

Barriers at the Ballot Box

Symposium Issue

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The Supreme Court has famously called the right to vote “preservative of all rights.”¹ The phrase is not just fine rhetoric but literally true. With the possible exception of free speech, there is no conceivable right more important to democratic self-governance. Chip away at it, dilute it, or sideline it, and you lose the ability to prevent those in power from taking away our property, liberty, and even lives.

And yet it’s been hard in recent years to escape the nagging sense that the right is indeed being chipped away and diluted or is at least under threat. In our last presidential election, a hostile foreign power intervened with a massive disinformation campaign with demonstrable results² and penetrated the voter-registration databases of several states.³ A major party candidate (now President) declared during the campaign that the election system was “rigged,” and declined

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1. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (explaining that the right to vote is “preservative of other basic civil and political rights”).

2. *See* Karen Yourish et al., *A Timeline Showing the Full Scale of Russia’s Unprecedented Interference in the 2016 Election, and Its Aftermath*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/interactive/2018/09/20/us/politics/russia-trump-election-timeline.html>.

3. Cynthia McFadden et al., *Russians Penetrated U.S. Voter Systems, Top U.S. Official Says*, NBC NEWS (Feb. 8, 2018, 6:28 AM), <https://www.nbcnews.com/politics/elections/russians-penetrated-u-s-voter-systems-says-top-u-s-n845721>.

to say he'd accept an adverse election result.⁴ The final result was the Electoral College victory of the candidate supported by the covert Russian operation despite that candidate losing the national popular vote by nearly 3 million votes.⁵ According to a recent poll, only 40% of voters have "a great deal of confidence" in the accuracy of U.S. election vote counts, and over 40% are "very concerned" about our elections being hacked.⁶

The courts will be of little help. The Supreme Court seems unable or unwilling to prevent gerrymandering.⁷ And it has aggressively acted against campaign finance reform.⁸

At the state level, it's a mixed bag. It seems the overall trend is toward the diminution of the right to vote. More and more states are enacting restrictive voter ID laws,⁹ engaging in severe purges of voters from the registration rolls,¹⁰ and enacting gerrymandered districting plans.¹¹ On the other hand, there have been some recent referendum victories for protection of voting rights. In the 2018 general election, 4 states (Colorado, Michigan, Missouri, and Utah) adopted nonpartisan

4. Patrick Healy & Jonathan Martin, *Donald Trump Won't Say if He'll Accept Result of Election*, N.Y. TIMES (Oct. 19, 2016), <https://www.nytimes.com/2016/10/20/us/politics/presidential-debate.html>.

5. Nate Cohn, *Why Trump Had an Edge in the Electoral College*, N.Y. TIMES (Dec. 19, 2016), <https://www.nytimes.com/2016/12/19/upshot/why-trump-had-an-edge-in-the-electoral-college.html>.

6. Billy Morgan, *New Survey Reveals Concerns About the Security of the Nation's Voting System Ahead of the Midterm Elections*, U. CHI. HARRIS PUB. POL'Y (Oct. 10, 2018), <https://harris.uchicago.edu/news-events/news/new-survey-reveals-concerns-about-security-nations-voting-system-ahead-midterm>.

7. *See, e.g.*, Gill v. Whitford, 138 S. Ct. 1916, 1934 (2018) (unanimously vacating and remanding a gerrymander-based challenge to a Wisconsin state legislative districting plan).

8. *See, e.g.*, McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 227 (2014) (striking down "aggregate" contribution limits); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 372 (2010) (striking down spending limits by corporations); SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 698 (D.C. Cir. 2010) (striking down spending limits for independent expenditure committees, which set the stage for the rise of "Super PACs"), *cert. denied*, 562 U.S. 1003 (2010).

9. *See infra* pp. 959–63 and notes 16–36.

10. *See infra* pp. 963–66 and notes 37–57.

11. *See* STEVEN MULROY, RETHINKING US ELECTION LAW: UNSKEWING THE SYSTEM 74–78 (2018).

redistricting commission reform via referendum.¹² And a Florida referendum restored voting rights to over 1 million previously disenfranchised former felons.¹³ Either way, voting rights and election reform are very much on the political radar.

Given all these causes for concern, it should come as no surprise that the first bill introduced in the new Democratic-majority House of Representatives—the signature bill showcased as illustrative of the new chamber’s self-touted reform agenda—was a comprehensive election reform bill, one whose self-avowed purpose is to “expand Americans’ access to the ballot box” and “reduce the influence of big money in politics.”¹⁴

So, it seems timely indeed for a Symposium focusing on voting rights and election reform. Currently, the main battlegrounds in election reform fall into a few main categories: (1) impediments to individual voter franchise; (2) campaign finance; (3) electoral administration (other than that governing access to the franchise); and (4) electoral systems. The first category includes such issues as registration requirements, voter ID requirements, registration purges, and felon disenfranchisement.¹⁵

The articles in this Symposium Issue touch on parts of all 4 categories. I highlight a few discrete issues below, ones both discussed in this Symposium Issue’s articles as well as others that deserve attention.

Voter ID Laws. Voter ID laws have become a higher-profile issue in the last decade or two. Since 2000, the number of states with voter ID laws rose from 15 to 33, with the pace of adoption accelerating

12. David Daley, *As Polarized as Americans Are, They Agree on This: Gerrymandering Is Wrong*, L.A. TIMES (Nov. 8, 2018, 3:30 PM), <https://www.latimes.com/opinion/op-ed/la-oe-daley-gerrymandering-reform-20181109-story.html>.

13. S.M., *Why the Restoration of Felons’ Voting Rights in Florida Is a Big Deal*, THE ECONOMIST (Nov. 9, 2018), <https://www.economist.com/democracy-in-america/2018/11/09/why-the-restoration-of-felons-voting-rights-in-florida-is-a-big-deal>.

14. For the People Act of 2019, H.R. 1, 116th Cong. (2019).

15. Often overlooked in this category, but worthy of consideration, are blanket geographical denials of the franchise to U.S. citizens. D.C. residents cannot vote for Congress. Residents of Puerto Rico, Guam, American Samoa, and other U.S. territories cannot vote for Congress or President. We should not be surprised to find that decades from now we will look back and wonder how we let these blanket disenfranchisements continue as long as we did.

in 2011.¹⁶ Not all of these laws call for a *photo* ID, and some do allow alternative identification means (like signing an affidavit). But currently, 11 of these states require photo IDs and accept no substitutes.¹⁷

At first glance, this may not seem unduly burdensome. Most of us have some form of photo ID with us at all times, typically a driver's license or other state-issued photo ID. But in states with voter ID laws, between 5% and 16% of registered voters lacked such documents.¹⁸ Since many elections in our closely divided nation have margins of victory of 5% or less,¹⁹ these laws can determine election outcomes.

Proponents justify these laws as necessary to combat voter fraud. Perhaps the most nationally prominent advocate for this view, **Hans von Spakovsky**, articulates it in one of this Symposium Issue's pieces.

The consistent experience in elections has been that where election fraud occurs, it almost always takes 1 of 2 forms: absentee ballot fraud or "insider jobs"—i.e., misconduct by election officials themselves.²⁰ Voter ID laws and voter purges would not address either of these varieties.

To evaluate the arguments for strict voter ID laws and voter registration purges, one must decide normative questions like how much

16. *History of Voter ID*, NAT'L CONF. ST. LEGISLATURES (May 31, 2017), <http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx>.

17. *See id.*

18. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-634, ELECTIONS: ISSUES RELATED TO STATED VOTER IDENTIFICATION LAWS 21–22 (2014), <https://www.gao.gov/assets/670/665966.pdf>.

19. *See Congressional Elections Decided by 10 Percent or Less, 2018*, BALLOTEDIA, https://ballotpedia.org/Congressional_elections_decided_by_10_percent_or_less_2018 (last updated Apr. 9, 2019).

20. *See, e.g.*, RICHARD L. HASEN, *THE VOTING WARS* 60–61 (2012) (noting that absentee-ballot fraud is much more common than voter-impersonation fraud); *id.* at 47–48, 53–62 (discussing fraud by election or party officials); *see also* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 235–36 (4th Cir. 2016) (contrasting evidence of absentee voting fraud with lack of evidence of voter impersonation fraud); Glenn Garvin, *You Can't Keep Up with South Florida Voter Fraud Without a Scorecard*, MIAMI HERALD (Nov. 14, 2018, 4:55 PM), <https://www.miamiherald.com/news/local/community/miami-dade/article111207622.html> (listing multiple instances of Florida "voter fraud" over the past several decades, all of them absentee fraud).

burden on access to the franchise is tolerable to safeguard election integrity. One must also consider the effectiveness of alternative integrity safeguards, like using non-photo IDs, bank records, utility bills, etc.; matching voter sign-in signatures to those in the registration records; or even just the availability of felony prosecution for voter fraud. But 2 much simpler empirical questions lie as threshold matters: (a) How much voter fraud occurs?; and (b) How many voters would be disenfranchised by these laws?

The answer to (a) appears to be “not much.” Exhaustive studies fail to find more than a few documented instances of voter impersonation fraud out of millions of ballots cast in elections over time.²¹ After years of research, Rutgers political science professor Lorraine Minnite concluded that in-person voter fraud—individual voters impersonating other eligible voters, voting more than once in the same election, or otherwise knowingly voting when they are ineligible—is actually rare, and a “politically constructed myth.”²² Far more significant, from the standpoint of election integrity, are failures in election administration,²³ which receive much less attention from legislators. More recently, Loyola Law School professor Justin Levitt conducted a comprehensive study of U.S. elections from 2000 through 2014, striving to identify any credible allegation of in-person voter impersonation fraud.²⁴ He found 31 valid incidents, representing about 230 separate votes out of 1 billion ballots cast.²⁵ A study by the Brennan Center concluded that an American is more likely to be struck by lightning than to participate in an election with in-person voter fraud.²⁶ Courts reviewing the issue

21. See HASEN, *supra* note 20, at 47–48, 51–54, 61 (recounting numerous studies and investigations).

22. LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* 6 (2010).

23. *Id.*

24. Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?utm_term=.396b6e0866ef.

25. *Id.*

26. JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, *THE TRUTH ABOUT VOTER FRAUD* 3–6 (2007), <http://www.brennancenter.org/page/-/The%20Truth%20About%20Voter%20Fraud.pdf>.

have come to similar conclusions.²⁷ Even when the Bush Justice Department,²⁸ the Texas Attorney General's office,²⁹ and various U.S. Attorneys' offices³⁰ went out of their way to try to find voter fraud cases, they have had a hard time coming up with more than a tiny number of actual voter impersonation cases.

Nonetheless, the election fraud that does occur, primarily absentee ballot fraud or fraud by election officials, is sometimes conflated with in-person voter fraud to justify voter ID laws. A salient example from right here in Memphis: In an electoral contest of an extremely close 2005 special state senate election, it was discovered that poll workers illegally recorded 3 votes from residents of the precinct that the poll workers knew to be recently dead.³¹ It was not enough to change the outcome of the election, but troubling nonetheless. To this day, Republican legislators in Tennessee use this "dead people voting" anecdote to justify their support for strict voter ID laws, eliding the fact that those laws would have done nothing to prevent it.³²

The results of such over-scrutiny are predictable: a drop in voter participation. For example, a 2014 study by the U.S. Government Accountability Office found that Tennessee's voter ID laws caused a 2.2 percentage-point drop in voter participation.³³ Again, it may not seem like much, but it could be enough to change the outcome in a close election, especially since the drop-off is skewed demographically: the

27. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 238 (5th Cir. 2016) (noting only 2 convictions for in-person voter impersonation fraud out of 20 million votes cast in a decade of Texas elections); *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 235 (4th Cir. 2016) (observing North Carolina failed to identify "even a single individual" who has ever been charged with in-person voter fraud).

28. HASEN, *supra* note 20, at 53–58.

29. *Id.* at 54.

30. *Id.* at 58–59.

31. Joe Strupp, *Memphis Paper Finds Dead Voters, Prompts Fraud Probe*, EDITOR & PUBLISHER (Dec. 15, 2005), <http://www.editorand-publisher.com/news/memphis-paper-finds-dead-voters-prompts-fraud-probe/>.

32. *See, e.g.*, Bill Ketron, *Voter Fraud Compromises the Electoral Process*, DAILY NEWS J. (Aug. 23, 2016, 9:01 PM), <https://www.dnj.com/story/opinion/2016/08/22/ketron-voter-fraud-compromises-electoral-process/89099814/>.

33. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-634, ELECTIONS: ISSUES RELATED TO STATED VOTER IDENTIFICATION LAWS 48, 51 (2014), <https://www.gao.gov/assets/670/665966.pdf>.

drop was most pronounced among African-American voters.³⁴ The overall 2.2 percentage-point drop translates to about 88,000 voters disenfranchised.³⁵

The best way to view these issues is to think in terms of “false positives” and “false negatives.” The “false positives,” the number of otherwise legitimate voters being excluded because of these laws, clearly dwarfs the “false negatives,” the number of voter impersonation fraud voters who slip through for want of these restrictions. In the criminal justice system, we have a very high tolerance for false negatives. We say, “better that ten guilty persons go free than we convict one innocent person.”³⁶ It is unclear why that calculus should be reversed—and by many orders of magnitude—in the context of enfranchisement.

Authors in this Issue take voter ID laws as a given and seek to justify or improve them. As noted, **Hans von Spakovsky** makes the case for such laws as a prophylactic to voter fraud. **Tracey Carter** argues that college-issued photo IDs, which some voter ID states disallow, should be found sufficient. **Eugene Mazo** argues that states with such laws have a moral responsibility to provide all citizens with a free state-issued photo ID.

Voter Purges. A similar “false positive” and “false negative” argument could be made about aggressive “list maintenance” actions, sometimes called “voter purges.” Election officials have always had to periodically revise voter registration rolls to delete persons who have died, moved out of the jurisdiction, or otherwise become ineligible.³⁷

34. *Id.* at 52.

35. Philip Bump, *Voter ID Laws in Kansas and Tennessee Dropped 2012 Turnout by Over 100,000 Votes*, WASH. POST (Oct. 9, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/10/09/gao-voter-id-laws-in-kansas-and-tennessee-dropped-2012-turnout-by-over-100000-votes/?utm_term=.bb6d68a24b9d.

36. The original version of this oft-paraphrased adage is attributed to Blackstone. 4 WILLIAM BLACKSTONE, COMMENTARIES *352 (“[I]t is better that ten guilty persons escape, than that one innocent suffer.”).

37. See Michael Wines, *Culling Voter Rolls: Battling Over Who Even Gets to Go to the Polls*, N.Y. TIMES (Nov. 25, 2017), <https://www.nytimes.com/2017/11/25/us/voter-rolls-registration-culling-election.html>. In the United States, noncitizens, including permanent legal residents, are not allowed to vote in elections. *Register to Vote and Check or Change Registration*, USA.GOV, <https://www.usa.gov/register-to-vote#item-212447> (last updated Mar. 4, 2019). And

But these efforts have become increasingly aggressive in recent years,³⁸ as has criticism of these efforts,³⁹ due to false positives based on superficial resemblances in names and other identifying information among different voters.⁴⁰ These strict purge programs tend to disproportionately disenfranchise racial and ethnic minority voters.⁴¹

The same problems occur on the front end with barriers to registration. Just recently, the State of Georgia placed tens of thousands of voter registration applications on hold, requiring an “exact match” with information on file with the Social Security Administration or Georgia’s driver’s license office.⁴² Deviations as minor as a missing hyphen in a last name could disqualify a voter.⁴³ An Associated Press study showed a racial disparity in Georgia’s registration verification process, with over 70% of the flagged applications from black applicants in a state that is only 32% black.⁴⁴ And North Dakota recently imposed a requirement that voters show proof of a residential street address, although many Native Americans living in remote areas lack such an address, using P.O. Box numbers instead.⁴⁵ A federal district court found that this requirement disproportionately burdened Native Americans: roughly 10% of North Dakota’s Native American residents, roughly 2,000 persons, became ineligible to vote.⁴⁶

depending on the state, there are potential restrictions on convicted felons and mentally incapacitated people. *Id.*

38. *See, e.g.*, JONATHAN BRATER ET AL., BRENNAN CTR. FOR JUSTICE, PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 1–3 (2018), https://www.brennan-center.org/sites/default/files/publications/Purges_Growing_Threat_2018.pdf.

39. *See, e.g.*, Greg Palast, *The GOP’s Growing Stealth War Against Voters*, ROLLING STONE (Aug. 24, 2016, 2:40 PM), <https://www.rollingstone.com/politics/politics-features/the-gops-stealth-war-against-voters-247905/>.

40. *See, e.g.*, Sharad Goel et al., *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections 27–28* (Jan. 18, 2019) (working paper), <https://5harad.com/papers/1p1v.pdf> (describing overestimations of “double voters” based on false positive matches, among other problems).

41. BRATER ET AL., *supra* note 38, at 7.

42. Ben Nadler, *Voting Rights Become a Flashpoint in Georgia Governor’s Race*, ASSOCIATED PRESS (Oct. 9, 2018), <https://ap-news.com/fb011f39af3b40518b572c8cce6e906c>.

43. *Id.*

44. *Id.*

45. *See Brakebill v. Jaeger*, 905 F.3d 553, 557–59 (8th Cir. 2018).

46. *Id.*

Justifying these practices is a narrative emphasizing—and overstating—the extent of fraudulent registrations and improper voting.⁴⁷ Immigrants are a convenient target for this alarmism. President Trump famously and inaccurately claimed that at least 3 million noncitizens fraudulently voted in the 2016 presidential election.⁴⁸ More recently, he claimed that 58,000 noncitizens voted in Texas, another false claim, this time based on Texas’ efforts to match driver’s license applications from known noncitizens to similar names on the voter registration rolls.⁴⁹

These claims are a good example of the weak links in the inferential chain that lead to unsupportable claims of noncitizen voting. First, the Texas Director of Elections himself warned that these were “WEAK matches,” and could not by themselves be relied on as conclusive proof that the person registered was the same noncitizen driver.⁵⁰ Second, many such records will reflect instances in which a driver later became a citizen and then registered to vote.⁵¹ After all, the list covered anyone who had identified as a noncitizen in the last 22 years.⁵² Indeed, a similar matching attempt in Florida in 2012 started with a list of 180,000 names only to narrow the list down to about 200 suspected noncitizens on voter rolls.⁵³ Finally, only 85 noncitizens

47. See, e.g., Goel et al., *supra* note 40, *passim* (describing the overstatement of the “double voting” phenomenon).

48. Nicholas Fandos, *Trump Won’t Back Down from His Voting Fraud Lie. Here Are the Facts.*, N.Y. TIMES (Jan. 24, 2017), <https://www.nytimes.com/2017/01/24/us/politics/unauthorized-immigrant-voting-trump-lie.html>.

49. Robert Farley, *More Voter Fraud Misinformation from Trump*, FACTCHECK.ORG: THE WIRE (Jan. 30, 2019), <https://www.factcheck.org/2019/01/more-voter-fraud-misinformation-from-trump/>.

50. Keith Ingram, *Election Advisory No. 2019-02*, TEX. SECRETARY ST. (Jan. 25, 2019), <https://www.sos.texas.gov/elections/laws/advisory2019-02.shtml> (as of publication, this Advisory has been rescinded).

51. Farley, *supra* note 49.

52. Ashley Lopez, *Texas Officials Begin Walking Back Allegations About Noncitizen Voters*, NAT’L PUB. RADIO (Jan. 30, 2019, 3:13 PM), <https://www.npr.org/2019/01/30/690023531/texas-officials-begin-walking-back-allegations-about-noncitizen-voters>.

53. Robert Farley, *Fact Check: Trump Wrongly Claims There Was Voter Fraud in Texas*, USA TODAY (Jan. 31, 2019, 12:51 PM), <https://www.usatoday.com/story/news/politics/2019/01/31/voter-fraud-fact-check-trump-wrongly-says-non-citizens-voted-texas/2732037002/>.

were actually removed from the rolls on that basis.⁵⁴ Third and most significant, while noncitizens, unsure of their legal rights, can incorrectly register to vote, that does not mean that they actually attempt to cast a ballot. Indeed, there are vanishingly few confirmed cases of noncitizens actually voting.⁵⁵

Fortunately, it appears that the computer program most associated with these types of overly restrictive voter purges has decreased in usage in the last few years, indicating some hope that the worst abuses are on the decline.⁵⁶ Persons removed improperly from voting rolls are supposed to be able to vote a provisional ballot, which will count in the election if they can provide proof of their proper registration within a few days.⁵⁷ But this process does not always work as contemplated.

In this Symposium Issue, **Naila Awan** describes how states use registration-list purges to effect voter suppression and proposes solutions to prevent this outcome. In her printed remarks, Symposium participant **Audrey Calkins** discusses how her provisional ballot in the 2016 presidential election was denied, leading her to testify before the Tennessee General Assembly about enacting laws that would provide an appeal process for provisional ballot denials.

Felon Disenfranchisement. A similar calculus applies regarding felon disenfranchisement laws. Such laws have been with us since the

54. Amy Sherman, *Charlie Crist Says Florida "Put Together a List of Over 100,000 People That They Thought Were Ineligible to Vote. Came Out There Were Less than 10."*, POLITIFACT: FLA. (Sept. 12, 2013, 4:24 PM), <https://www.politifact.com/florida/statements/2013/sep/12/charlie-crist/charlie-crist-says-secretary-state-put-together-li/>.

55. Wendy Weiser & Douglas Keith, *The Actually True and Provable Facts About Non-Citizen Voting*, TIME (Feb. 13, 2017), <http://time.com/4669899/illegal-citizens-voting-trump/>.

56. Steven Rosenfeld, *Red State and GOP Efforts to Purge Voter Rolls Have Been Stymied*, SALON (Aug. 6, 2018, 7:00 AM), https://www.salon.com/2018/08/06/red-state-and-gop-efforts-to-purge-voter-rolls-have-been-stymied_partner/.

57. See 52 U.S.C. § 21082 (2018) (the section of the federal Help America Vote Act mandating provisional ballot procedures); TENN. CODE. ANN. § 2-7-112(a)(3)(A) (2019) (example of Tennessee provisional ballot procedures); see also *Provisional Ballots*, NAT'L CONF. ST. LEGISLATURES (Oct. 15, 2018), <http://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx> (summary of state law provisions on provisional ballots).

beginning of the Republic,⁵⁸ and became more widespread after the Civil War.⁵⁹ Many of the post-Civil War enactments were conscious attempts to reduce the number of African-Americans on the voting rolls.⁶⁰ The number of persons affected has risen sharply in recent decades along with the general rise in incarceration rates.⁶¹ Today, over 6 million Americans have lost their franchise in this manner.⁶² The laws have a clear racially disproportionate effect: 1 in 13 African-Americans are disenfranchised, compared to 1 in 52 non-black Americans.⁶³

Major rationales for these laws include the argument that felons cannot be trusted to exercise their franchise honestly and responsibly.⁶⁴ Such persons might vote fraudulently, or with ill intent to further the interests of lawbreakers. But given the increase in incarceration of Americans convicted for non-violent drug offenses,⁶⁵ and the prevalence of strict disenfranchisement laws that disqualify voters long after they have served their time and are presumably rehabilitated,⁶⁶ it is arguable that the number of “false positives”—persons disenfranchised who could be counted on to vote responsibly—far outweighs the “false negatives”—ill-intended former felons who would take the time to register and vote just to further fraudulent or anti-social aims. This is especially the case given the lack of evidence of perversions of the electoral process by ill-intentioned voters seen in the 2 states (Maine and

58. Alec Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1060–62 (2002).

59. *Id.* at 1063–64.

60. *Id.* at 1064–65.

61. CHRISTOPHER UGGEN ET AL., 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, THE SENTENCING PROJECT *passim* (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf>.

62. *Id.* at 3.

63. *Id.*

64. *See* Ewald, *supra* note 58, at 1052, 1072–89.

65. Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POL’Y INITIATIVE (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html>.

66. *See generally* JEAN CHUNG, FELONY DISENFRANCHISEMENT: A PRIMER, THE SENTENCING PROJECT (July 17, 2018), <https://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf> (summarizing different state-law approaches).

Vermont)⁶⁷ that have no felon disenfranchisement at all, allowing even incarcerated persons to vote.⁶⁸

This Symposium Issue features the remarks of a Symposium participant who spoke to these issues. **Nora Demleitner** discusses felon disenfranchisement and how this practice constitutes an unwarranted limitation on the right to vote that fails to protect voting integrity.

Census. The scapegoating of immigrants, discussed earlier with respect to voter registration purges, leads easily to manipulation of the census. The current administration has proposed adding a question about citizenship to the census form.⁶⁹ Previously, the government derived any data it needed about citizenship from the American Community Survey, a smaller-sample survey that the Census Bureau regularly conducted mid-decade between the main census operations.⁷⁰ The decision to add a citizenship question has sparked opposition from civil

67. See ME. CONST. art. II, § 1; VT. CONST. ch. II, § 51; see also Ewald, *supra* note 58, at 1054 n.23.

68. Generalized “bad faith” or “antisocial” voting is difficult to define, let alone measure. But however one defines or measures it, there is no obvious affirmative evidence from election results that Maine and Vermont suffer from disproportionately high rates. As to the more narrow concern of fraudulent voting, affirmative evidence rebuts any notion that Maine and Vermont’s more permissive policies cause problems. For example, of over 900 reported election fraud cases between 1979 and 2019 in a comprehensive database maintained by the conservative think tank The Heritage Foundation, only 2 came from Maine, and none came from Vermont. See *Election Fraud Cases*, HERITAGE FOUNDATION, https://www.heritage.org/voterfraud/search?combine=&state=ME&year=&case_type=All&fraud_type=All (last visited May 10, 2019). And for a recent comprehensive official review in New Hampshire, see also Casey McDermott, *After Exhaustive Investigations, New Hampshire Officials Find No Widespread Fraud in Recent Elections*, N.H. PUB. RADIO (May 29, 2018), <https://www.nhpr.org/post/after-exhaustive-investigations-nh-officials-find-no-widespread-fraud-recent-elections#stream/0>.

69. Michael Wines, *Court Blocks Trump Administration from Asking About Citizenship in Census*, N.Y. TIMES (Jan. 15, 2019), <https://www.nytimes.com/2019/01/15/us/census-citizenship-question.html>.

70. Catherine Rampell, *The Beginning of the End of the Census?*, N.Y. TIMES (May 19, 2012), <https://www.nytimes.com/2012/05/20/sunday-review/the-debate-over-the-american-community-survey.html>.

rights groups.⁷¹ Many experts raise the quite legitimate concern that having federal officials ask people about their citizenship status will have a chilling effect on census participation and disproportionately affect Latinos.⁷²

This is obviously a concern among undocumented persons, but it might even cause legal immigrants and Latino citizens to think twice about participating. Such persons are likely to know undocumented friends and relatives and may shy away from any interaction with federal authorities once the issue of immigration status is raised out of an abundance of caution. Because census data is used for reapportionment, redistricting, and funding allocations for federal programs,⁷³ an undercount among immigrants or Latinos would have serious ill-effects for both communities. The underrepresentation of Latinos would also tend to disproportionately harm representation among Democrats. **Molly Danahy and Danielle Lang** put these issues into perspective in their essay.

Campaign Finance. No one breathing and awake can miss the salience of campaign finance issues in our current political system. The past decade's decisions in *Citizens United*,⁷⁴ *SpeechNow.org*,⁷⁵

71. Tara Bahrapour, *Trump Citizenship Question on 2020 Census Is Blocked by Court*, L.A. TIMES (Jan. 15, 2019, 9:45 AM), <https://www.latimes.com/nation/politics/la-na-pol-census-citizenship-question-ruling-20190115-story.html>.

72. See Edith Honan & Tara Bahrapour, *Statistics Expert Testifies Census Citizenship Question Would Harm Count*, WASH. POST (Nov. 5, 2018), https://www.washingtonpost.com/local/social-issues/statistics-expert-testifies-census-citizenship-question-would-harm-count/2018/11/05/ee0a489a-e144-11e8-b759-3d88a5ce9e19_story.html?noredirect=on&utm_term=.fd54597071d4.

73. See NAT'L RESEARCH COUNCIL, MODERNIZING THE U.S. CENSUS 19–22, 28 (Barry Edmonston & Charles Schultze eds., 1995), <https://www.nap.edu/read/4805/chapter/1>.

74. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 372 (2010) (striking down spending limits by corporations).

75. *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 698 (D.C. Cir. 2010) (striking down spending limits for independent expenditure committees and setting the stage for the rise of “Super PACs”).

McCutcheon,⁷⁶ etc., have opened the floodgates for increases in unrestricted spending and “dark money” contributions.⁷⁷ Numerous studies document that the wealthy have more influence on politicians’ votes than other Americans,⁷⁸ and that political donors are disproportionately white, male, wealthy, and ideologically extreme.⁷⁹ **Ann Ravel** discusses how social media and campaign finance laws, 2 of several new voter suppression methods, suppress minority votes.

Election Administration. An often overlooked but fundamental area of electoral reform is election administration itself. The nuts and bolts of how election officials physically keep track of votes and voters is foundational. The devil is in the details. Increased concern in recent years in election equipment’s vulnerability to hacking and tampering has placed hardware and software issues in stark relief.⁸⁰ **Kim Breedon** and **Chris Bryant** explain the problem we have with public corruption in voting machine irregularities and how integrity’s absence in recounts threatens democracy.

Gerrymandering and Hyperpartisanship. No review of election reform in 2019 would be complete without a reference to gerrymandering. While the practice of drawing districts with the intent to favor one political group or another has been with us since the beginning of the Republic,⁸¹ it has gotten worse in recent decades,⁸² as computer map-

76. *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 227 (2014) (striking down “aggregate” contribution limits).

77. See Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts’ Role in Eroding “We the People’s” Ability to Constrain Our Corporate Creations*, 51 HARV. C.R.-C.L. L. REV. 423, 426–28, 437–38 (2016) (making this observation).

78. See Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1468–74 (2015).

79. *Id.* at 1474–75.

80. See Kim Zetter, *The Crisis of Election Security*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/magazine/election-security-crisis-mid-terms.html>.

81. See Thomas Rogers Hunter, *The First Gerrymander? Patrick Henry, James Madison, James Monroe, and Virginia’s 1788 Congressional Districting*, 9 EARLY AM. STUDIES 781, 782 (2011), https://www.jstor.org/stable/23546676?seq=1#page_scan_tab_contents.

82. See LAURA ROYDEN & MICHAEL LI, BRENNAN CTR. FOR JUSTICE, EXTREME MAPS 1–2 (2017), <https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf> (summarizing substantial gerrymandering effects in the first 3 elections after the 2010 round of redistricting, 2012–2016); Sam Wang & Brian

drawing systems become ever more sophisticated.⁸³ Indeed, in U.S. House races there are significant, repeated deviations from the share of the vote a party receives and the share of seats the party wins (a standard fairness measure for a redistricting plan), with almost 20 House seats gained through gerrymandering today.⁸⁴

In light of this problem, the **Hon. Lynn Adelman** helpfully argues that map-drawers and courts need to look at a state's actual political complexion so that partisanship redistricting plans accurately reflect the percentages that each party represents. And, on the more general topic of hyperpartisanship in our legislatures, **Bruce Ledewitz** discusses 2 events that could threaten our democracy in today's polarizing partisan political climate and suggests that law professors create a bipartisan, pro-democracy caucus in response.

Structural Electoral System Reform. While any contribution to the jurisprudence of gerrymandering is welcome, it bears noting that there are even more fundamental issues with our electoral system—underappreciated issues that until recently have received relatively little attention. It is not just at the presidential level that we have recently seen the majority will thwarted. In 2012, more Americans voted for Democratic candidates for U.S. House seats than for Republican candidates, yet the GOP maintained a 30-seat lead.⁸⁵ Over the course of the first 3 (staggered) U.S. Senate elections in this decade, more Americans voted for Democratic Senate candidates than Republican, and yet

Remlinger, *Slaying the Partisan Gerrymander*, AM. PROSPECT (Sept. 25, 2017), <http://prospect.org/article/slaying-partisan-gerrymander> (summarizing results of redistricting analysis over recent decades, and concluding, inter alia, that the number of U.S. House seats gained through gerrymandering has increased from fewer than 5 in the 1970s, '80s, and '90s to almost 20 today). Another study shows a dip in seats-votes deviation in the 1990s, but otherwise a rise in recent decades from the '70s and '80s. Theodore S. Arrington, *Gerrymandering the House, 1972–2016*, U. VA. CTR. FOR POL.: SABATO'S CRYSTAL BALL (Jan. 26, 2017), <http://www.centerforpolitics.org/crystalball/articles/gerrymandering-the-house-1972-2016/>.

83. See Micah Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting*, 5 DUKE J. CONST. L. & PUB. POL'Y 69, 73–75 (2010); Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, THE ATLANTIC (Oct. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/>.

84. Wang & Remlinger, *supra* note 82.

85. MULROY, *supra* note 11, at 1.

Democrats won only 46% of the Senate seats.⁸⁶ Similar non-majoritarian results can occur at the state and local level.⁸⁷

The underlying cause of all these deviations from majority rule is our practice of carving up the voting jurisdiction into various subunits—states for the Electoral College and Senate, and districts for the House as well as state and local elections—and holding a “winner-take-all” contest within each. Whenever this occurs, there is a significant potential to skew the vote away from a true reflection of popular will. Even where it doesn’t result in denying the party with the most votes a majority of seats, such a contest can make its share of seats larger or smaller than what it deserves based on its true proportion of the vote. The same dynamic is possible when we look at a racial or ethnic minority group’s share of the vote and political power—or, really, any politically cohesive group, be it ideological or otherwise in makeup.

As noted above, the Supreme Court seems disinclined to intervene aggressively to police gerrymandering.⁸⁸ This is unsurprising, since the Court has always been reluctant to enter the “political thicket” of districting.⁸⁹ But even if it did, it would only address the most extreme forms of gerrymandering,⁹⁰ ones so obvious that a court could definitively conclude that the districting plan was drawn with an intent to harm a rival political group.⁹¹

This is insufficient, because many gerrymanders occur unintentionally as the natural product of the phenomenon of “demographic

86. *Id.*

87. For example, in New Jersey, Republican candidates garnered 51% of the statewide vote for General Assembly in 2013, but Democrats controlled 60% of the seats. *Id.*

88. *See, e.g., Gill v. Whitford*, 138 S. Ct. 1916, 1926–34 (2018).

89. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016) (citing *Colegrove v. Green*, 328 U.S. 549, 556 (1946)) (quoting the famous “political thicket” phrase); *see also Vieth v. Jubelirer*, 541 U.S. 267, 283–84 (2004) (plurality opinion) (concluding that partisan gerrymandering was a “nonjusticiable political question”).

90. *See MULROY, supra* note 11, at 97–98.

91. Even Justice Kagan, writing for the 4 Justices most receptive to judicial intervention in gerrymandering cases, has recently suggested that any legally cognizable gerrymandering claim would involve some evidence that line-drawers *intended* to gerrymander. *See Gill*, 138 S. Ct. at 1936–40 (Kagan, J., concurring).

clustering.”⁹² In the post-World War II era, increasingly mobile Americans have tended to move together in areas where they are politically similar, with Democrats over-concentrating in large cities.⁹³ Because redistricters must draw single-member districts with equal populations that are relatively compact, this leads to “unintentional gerrymanders.”⁹⁴

This phenomenon of “natural gerrymanders” explains why another commonly favored remedy for gerrymandering, nonpartisan redistricting commissions, is not a complete remedy. To be certain, they are a good idea. The United States is the only industrialized democracy that still allows self-interested legislators to draw their own district lines.⁹⁵ As a result, voters in America do not choose their representatives; it is the other way around. Establishing bipartisan commissions made up of non-elected officials and allowing technical experts to draw the lines has worked well in other countries to reduce the partisan votes-seats bias.⁹⁶ In the United States, the idea has caught on at the state level in recent years, with more and more states adopting some form of this approach.⁹⁷

But while these systems may somewhat reduce the voting skew, they do not eliminate it. A 2007 study comparing state legislative redistricting in states with and without redistricting commissions concluded that bipartisan redistricting commissions featured lower partisan bias, but that the across-state comparisons were nonetheless “mixed.”⁹⁸ Two states implementing commissions for the first time in the 2000 redistricting cycle (Idaho and Arizona) provided “only modest support” for the hypothesis that commissions lower partisan bias, and evaluation of districts using presidential election results showed “little

92. See MULROY, *supra* note 11, at 80–81; Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q. J. POL. SCI. 239, 240, 265 (2013).

93. See BILL BISHOP, *THE BIG SORT* 9–10 (2009).

94. See Chen & Rodden, *supra* note 92, at 265.

95. See Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 773–83 (2013).

96. See *id.* at 785–87.

97. See MULROY, *supra* note 11, at 102–04.

98. See Bruce E. Cain et al., *Redistricting and Electoral Competitiveness in State Legislative Elections* 18 (Apr. 13, 2007) (unpublished manuscript) (on file with the Midwest Political Science Association).

difference” between commission states and those where legislators drew their own lines.⁹⁹ A later study of both state legislative and congressional districting in the 1992–2012 electoral period found no significant effect on partisan bias.¹⁰⁰ A more recent study by the same scholar, using the innovative new “efficiency gap” measure of gerrymandering,¹⁰¹ showed a median efficiency gap of 12% for legislator-drawn plans compared to 6% for commission-drawn plans.¹⁰² While a 5%–6% deviation from actual voter preferences may at first glance seem small, it is more than enough to turn the tide in close elections and deny a group supported by the majority from actually controlling a legislative body. This practice is problematic indeed in a closely divided country like America. Thus, while these undoubtedly salutary reforms do improve matters, a troubling voting skew remains.

This problem would exist even without the historical development of the post-World War II “Big Sort” internal migration. It is an inherent bug of any single-member district, winner-take-all system. The very act of carving a jurisdiction into single-member districts requires choices among a host of factors like partisan fairness; racial and ethnic fairness; equality of population; compactness; respect for local political subdivision boundaries; and more. Trying to do well on some criteria inevitably requires sacrificing others.¹⁰³

This is particularly the case when it comes to the common redistricting reform goal of drawing competitive districts, which conflicts

99. *Id.*

100. Nicholas O. Stephanopoulos, *The Consequences of Consequentialist Criteria*, 3 U.C. IRVINE L. REV. 669, 704 (2013).

101. The “efficiency gap” measures the number of “wasted votes” in a redistricting plan—i.e., either votes for a losing candidate, or “surplus” votes for a winning candidate over and above the minimum amount necessary for that candidate to win (i.e., one more than the nearest competing candidate). A large difference between the number of wasted votes for one party versus another suggests gerrymandering. See Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263, 1271 (2016).

102. Nicholas O. Stephanopoulos, *Arizona and Anti-Reform*, 2015 U. CHI. LEGAL FORUM 477, 482 (2015).

103. Indeed, racial fairness in districting depends on racial segregation. As housing integration improves, it becomes harder to draw compact minority-majority districts. As noted below, a proportional representation system would resolve that dilemma. See *infra* pp. 975–77.

fundamentally with notions of partisan or racial fairness. In a hypothetical state with 10 districts that are 60% Republican and 40% Democratic, one might favor a districting plan with 6 majority-GOP and 4 majority-Democratic districts. But then no district races would be competitive; all general elections would be a foregone conclusion.

Indeed, that is the current reality anyway, even without special attempts at partisan or racial fairness. Most general elections are preordained at the line-drawing stage—which explains why incumbents are re-elected at over 90% of general elections.¹⁰⁴ In such a system, the only real competition is at the partisan primary stage. This incentivizes candidates to move to extremes of the left and right during the primary and to avoid reaching across the aisle for bipartisan compromise, lest they be “primaried.” There is no incentive for compromise or “getting things done,” for there is no real competition in general elections. Justice Kagan recently recognized this “cascade of negative results” of the current gerrymandered districting system: “indifference to swing voters[?] . . . views; extreme political positioning designed to placate the party’s base and fend off primary challenges; the devaluing of negotiation and compromise; and the impossibility of reaching pragmatic, bipartisan solutions to the nation’s problems.”¹⁰⁵ This regrettable reality is not likely to change dramatically, even with increased judicial scrutiny and use of nonpartisan redistricting commissions.

There is a solution, but it involves a move away from our fixation on a winner-take-all construct. Under winner-take-all, 51% of the votes controls 100% of the power, and a consistent minority of 40% in repeated elections gets nothing, leading that minority over time toward a sense of futility, alienation, and disengagement. Better would be proportional representation (“PR”), where elections fill multiple legislative seats at once rather than just one at a time. Under PR, 40% of the votes leads to roughly 40% of the seats. Rather than “winner-takes-all,” it’s “majority take most, and minority take its fair share.”

104. Chris Cillizza, *People Hate Congress. But Most Incumbents Get Re-elected. What Gives?*, WASH. POST (May 9, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/05/09/people-hate-congress-but-most-incumbents-get-re-elected-what-gives/?utm_term=.96090654ec22.

105. *Gill v. Whitford*, 138 S. Ct. 1916, 1940 (2018) (Kagan, J., concurring) (quoting Brief for Bipartisan Group of Current and Former Members of Congress as *Amici Curiae* Supporting Appellees at 4, 10–30, *Gill*, 138 S. Ct. 1916).

Indeed, almost every democracy in the developed world, except for the United States and Canada, uses some form of PR.¹⁰⁶ Most of them achieve this through some form of a parliamentary system, where voters vote for parties rather than individuals, and party leaders choose party nominees rather than hold primary elections.¹⁰⁷

More adaptable to the American model would be a form of PR known as the Single Transferable Vote (“STV”). STV is used to fill multiple legislative seats in the same election.¹⁰⁸ It can be used either in an at-large election in a jurisdiction, or within a multi-member district. STV allows voters to rank their candidate preferences: first choice, second choice, and so on. This is known as Ranked Choice Voting (“RCV”). To be elected, a candidate must meet a “quota,” a minimum threshold of votes, calculated by {total number of votes cast} divided by {# of seats to be filled + 1}. For example, to fill 5 seats in an at-large or multi-member district race, a candidate would need at least one-sixth of the vote.

Counting of the votes occurs in a series of rounds. If a candidate reaches the quota in the first round, she is seated.¹⁰⁹ Any “surplus” votes she received over and above the quota are redistributed based on the second choices indicated on the ballots for that candidate.¹¹⁰ If another candidate now also meets the quota, that candidate is also seated, with any surplus votes being redistributed as before. If no candidate reaches the quota in a given round, the candidate with the fewest votes is eliminated, with all ballots for that eliminated candidate redistributed among remaining candidates based on second choices. If a second choice is not available because that candidate has already been seated

106. See MULROY, *supra* note 11, at 130–33, and sources cited therein.

107. *Id.*

108. The description of STV in the next 2 paragraphs is taken from MULROY, *supra* note 11, at 136–39.

109. *Id.*

110. *Id.* There are 2 main ways to redistribute “surplus” votes. One, the “Cincinnati” method, simply does a random draw of ballots for that winning candidate equal to the surplus and redistributes those ballots based on second choices. For example, if the quota is 100 and the candidate gets 125 votes, 25 ballots would be randomly drawn to be redistributed. Under the “fractional” method, all ballots for that winning candidate would be redistributed but only assigned a fractional value. In this example, all 125 ballots for the early round winner would be redistributed based on the second choices listed on the ballots, but each ballot would only count as 25/120 or approximately 1/4 of a vote.

or eliminated, STV moves to the third choice listed for the candidate, and so on, down through any choices indicated on a ballot. This process of seating candidates and redistributing votes continues until all seats are filled.¹¹¹

STV has been used for decades in Cambridge, Massachusetts, and for years in Minneapolis, Minnesota.¹¹² Australia has used it for over 7 decades to elect its national Senate.¹¹³ Where it is used, it leads to PR—i.e., a rough correspondence between the percentage of the vote earned by a political party or racial/ethnic group and the percentage of legislative seats won in that election.¹¹⁴

STV would be easily adaptable at the local level, where cities and counties often hold at-large elections or fill multiple seats from multi-member districts.¹¹⁵ Even some state legislatures use multi-member districts and could easily adopt STV.¹¹⁶ Adoption at the federal level is harder, because current law requires that U.S. House elections use single-member districts.¹¹⁷

A bill currently in Congress would address this. Under the Fair Representation Act,¹¹⁸ sponsored by Rep. Don Beyer (D-Virginia), states would use STV to elect their U.S. House representatives.¹¹⁹ If a state had 5 or fewer House members, it would hold a statewide at-large election.¹²⁰ In other states, STV elections would occur in multi-member districts of between 3 and 5 seats each, drawn by nonpartisan redistricting commissions.¹²¹

111. *See id.* at 136–39.

112. *Id.* at 138.

113. *Id.* at 133.

114. *Id.*; *see* DOUGLAS AMY, REAL CHOICES, NEW VOICES 138 (1993).

115. MULROY, *supra* note 11, at 167.

116. *See* Karl Kurtz, *Changes in Legislatures Using Multimember Districts After Redistricting*, NCSL: THE THICKET AT STATE LEGISLATURES (Sept. 11, 2012, 6:01 PM), http://ncsl.typepad.com/the_thicket/2012/09/a-slight-decline-in-legislatures-using-multimember-districts-after-redistricting.html.

117. 2 U.S.C. § 2c (2012).

118. *See* Fair Representation Act, H.R. 3057, 115th Cong. (2018).

119. *Id.*

120. *Id.* at § 202.

121. *Id.* at § 201.

This approach has a number of advantages. The PR nature of the system minimizes the evils of gerrymandering by minimizing districting. It would lead to a more accurate reflection of popular will. It would give Democrats in Texas and Republicans in Massachusetts a more realistic voice. It would make elections more competitive, thus spurring voter interest and turnout.

The RCV feature of STV adds distinct advantages. It gives more opportunity to third-party candidates and lesser-known, lesser-funded candidates generally. Currently, voters who may sincerely prefer such a candidate would be fearful of voting for her, lest they “throw away their vote.” Even worse, in a two-major-party race, voting for such a candidate might actually help the major-party candidate you *least* prefer. A vote for Jill Stein is a vote for Trump. A vote for Gary Johnson is a vote for Hillary Clinton. RCV avoids these dilemmas: if you prefer Ralph Nader, you can rank him first, and rank Al Gore second, without fear.

RCV also encourages positive campaigning. In an RCV election, a candidate wants to be the first choice of his own base, but also the second choice of his rival’s base. Attack ads against opponents will only hurt in that effort. The better strategy is to say, “I’d love to be your first choice, but if you sincerely prefer Ms. Jones, I respect that, and ask to be your second choice.” Indeed, recent polls had voters in 7 U.S. cities using RCV elections reporting lower levels of negative campaigning compared to 14 cities using non-RCV methods.¹²²

While STV may seem exotic to those unfamiliar with it, it has a proven track record of decades of successful use in a variety of jurisdictions.¹²³ It merits serious consideration—as do the proposals discussed in the following pages. Together, they illustrate that election reform is as urgent a topic as it is timely. If the right to vote is to continue to preserve our other rights, we need to make sure we preserve it as well.

122. *Ranked Choice Voting and Civil Campaigning*, FAIRVOTE, http://www.fairvote.org/research_rcvcampaigncivility (last visited Apr. 4, 2019).

123. *See supra* notes 89–91 and accompanying text. STV was also used in about 2 dozen American cities throughout the early to mid-20th century and in local community school board elections in New York City from the 1970s to the 1990s. *See AMY, supra* note 114, at 138; MULROY, *supra* note 11, at 138–39.