack Reed	163719	33.12%	II	2.814
VA-D	Mark Warner	532301	12.08%	II	1.026
AZ-D	Mark Kelly	78806	2.35%	III	0.167
CA-D	Alex Padilla	2832336	23.20%	III	1.647
CO-D	Micheal Bennet	156352	5.70%	III	0.405
CT-D	Richard Blumenthal	456534	28.60%	III	2.030
GA-D	Raphael Warnock	74611	1.68%	III	0.119
HI-D	Brian Schatz	214112	51.40%	III	3.649
IL-D	Tammy Duckworth	829273	15.10%	III	1.072

MD-D	Chris Van Hollen	686994	25.20%	III	1.789
NV-D	Catherine C. Masto	26599	2.40%	III	0.170
NY-D	Chuck Schumer	3196077	43.60%	III	3.095
OR-D	Ron Wyden	454927	23.30%	III	1.654
VT-D	Patrick Leahy	88494	28.20%	III	2.002
WA-D	Patty Murray	587797	18.00%	III	1.278
NH-D	Maggie Hassan	738	0.10%	III	0.007

To reiterate, each party's cumulative power would be the same if we understood margins of victory in terms of the number of votes by which Senators won. What would be different is how each party's legislative power is dispersed among its elected representatives. Compare Marsha Blackburn (TN-R) to Kevin Cramer (ND-R). Blackburn won by more votes (approximately 242,000 to 35,000), but with a smaller share of the vote (10.8% to 10.9%). Whether we use the number of votes or share of the vote changes whether Blackburn has more legislative power than Cramer, or vice versa.

So which way of quantifying margins of victory should we use? In Table 5, I used vote share. I think several factors make this preferable. But before listing them, I want to emphasize that some factors favor using the number of votes instead.[260] I have no deep objection to proceeding that way, the general effect of which would be to increase the relative legislative power of larger states. So, if the reader finds it odd or objectionable that in Table 5 Senators from smaller states tend to have more power than Senators from larger states, they should recognize that this is not a necessary implication of WVMV itself.

Why, then, should we understand a Senator's margin of victory in terms of the share of the vote? For one, this is the more conventional measure of margins of victory.[261] For another, doing so does not disadvantage districts with lower voter turnout or lower ratios of voters to residents (e.g., districts with higher proportions of children, disenfranchised citizens, or resident aliens). But most importantly, this way of implementing WVMV best

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260. For example, doing so would ameliorate the problems of prison gerrymandering. For further discussion of this topic, see Michael Skocpol, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 STAN. L. REV. 1473 (2017).

261. Gary W. Cox, Jon H. Fiva & Daniel M. Smith, *Measuring the Competitiveness of Elections*, 28 POL. ANALYSIS 168, 169 (2020) ("The 'traditional' measure of competitiveness in [single-member districts] used in these studies is based on the simple difference in vote shares between the winner and the runner-up.").

positions the system to survive a constitutional objection, which is formidable on its face: WVMV seems to violate the Constitutional requirement that "each Senator shall have one vote" in Article I.[262]

Before discussing how WVMV might survive this challenge, I want to emphasize that it only arises for the Senate. This is another reason why I have focused on this chamber of the federal legislature in this Part. The Constitution protects the equal voting power of voters but diverges in how it treats their representatives in Congress. WVMV is relatively easy to implement in the House,[263] because "[t]here is no provision in the Constitution requiring each representative to have exactly one vote or a provision demanding that each of the 435 representatives have equal power when making decisions."[264] But if giving Senators weighted votes is inconsistent with the requirement that each Senator shall have one vote, then WVMV could only be implemented in the Senate through a constitutional amendment, which suggests that it is much less feasible.[265]

So, could any version of WVMV survive this challenge? I will not be able to fully resolve this issue, but I will outline possible responses to the challenge, and frame them in terms of interpreting the textual requirement that each Senator shall have one vote in light of its constitutional purpose.

One purpose of the "each Senator shall have one vote" provision of Article I was to have "senators vote individually rather than as state delegations."[266] WVMV allows Senators to vote individually, so if the textual requirement were interpreted to mean that each Senator shall have their own vote, WVMV would face no serious constitutional challenge. However, the textual requirement very plausibly had a further purpose. After all, weighted voting by population also allows Senators to vote individually. But many have held that this textual provision precludes weighted voting by population in the Senate, because that would disadvantage less populous states:

> The textual requirement that "each Senator shall have *one* vote" was aimed at preventing weighted voting by assuring that the mathematical value of each senatorial vote would remain equal. Any doubt about the meaning of the "one Senator, one vote"

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262. *See* U.S. CONST. art. I § 3. The same provision is incorporated into U.S. CONST. amend. XVII.

263. One would just need to change the rules of the House of Representatives. Toplak, *supra* note 123, at 150 n.193.

264. *Id.* at 150.

265. Amending the U.S. Constitution through Article V has "always been hard," but developments "have made the double supermajority required of Article V almost impossible to achieve." Jill Lepore, *The United States' Unamendable Constitution*, NEW YORKER (Oct. 26, 2022), https://www.newyorker.com/culture/annals-of-inquiry/the-united-states-unamendable-constitution. Though see Amar, *supra* note 56, for a defense of amending the constitution outside of Article V via a national popular vote.

266. Michael J. Teter, *Equality Among Equals: Is the Senate Cloture Rule Unconstitutional?*, 94 MARQ. L. REV. 547, 571 (2010).

language is swept away by the equal state suffrage language of Article V designed to entrench the mathematically equal voting power of each state forever.[267]

Assume, then, that this analysis guides our interpretation of the textual requirement. The key question is whether we must then interpret the text to require that each Senator's vote shall have equal *weight*, or to require that each Senator's vote shall have equal *power*. If we adopt the former view, WVMV violates the requirement. But the former view isn't forced upon us if the purpose of "each Senator shall have one vote" is to entrench the equal voting power of each state. Since voting weight is not equivalent to voting power, WVMV could give Senators votes of unequal weights and yet be consistent with the requirement that each Senator and state have equal voting power.[268] And it could most plausibly be consistent with that requirement if we adopt the version of WVMV that quantifies vote margins using the share of the vote, since that does not disadvantage smaller states or the Senators who represent them.

To see why this is so, we need to return to the question of how we quantify voting power. If the concern is that each Senator and state have equal voting power, and equal voting power means equal probability of decisiveness, how do we quantify those probabilities?[269] Should we use *a priori* or *ex ante* measures of the probability of each state's Senators' votes being decisive within this legislative chamber? This issue has not received the attention it deserves, and which way we go matters in this context.

Say we use *a priori* measures. If we make the random voter assumption, we cannot have reasonable expectations about how ordinary voters (or legislators) will vote. This means no State can have reasonable expectations about its own competitiveness. As such, the expected vote margins for each state are roughly equal. They are not *exactly* equal because of the point

267. Burt Neuborne, *One-State/Two-Votes: Do Supermajority Senate Voting Rules Violate the Article V Guaranty of Equal State Suffrage?*, 10 STAN. J. C.R. & C.L. 27, 40–41 (2014); *see also id.* at 34 ("There's not much that can be done about the basic fact of a malapportioned Senate. Article I, Section 3, which provides that 'the Senate of the United States shall be composed of two Senators from each State . . . and each Senator shall have one vote,' was designed to codify Roger Sherman's Connecticut Compromise, which gave the large states a House of Representatives apportioned by population, and the smaller states a Senate where each state, regardless of population, would exercise 'equal suffrage.' The Entrenchment Clause of Article V purports to lock the Connecticut Compromise into place forever by forbidding any constitutional amendment that would deprive a state without its consent of 'its equal suffrage in the Senate.'").

268. See also *supra* note 178–179 and accompanying text for defenses of the claim that "one person, one vote" must be understood in terms of equal voting power, rather than equal voting weight. Giving citizens votes of equal weight is not *sufficient* for "one person, one vote," since in the context of malapportionment votes of equal weight can have unequal power. My claim here is that giving Senators votes of equal weight is not necessary for "one Senator, one vote," since, as I argue below, unequally weighted votes can have roughly equal power.

269. Standard measures of voting power apply equally to citizens *and* legislators. For discussion, see Gelman et al., *supra* note 180; Banzhaf, *supra* note 126.

mentioned above—on *a priori* measures, larger states can expect to be slightly more competitive. But the difference here is small, and well within the bounds of what the Courts have deemed tolerable in giving each voter roughly equal *a priori* voting power.[270]

What if we drop the random voter assumption and consider the *ex ante* probability of decisiveness? Now we should consider factors such as polling and past voting behavior and partisanship, so that more competitive states can reasonably expect to receive smaller weighted votes (as they will be decided by smaller margins of victory). But margins of victory, understood in terms of the share of the vote by which a candidate won, fluctuate between elections, and do not correlate to states' populations. It is easy to calculate the total voting power of each state in the table above, and the results do not correlate with each State's population.[271] As such, no state should expect to have an *entrenched* inequality of voting power. Arguably, that is consistent with Articles III and V, if we understand the Constitution to be concerned with entrenched inequalities of voting power.[272]

What if we take Article V to require a more exact equality of *ex ante* voting power? WVMV cannot provide that. But nothing can. If one argues that WVMV violates Articles I and V by giving Senators and states unequal *ex ante* voting power, one should already object to district systems as a whole. For one thing, if Senators and states can complain that they have less voting power due to inequalities in the competitiveness of districts, so can their voters. For another, Senators and states already have unequal *ex ante* voting power. Dropping the random voting assumption means we can have reasonable *ex ante* expectations about how ordinary voters *and legislators* will vote. *Ex ante*, we can expect that the decisive vote in the Senate will be cast by Senators from a small number of states.[273] WVMV would change which Senators are more likely, *ex ante*, to be the pivotal vote. On any vote that requires a bare majority (a cumulative weighted vote above 50), the Democratic caucus would not have needed the votes of their seven most

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270. The difference can be determined by comparing the probability distributions for fair independent tosses of *n* coins. As *n* becomes much larger, the results cluster slightly more. *See supra* notes 188–190 and accompanying text.

271. The ten least powerful states are, in order, Georgia, North Carolina, Florida, Arizona, Nevada, Michigan, Montana, Texas, Montana, and Wisconsin. The ten most powerful states are, in order, Connecticut, Oregon, Nebraska, Maryland, Rhode Island, Vermont, Massachusetts, Utah, New York, Wyoming, and Hawaii. These calculations are my own, based on the data in Table 5. *See supra* note 259.

272. Some may not accept such a position. Neuborne argues for a stricter requirement of equal voting power in the Senate (though without applying a standard measure of voting power, or noting the distinction between *a priori* and *ex ante* measures of Senators' voting power). Neuborne, *supra* note 267.

273. In the 2021–2023 Senate, either Joe Manchin or Kristen Sinema is *ex ante* most likely to be decisive on any Senate vote decided by a bare majority, for example.

moderate members.[274] With a weighted vote of 1.83, Coons (DE-D), the eighth most moderate Democratic Senator, would have been the pivotal vote in the Senate in 2021–2023. For any vote requiring a filibuster-proof coalition, Mitt Romney, the fourth most moderate Republican would have been the pivotal vote in the Senate, since the four most moderate Republicans and the Democratic caucus have a combined weighted vote of 60.47.[275]

Some may regard these implications as promising. Democrats would have succeeded in a recent vote on the filibuster under WVMV, and thereby been able to pass voting rights bills in the Senate.[276] The four most moderate Republican Senators have a record of voting with Democrats, so more bipartisan legislation could feasibly be passed in Congress without changing the filibuster. But regardless of whether we regard them as welcome, we should note that these implications reveal that WVMV changes which Senators have more *ex ante* voting power. It does not equalize *ex ante* voting power in the Senate, because nothing can.

So far, I have focused on implementing WVMV in the 117th Congress, but I will now briefly consider its implementation in the 118th Congress. In the 2022 mid-term elections, the Democratic candidates for the Senate collectively received the majority of the vote (50.27%, to the Republicans' 49.73%), and so would receive the majority of the legislative power.[277] The weighted votes of the recently elected Class III Senators' would hence be as follows.

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274. Once again, I am using the ranking from Voteview, *supra* note 164. Combined, the votes of Manchin, Sinema, King, Carper, Kelly, Warner, and Tester have a weight of 3.642, while the remaining 44 Democratic Senators' votes have a weight of 51.439.

275. The four most moderate Republican Senators, based on Voteview, *supra* note 164, are, in order, Collins, Murkowski, Capito, and Romney. Romney's weighted vote of 2.895 is pivotal. A filibuster-proof coalition with Romney is possible even without the votes of either Collins or Manchin and Sinema.

276*. See* Carl Hulse, *Democrats Fail to Change Filibuster Rules as Republicans Block Action on Voting Rights*, N.Y. TIMES (Jan. 19, 2022), https://www.nytimes.com/live/2022/01/19/us/biden-voting-rights-filibuster.

277. The calculation is mine, based on aggregating the data from https://ballotpedia.org/United_States_Senate_elections,_2022.

Figure 5
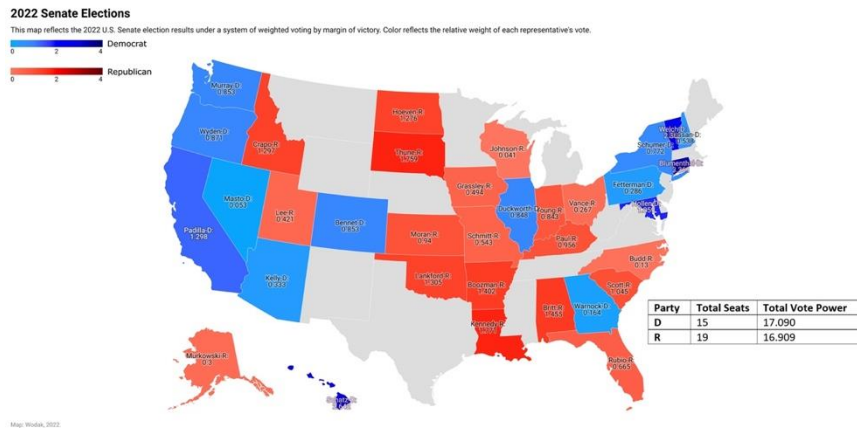
No additional complications were posed by these mid-term elections,[278] but it is instructive to compare the results of the 2016 and 2022 Senate elections. In the latter, the Democratic party flipped one state, Pennsylvania. But under WVMV, they won more voting power in 2016 than in 2022.[279] The reason why is simple. In both 2016 and 2022, the Democratic candidates for the Senate won the most votes, but in 2016 this was by a bigger margin. The Democratic party won more seats in the Senate in 2022 than in 2016 because their votes were more efficiently distributed across states. A similar dynamic played out in the 2022 election of the House of Representatives: The Republican party won the most votes by a large margin,[280] but only narrowly won the most districts (222 to 213) because Democratic votes were more efficiently distributed across districts. If the Democrats had won slightly more votes in any five of the districts with very narrow Republican margins of victory,[281] the 2022 midterms would have been an election inversion. Since WVMV is concerned with margins of victory, the 2022 mid-term election results would have been less favorable to Democrats under WVMV in the Senate and the House.

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278. Two outcomes are worth flagging. First, the party and candidate voting data takes into account the results of Warnock's (D-GA) victory in the December 6 Georgia runoff election, not the November 8 general election. Second, Murkowski (R-AK) won the first Senate election held since Alaska adopted an open primary system with ranked choice voting. Murkowski won with 53.7% of the ranked vote, to Tshibaka (R)'s 46.3%. Hence, the Republican party was treated as having won 100% of the vote in Alaska, although Murkowski had a 7.4% margin of victory.

279. *Compare supra* Figure 4, *with supra* Figure 5.

280. See the updated vote count at https://www.cookpolitical.com/charts/house-charts/national-house-vote-tracker/2022.

281. This list includes California's 13th Congressional District, Iowa's 3rd, New York's 17th, Oregon's 5th, New York's 19th, Colorado's 3rd, Arizona's 6th, and Nebraska's 2nd. The Democrats needed an additional 566 votes to win in California's 13th, for example.

One final note about this discussion. As I discussed earlier, there are more sophisticated versions of weighted voting by population. They rely on an analysis of minimal possible coalitions within the legislative body. In principle, a similar analysis could be applied within versions of WVMV. Under the table described above, we can rank legislators by their weighted votes, to determine the minimum necessary coalitions to reach a majority of the total weighted vote.[282] If we only consider Democratic Senators, the smallest coalition necessary to reach this threshold in the 117th Congress would have had thirty-two Senators.[283] The smallest bipartisan coalition necessary to reach a sixty-vote threshold also had thirty-two Senators.[284] Some may prefer to tweak WVMV in light of this analysis. But I will leave that complex exercise to the reader.

B. Margins of Victory and Third Parties

So far, I have focused on the United States, which happens to be a two-party system; in doing so, I have ignored third parties. But if WVMV were to be implemented outside today's United States, it would need to confront the challenges posed by third parties. And we may well expect that third parties will pose challenges, since minority rule "can easily happen when more than two parties contest an election."[285] Indeed, Amy writes that the United Kingdom has been "plagued" with that problem, including an election of Thatcher's Conservative government in 1987 and Wilson's Labour government in 1974.[286] Commentators also contend that vote splitting in the

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282. *See* FELSENTHAL & MACHOVER, *supra* note 25, at 91–95.

283. The coalition of Senators Casey (PA-D), Kaine (VA-D), Hickenlooper (CO-D), Cantwell (WA-D), King (ME-I), Murphy (CT-D), Warner (VA-D), Duckworth (IL-D), Carper (DE-D), Whitehouse (RI-D), Heinrich (NM-D), Klobuchar (MN-D), Warren (MA-D), Murray (WA-D), Shaheen (NH-D), Durbin (IL-D), Booker (NJ-D), Merkley (OR-D), Padilla (CA-D), Gillibrand (NY-D), Wyden (OR-D), Cardin (MD-D), Van Hollen (MD-D), Coons (DE-D), Sanders (VT-I), Leahy (VT-D), Blumenthal (CT-D), Hirono (HI-D), Markey (MA-D), Reed (RI-D), Schumer (NY-D), and Schatz (HI-D) has 50.219 votes.

284. The coalition of Cotton (AR-R), Murray (WA-D), Shaheen (NH-D), Lee (UT-R), Durbin (IL-D), Booker (NJ-D), Lankford (OK-R), Thune (SD-R), Sasse (NE-R), Merkley (OR-D), Cassidy (LA-R), Padilla (CA-D), Gillibrand (NY-D), Wyden (OR-D), Capito (WV-R), Cardin (MD-D), Wicker (MS-R), Fischer (NE-R), Lummis (WY-R), Van Hollen (MD-D), Coons (DE-D), Sanders (VT-I), Hoeven (ND-R), Leahy (VT-D), Blumenthal (CT-D), Hirono (HI-D), Markey (MA-D), Reed (RI-D), Romney (UT-R), Schumer (NY-D), Barrassom (WY-R), Schatz (HI-D) has a weighted vote of 61.14.

285. AMY, *supra* note 29, at 37.

286. *Id*. at 37 ("Great Britain, the traditional home of single-member plurality elections, has often been plagued with manufactured majorities . . . . Typical was the 1987 election where the Conservative party won 42.3 percent of the vote, the Labour party won 30.8 percent, and the Alliance of Social Democrats and Liberals 22.8 percent. However, because Labour and the Alliance split the center-left vote, the Conservatives were able to win 58 percent of the seats in Parliament. The large majority of seats garnered by Thatcher's party gave the illusion of a strong public mandate for the prime minister and her conservative ideology."); *id.* at 44 ("In 1974, in Great Britain, the Labour party won 37.2 percent of the vote and garnered 301 seats, the Conservatives 38.2 percent

United Kingdom results in minor parties receiving fewer seats per vote than major parties.[287]

So, could we implement WVMV in a third-party system like the United Kingdom? Eleven political parties are represented in the House of Representatives and the House of Lords.[288] In many of its electorates, seats are credibly contested by at least three parties, typically Labour and Conservatives, plus one other party such as the Liberal Democrats or the Scottish National Party. Does WVMV generate problems in such political contexts?

I will argue that it does not. There are serious and realistic problems for WVMV, as described so far, in multi-party contexts. But they are underlying problems that WVMV inherits from features of the district system it preserves, such as the use of FPTP. These cannot be reasons to reject WVMV. They are reasons to change those aspects of the underlying district system. The only unique problem posed by WVMV, by contrast, is so improbable as not to generate a reason to reject WVMV either.

For the sake of both brevity and comprehensiveness, let's walk through the implications that third parties have for WVMV by considering four possible election results. The first represents scenarios when a third party wins a small fraction of the total vote and does not win a majority in any given district. This is illustrated here:

Table 6

	A	B	C	D	E	F	G	H	Total
Blue	4,998	4,998	4,948	4,948	4,948	9,900	9,900	9,900	54,540
Red	5,002	5,002	5,002	5,002	5,002	50	50	50	25,160
Green	0	0	50	50	50	50	50	50	450

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and 297 seats. After that election a *London Times* survey showed that 70 percent of those polled supported a change to a new system of voting in which 'the number of seats a party wins reflects the number of votes it gets in the election.'").

287. *Id.* at 248 ("The centrist third party, the Liberal Democrats, has routinely been denied anything close to its fair share of seats in parliament."); *see also* Aaron Brick & Cameron Brick, *Districting that Minimizes Partisan Bias*, 8 HUMANS. & SOC. SCI. COMMC'NS, June 7, 2021, at 2 ("First-past-the-post elections, in which different maps create different outcomes for the same vote, produce partisan bias. Recent problematic cases include the UK Independence Party, which in 2015 got only 1% as many Parliamentary seats per vote as the Conservatives, and the Pakatan Rakyat of Malaysia, which in 2013 took only 40% of seats despite winning more than half of the total vote.").

288. This is based on the results of the 2019 General Election of the House of Commons. The eleven parties are the Alliance Party, Conservative Party, Co-operative Party, Democratic Unionist Party, Green Party, Labour Party, Liberal Democrats, Plaid Cymru, Scottish National Party, Sinn Féin, and Social Democratic and Labour Party. *Political parties in Parliament*, U.K. PARLIAMENT, https://www.parliament.uk/about/mps-and-lords/members/parties (last visited Nov. 29, 2022).

In this scenario, there is no issue with ignoring the few votes received by Green candidates. Indeed, that was the approach recommended at the start of Part IV.A. In fact, it is no different from how winner-take-all district systems treat two-party elections—if one party does not win a district, it wins no legislative power.[289]

The second scenario, by contrast, represents a case where a third party wins a larger share of the vote, and receives a majority in at least one district:

Table 7

	A	B	C	D	E	F	G	H	Total
Blue	2,998	2,998	2,998	2,998	2,998	7,900	7,900	7,900	38,690
Red	2,000	5,002	5,002	5,002	5,002	100	100	100	22,308
Green	5,002	2,000	2,000	2,000	2,000	2000	2000	2000	19,002

This is a relatively tidy example of the type of electoral outcome we find in district systems with more powerful third parties, such as the United Kingdom. In this particular case, no party has won a majority of the total vote (Blue has 48.3% of the total vote), so no party has won a majority of total voting power in the legislature. Is this a problem? That depends on the voting rules in the legislative body. If it requires an absolute majority, rather than a plurality, to pass a bill, then the Blue party cannot pass legislation on its own, because the voting rules enshrine a more demanding conception of majority rule. But this is not a feature of WVMV. And it is not an outcome unique to WVMV. The Democrats in the Senate already face exactly this scenario if we consider King and Sanders to be Independents. Third party systems often require cross-party coalitions to govern.

The third scenario is where the trouble seems to start. What if a party wins a large share of the total vote *without winning a single district*? The answer is that the party has no legislative power at all, as it has no representative with whom to vest any power. To illustrate this, consider the dire case where a party wins *most* of the total vote, but without winning the most votes in a single electoral district:

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289. In *Whitcomb v. Chavis*, the Court documented "[a] striking but typical example of the importance of party affiliation and the 'winner take all' effect" in which a party receives a large minority of the popular vote (48.69%) and yet loses every single district. 403 U.S. 124, 134 n.11 (1971). In light of this, it is surprising that Dahl treated this "extreme outcome" as "only a theoretical possibility." *See* DAHL, *supra* note 42, at 100 ("In a majoritarian system, if the candidate of one party were to win a plurality (relative majority) of votes in every district, then that party would win *all* the seats.").

Table 8

	A	B	C	D	E	F	G	H	Total
Blue	0	0	0	0	0	5,002	5,002	5,002	15,006
Red	5,002	5,002	5,002	5,002	5,002	0	0	0	25,010
Green	4,998	4,998	4,998	4,998	4,998	4,998	4,998	4,998	39,984

Since WVMV retains majority rule *within* districts, no Green candidate wins any legislative power at all. But now WVMV fails to guarantee majority rule *across* districts. In this scenario, the Blue party will win 37.5% of the legislative power, and the Red party will win 62.5%, despite the Green party having received more votes than either of those parties. Here WVMV seems to allow minority rule.

And we can make matters worse by considering one final scenario, which illustrates how a minor change in the distribution of votes can produce a major change in the distribution of political power between parties:

Table 9

	A	B	C	D	E	F	G	H	Total
Blue	0	0	0	0	0	5,002	5,002	5,002	15,006
Red	4,998	5,002	5,002	5,002	5,002	0	0	0	25,006
Green	5,002	4,998	4,998	4,998	4,998	4,998	4,998	4,998	39,988

The only change in voter behavior between the third and fourth scenario is that two voters in District A switched parties, such that now the Green candidate narrowly won rather than narrowly lost. But since the Green party has now won a district, it now has a single representative with whom to vest legislative power. The balance of power shifts dramatically. Switching two votes out of 80,000 makes the Green party jump to having most of the total legislative power (49.985%).

The third and fourth scenarios seem to present serious concerns about WVMV. The most important response to address these problems is simple. They only arise in extremely improbable scenarios. Consider the aforementioned example of a dramatic vote-seat share disparity where the U.K. Independence Party ("UKIP") in 2015 received only 1% as many Parliamentary seats per vote as the Conservatives. UKIP won only 12.64% of the popular vote, and it still won a seat.[290] I cannot locate a single example where a party has won *most* of the popular vote across districts without

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290. *See* Brick & Brick, *supra* note 287, at 2; Matt Osborn et al., *UK 2015 General Election Results in Full*, GUARDIAN (May 7, 2015), https://www.theguardian.com/politics/ng-interactive/2015/may/07/live-uk-election-results-in-full .

winning a majority in a single district. We should judge electoral systems on the *probability* of perverse outcomes, not the mere *possibility* of perverse outcomes.[291] District systems frequently result in minoritarian government. That is why the problem of minoritarian government is serious. Insofar as WVMV poses any risk of a perverse outcome here—a violation of majority rule in the jurisdiction as a whole—the risk is strictly theoretical.

That said, I also think it is arguable that these scenarios do not present uniquely serious problems for WVMV. First, we already know that district systems allow minor changes in the distribution of voters to produce changes in the distribution of legislative power: This "is a structural feature of single-member districting."[292] Second, we already know that voting for third parties who will not win under plurality rule voting systems results in "wasted votes."[293] In fact, this situation is significantly improved under WVMV. For example, imagine you are a voter in a Labour district where the Green Party candidate is by far the most likely second-place candidate, but no Green Party candidate is likely to win anywhere. If you vote for the Green Party candidate, your vote contributes to reducing the Labour representative's margin of victory—this vote is not wasted. If you vote for a different party's candidate—the Conservative, the Liberal Democrat—your vote contributes to *their* share of the total vote, and so is not wasted either. WVMV thus gives voters more ways to make a difference in district systems with third parties.

This leaves the fact that WVMV in one sense cannot guarantee majority rule. But even here, the same is true of other electoral systems. The best comparison is to instant-runoff voting ("IRV"). While IRV is often defended on the grounds that it guarantees rule by an absolute majority within districts (a candidate can only win with over 50% of the preferred vote),[294] there is a similar sense in which that claim is false.[295] IRV increases the rate of spoiled and exhausted ballots, and those votes are not counted.[296] Spoiled ballots have been incorrectly filled out. A ballot is exhausted in the counting process when voters do not need to rank all candidates and all of a voter's preferred candidates have been eliminated. There is a relation between the rates of exhausted and spoiled ballots: Requiring voters to rank more candidates

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291. *See* GERRY MACKIE, DEMOCRACY DEFENDED 17 (2003).

292. Beitz, *supra* note 55, at 334.

293. Stephanopoulos & McGhee, *supra* note 107, at 1506.

294. *See, e.g.*, MATT GEHRING, MINN. HOUSE OF REPS. RSCH. DEP'T, INSTANT-RUNOFF VOTING 2 (Feb. 2007) (". . .[T]he system is designed to ensure that the winner has the support of a majority of voters."); Betty Keller, *Pros and Cons of Instant Runoff (Ranked Choice) Voting*, LEAGUE OF WOMEN VOTERS VT., https://my.lwv.org/vermont/article/pros-and-cons-instant-runoff-ranked-choice-voting ("The voting continues until one candidate has the majority of votes, so the final winner has support of the majority of voters.").

295. *See* Craig M. Burnett & Vladimir Kogan, *Ballot (and Voter) "Exhaustion" Under Instant Runoff Voting: An Examination of Four Ranked-Choice Elections*, 37 ELECTORAL STUD. 41, 46–49 (2015).

296. *Id.*

reduces the rate of exhausted ballots but increases errors, and hence the rate of spoiled ballots. Often the number of spoiled ballots is greater than the vote margin between the top two candidates.[297] In elections of the Australian House of Representatives, where voters are required to rank all candidates,[298] often as many as 5% of votes cast are spoiled ballots.[299] The rate of exhausted ballots in IRV systems where voters need not rank all candidates is often also higher than the margin between candidates.[300] As such, IRV only guarantees that the victor won the majority of all preferred votes that can be counted. In a crucial respect, the issue for WVMV is very similar to the issue posed by exhausted ballots under IRV. Some votes are in effect discarded from the total because they were for candidates with insufficient support, and that allows parties to govern with a majority of the *total eligible vote*. In effect, WVMV just treats all votes cast for parties that do not win a single district as exhausted ballots for the purposes of determining which party has won the most votes across districts. As demonstrated above, similar outcomes abound under IRV, but IRV is often touted as more democratic or more consistent with majority rule.[301] Why take a different stance with WVMV?

C. Margins of Victory and Distinct Voting Procedures

So far, we have considered the challenges posed by unequal district sizes and third party candidates. The third and final complication to consider is less pressing, and more technical. To implement WVMV, we would need to compare margins of victory in districts which use different voting procedures. This is particularly true in the United States, where Article I of the Constitution gives states the power to set the "[t]imes, [p]laces and [m]anner" of congressional elections.[302] As such, the procedures used in congressional elections vary between states. Washington and California use open primaries with runoffs for the top two candidates.[303] Maine uses ranked

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297. *Id.*

298. In Australia, a ballot paper marked as informal is not counted towards any candidate: "To make a formal vote on a House of Representatives ballot paper, you need to number every box with a series of consecutive numbers according to your preference." *Voting in the House of Representatives*, AUSTL. ELECTORAL COMM'N (May 11, 2022), https://aec.gov.au/Voting/How_to_Vote/Voting_HOR.htm.

299. George Siddons, *What Can We Learn From the Impact of Compulsory Voting in Australia?*, EXEPOSÉ, https://exepose.com/2016/11/02/what-can-we-learn-from-the-impact-of-compulsory-voting-in-australia/ (last visited Dec. 14, 2022).

300. Burnett & Kogan, *supra* note 295, at 46–49.

301. *See supra* note 294 and accompanying text.

302. U.S. CONST. art. I, § 4.

303. *Top-two Primary*, BALLOTPEDIA, https://ballotpedia.org/Top-two_primary (last visited Nov. 29, 2022).

choice voting ("RCV") for House and Senate elections.[304] Louisiana uses jungle primaries.[305] How can WVMV compare electoral outcomes across districts that use different electoral procedures?

It's helpful, again, to consider how this complication plays out across the two steps of WVMV. Let's start with the second step: comparing representatives' margins of victory. Consider the fact that in five districts in 2018,[306] and in eight districts in 2020,[307] the general election was between two members of the same political party. Commentators have noted that the winners of those elections receive a smaller share of the total vote than you might expect given the partisan lean of their districts.[308] In other words, if we use the same measure of representatives' margins of victory across all districts, the winners of those districts might receive less legislative power than they, in some sense, deserve.

I am less concerned about this issue. Much work has already been done in political science on how to represent margins of victory in elections that use procedures other than FPTP.[309] Building off this work, more sophisticated versions of WVMV can adopt different measures of representatives' margins of victory depending on the electoral procedure used in their state.

What about the first step, where we compute a party's total vote share? In districts where both candidates in the general election are from the same party, the election is in effect uncontested for the purposes of determining a party's cumulative vote share. If all candidates in the general election of a given district are Democrats, all votes in that district go to Democrats. And notably, in all but two of the races just mentioned (California's 8th in 2018

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304. *Maine Question 5, Ranked-Choice Voting Initiative (2016)*, BALLOTPEDIA, https://ballotpedia.org/Maine_Question_5,_Ranked-Choice_Voting_Initiative_(2016) (last visited Nov. 29, 2022).

305. *Jungle Primary*, BALLOTPEDIA, https://ballotpedia.org/Jungle_primary (last visited Nov. 29, 2022). A "jungle primary" starts with a single non-partisan primary. If one candidate wins a simple majority in that election, they win their position. If no candidate wins a simple majority, the top two candidates (regardless of party) advance to a general election where only a plurality vote is required to win.

306. California's 6th, 8th, 27th, and 44th Congressional Districts and Washington's 9th Congressional District. *See 2018 Congressional Margin of Victory*, 270TOWIN, https://www.270towin.com/content/2018-congressional-margin-of-victory-notes (last visited Nov. 29, 2022).

307. California's 12th, 18th, 29th, 34th, 38th, and 44th Congressional Districts, Washington's 10th Congressional District, and Louisiana's 5th Congressional District. See *Election Results, 2020: Congressional Margin of Victory Analysis*, BALLOTPEDIA (Aug. 29, 2022), https://ballotpedia.org/Election_results,_2020:_Congressional_margin_of_victory_analysis; *November 3, 2020 General Election Results*, SEC. OF STATE OF WASH. (Feb. 3. 2021), https://results.vote.wa.gov/results/20201103/federal-all.html.

308. *See 2018 Congressional Margin of Victory*, *supra* note 306.

309. *See* Lirong Xia, *Computing the Margin of Victory for Various Voting Rules*, *in* PROCEEDINGS OF THE 13TH ACM CONFERENCE ON ELECTRONIC COMMERCE 982–99 (Boi Faltings, Kevin Leyton-Brown & Panos Ipeirotis eds., 2012).

and Louisiana's 5th in 2020), a Democrat vied against a fellow Democrat on election day.[310] This inflates their total vote share.

This does not pose a significant challenge for WVMV. For one thing, the net effect is likely very small. For another, it's not clear why the effect is truly undemocratic. Consider the prevalence of uncontested congressional districts: forty-two in 2018,[311] twenty-seven in 2020,[312] and thirty-six in 2022.[313] There is nothing undemocratic about a party winning a lower share of the total vote because it chose not to field candidates in some districts.[314] So why is there anything undemocratic about a party winning a lower share of the total vote because it could not field a sufficiently popular candidate to get through to the runoff election in California, Washington, Georgia, or Louisiana?

CONCLUSION

In a context where many are deeply concerned about the rise of minority rule and the erosion of equal voting power, we need solutions that match the scale of the problem. This is not to deny the importance of other ambitious reform agendas, or to claim that weighting representatives' votes by margins of victory would be a panacea. It would not provide Congressional representation for U.S. territories, or end felon disenfranchisement, or cure any number of other pathological features of American democracy. But if we aspire to live in a republic that guarantees government by the majority, and if we want to live up to the ideal of political equality in which our votes are meaningfully equal, then we need to make margins matter.

This Article offers a way to do just that. We can preserve electoral districts in which the candidate with the most votes wins, such that the party that wins the most districts wins the most seats. And we can guarantee that this will not generate minoritarian governments by making how much legislative power representatives and parties receive (i.e., the weight of the votes they control) a function of margins of victory. In that way, WVMV can

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310. *2018 Congressional Margin of Victory*, *supra* note 306; *Election Results, 2020: Congressional Margin of Victory Analysis*, *supra* note 307.

311. Matt Taibbi, *Far Too Many House Seats Have Been Uncontested for Too Long*, ROLLING STONE (Nov. 6, 2018), https://www.rollingstone.com/politics/politics-features/uncontested-house-seats-history-752658/.

312. *Uncontested: House Races with no Major Party Opposition*, 270TOWIN (Oct. 30, 2020), https://www.270towin.com/news/2020/10/30/uncontested-house-races-no-major-party-opposition_1119.html.

313. *Uncontested: The 36 House Districts with Only One Major Party on the Ballot*, 270TOWIN (Sept. 15, 2022, 1:38 PM), https://www.270towin.com/news/2022/09/15/uncontested-the-36-house-districts-with-only-one-major-party-ballot_1419.html.

314. However, there is a strong incentive in WVMV for major parties to contest all races, which has been a long-standing and often criticized feature of U.S. Congressional races. *See, e.g.*, CHRISTIANO, *supra* note 25, at 230.

ensure that even in the face of partisan gerrymandering or natural sorting, the party with the most votes will govern.

In doing so, WVMV also gives voters a second type of voting power. And unlike the power to decide who wins an election, it is a power that can be meaningfully equalized between voters whose districts vary in competitiveness. Hence, voters who are less likely to change who wins can still be the political equals of their fellow citizens, insofar as they can be equally likely to change the margins of victory and thereby alter how much legislative power is held by their representatives.

This proposal is not intended to be of mere theoretical interest. We could implement WVMV in modern democracies like the U.S. Congress and U.K. Parliament, despite the challenges that would be involved. Accordingly, WVMV offers a practical solution to the real-world problems of minority rule and political inequality. We don't just have a new idea here—we have a democratic imperative to make margins of victory matter.