

# Escaping the Goldilocks Problem: A Proposal That Would Enable States to Avoid Redistricting Litigation

By Dan Morenoff

Free Speech & Election Law Practice Group

## About the Author:

Dan Morenoff is Executive Director of the Equal Voting Rights Institute.

## Note from the Editor:

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer other perspectives on the issue, including ones opposed to the position taken in the article. In this case, we are publishing a full rebuttal to the article by Kevin St. John, which you can find at page 102. We also invite responses from our readers. To join the debate, please email us at [info@fedsoc.org](mailto:info@fedsoc.org).

For a generation, state and local governments have faced a Goldilocks problem when they redistrict. Courts require them to use race to design districts in order to comply with Section 2 of the Voting Rights Act (Section 2), but they invalidate maps under the 14th Amendment to the U.S. Constitution when racial considerations “predominated” in the drawing of districts.<sup>1</sup> Seemingly every approach state and local governments have taken to try to draw districts that would comply with these dueling requirements leaves them in the crosshairs of plaintiffs and the federal judiciary: ignoring race entirely,<sup>2</sup> following bright-line concentration rules established by Supreme Court precedents to assure protected classes’ voting power,<sup>3</sup> deferring to the requests presented by representatives of protected classes,<sup>4</sup> deferring to the decisions of nominally non-partisan redistricting panels,<sup>5</sup> and more. There is also an obvious disconnect between voting reformers’ complaints about our current redistricting systems and those reformers’ proposed solutions. Almost no proposal on offer would solve these problems, and almost every proposal on the table would actually make them worse. Indeed, even the remedies imposed by courts have been attacked in later litigation as violating one or both of Goldilocks’ warring demands.<sup>6</sup>

But there is a solution to the Goldilocks problem. State and local governments can avoid further redistricting litigation under both the Constitution and Section 2 by simply getting out of the game and drawing no districts whatsoever.

- 1 Mark Rush, *The Current State of Election Law in the United States*, 23 WASH. & LEE J. CIV. RTS. & SOC. JUST. 383, 400 n.96 (2017) (citing Josh Gerstein, *Supreme Court Takes Case Claiming Racial Gerrymandering in Virginia*, POLITICO (June 6, 2016). See also Hans A. von Spakovsky, *Symposium: The Goldilocks Principle of Redistricting* (May 23, 2017), <https://www.heritage.org/courts/commentary/symposium-the-goldilocks-principle-redistricting>.
- 2 *Covington v. North Carolina*, 2017 U.S. Dist. LEXIS 215089, \*4 (M.D.N.C. 2017) (plan enacted without consideration of race “either fail[s] to remedy the identified constitutional violation or [is] otherwise legally unacceptable”). See also *Covington v. North Carolina*, Case No. 1:15-cv-00399; Dkt. 187, \*6-7 (M.D.N.C. 2017) (“The committees expressly forbade any consideration of racial data in drawing district lines.”).
- 3 *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267 (2015) (finding that “Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria”).
- 4 *Abbott v. Perez*, 138 S. Ct. 2305, 2334 (2018).
- 5 *Harris v. Ariz. Indep. Redist. Comm’n*, 993 F. Supp. 2d 1042, 1050 (D. Ariz. 2014).
- 6 *Abbott*, 138 S. Ct. at 2313 (“Before us for review are orders of a three-judge court in the Western District of Texas directing the State not to conduct this year’s elections using districting plans that the court itself adopted some years earlier.”).

I. OVERVIEW OF EXISTING LAW

A. Section 2 of the VRA Requires the Use of Race in Redistricting

In addressing Section 2 claims, courts first establish whether plaintiffs have standing to contest the districts at issue. Members of a racial minority residing in a district where that minority has either been “packed” or “cracked” have standing to challenge their district under Section 2.<sup>7</sup> If standing is established, a court gauges the plaintiffs’ claims through a two-stage inquiry:<sup>8</sup>

- 1) First, it determines whether the plaintiffs have met their burden in establishing three preliminary *Gingles* factors:
  - a) their group is “sufficiently large and geographically compact to constitute a majority” in an additional single-member district;
  - b) the group is “politically cohesive”; and
  - c) the “majority votes sufficiently as a bloc to—in the absence of special circumstances . . . —usually defeat the minority’s preferred candidate”;<sup>9</sup>
- 2) Then, it analyzes whether the members of the plaintiffs’ minority group have been afforded by their enacted districts an equal opportunity to elect their preferred candidates to office.<sup>10</sup> To do this, courts balance a list of factors from the VRA’s legislative history that is “neither

<sup>7</sup> *See, e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 914 (1996) (“[A] plaintiff may allege a § 2 violation in a single-member district if the manipulation of districting lines fragments politically cohesive minority voters among several districts . . . and thereby dilutes the voting strength of members of the minority community.”); *see also* *Gill v. Whitford*, 138 S. Ct. 1916, 1936 (2018) (Kagan, J., concurring) (“When a voter resides in a packed district, her preferred candidate will win no matter what; when a voter lives in a cracked district, her chosen candidate stands no chance of prevailing. . . . So when she shows that her district has been packed or cracked, she proves, as she must to establish standing, that she is ‘among the injured.’”).

<sup>8</sup> Some have concluded that the Supreme Court’s *Abbott v. Perez* decision added an additional, third step to the *Gingles* analysis. *Harding v. Cty. of Dallas*, 2020 U.S. App. LEXIS 1682, \*24-\*26 (5th Cir. 2020) (Ho, J., dissenting in part) (“Prior to *Perez*, the Court made clear that, once a plaintiff is able to meet the three *Gingles* factors, the vote dilution claim proceeds to the totality of the circumstances test. . . . *Perez* alters this framework. In addition to the three *Gingles* factors, Plaintiffs must survive an additional inquiry before reaching the totality of the circumstances test. Plaintiffs must now affirmatively prove that the minority group will have a ‘real’ opportunity to elect representatives of its choice. . . .” So after *Perez*, it is no longer enough for plaintiffs to draw a proposed district that satisfies the three *Gingles* factors. It must additionally prove that the proposed district will in fact perform as plaintiffs hope.”) (internal citations omitted). At a minimum, within the Fifth Circuit, parties must make this additional showing, above and beyond what the *Gingles* factors appear to require, either as a hidden component of the second and third prongs of *Gingles*, or as a new requirement of the case law, before proceeding onward to demonstrating the totality of the circumstances. It is unclear if any other Court of Appeals will share the 5th Circuit’s understanding of the Supreme Court’s ruling in *Perez*.

<sup>9</sup> *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

<sup>10</sup> *Abbott*, 138 S. Ct. at 2331 (“If a plaintiff makes [the threshold *Gingles*] showing, it must then go on to prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group.”).

comprehensive nor exclusive[.]” along with “other factors [that] may also be relevant[.]”<sup>11</sup> This is often referred to as a “totality of the circumstances” analysis.

While Section 2 expressly does not create a right to proportional representation among elected officials,<sup>12</sup> courts gauge the equality of opportunity afforded protected classes of voters by comparing their share of the electorate to the share of elections where their preferred candidates have prevailed.<sup>13</sup> The case law requires states to afford minority populations proportional opportunities to elect representatives, not that they be proportionally represented among officials.

Section 2 of the VRA requires governments, where possible, to draw districts in such a way that cohesive minorities should be able to control the outcome of elections in a proportional share of districts. In Goldilocks terms, map-drawing cannot be “too cold” in its use of race.

B. The Supreme Court’s Decision in *Shaw Bans the Use of Race in Redistricting*

The 14th Amendment protects Americans from intentional racial discrimination, unless it is narrowly tailored to meet a compelling governmental interest.<sup>14</sup> Deliberate racial gerrymandering violates the 14th Amendment, as the Supreme Court held in *Shaw v. Reno*.<sup>15</sup> Any American living in a racially gerrymandered district has standing to challenge it,<sup>16</sup> and where “race was the predominant factor motivating [the] decision to place a significant number of voters within or without a particular

<sup>11</sup> *Gingles*, 478 U.S. at 45.

<sup>12</sup> 52 U.S.C. § 10301(b) (“Provided that nothing in this section establishes a right to have members of a protected class *elected* in numbers equal to their proportion of the population.”) (emphasis added).

<sup>13</sup> *Gingles*, 478 U.S. at 48 n.15 (“[U]nless minority group members experience substantial difficulty *electing* representatives of their choice, they cannot prove that a challenged mechanism impairs their ability ‘to elect . . . .’ By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that Section 2 plaintiffs prove their claim before they may be awarded relief.”) (emphasis added); *LULAC v. Perry*, 548 U.S. 399, 436-42 (2006) (holding Section 2 to forbid drawing of district to protect a Hispanic incumbent from Hispanic voter opposition). *See also* *Sanchez v. Colorado*, 97 F.3d 1303, 1320-21 (10th Cir. 1996), (recognizing that while the “*Gingles* majority” “concluded [that] the candidate’s race is never irrelevant[.]” it “is ‘of less significance than the race of the voter[.]’” before announcing that “the VRA ensures members of a protected class equal opportunity ‘to elect representatives of their choice,’ not ‘necessarily members of their class.’”); *Perez v. Abbott*, 253 F. Supp. 3d 864, 881 (W.D. Tex. 2017) (recognizing that “the Fifth Circuit [has] directed courts to consider . . . the inability *of the protected class to elect*[,]” rather than an inability to candidates from that class to win election) (emphasis added) (citing *Salas v. Southwest Texas Junior College District*, 964 F.2d 1542, 1547 (5th Cir. 1992)).

<sup>14</sup> *Washington v. Davis*, 426 U.S. 229, 239 (1976).

<sup>15</sup> 509 U.S. 630, 640 (1993).

<sup>16</sup> *Hays v. Louisiana*, 515 U.S. 737, 744-45 (1995) (“Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature’s reliance on racial criteria, and therefore has standing to challenge the legislature’s action.”).

district[.]” courts invalidate that district.<sup>17</sup> Courts determine actual legislative motivations by reference to “either circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose.”<sup>18</sup>

Where plaintiffs establish that racial concerns predominated over all others in the crafting of electoral districts, the burden shifts to the government to “demonstrate that its districting legislation is narrowly tailored to achieve a compelling state interest.”<sup>19</sup> That is an affirmative defense, which must be pled with proper evidentiary support to prevail.<sup>20</sup> Most commonly, jurisdictions assert as a defense that they used race only as required by the VRA. While the Supreme Court has never held that compliance with Section 2 is a compelling governmental interest sufficient to meet strict scrutiny,<sup>21</sup> it has assumed that such compliance *could be* sufficiently compelling. The Court said in a 2017 case that a government making that argument would need to show that it had “good reasons to believe” the use of race was required to comply with the VRA, including by demonstrating that it had “a strong basis in evidence in support of the (race-based) choice that it has made.”<sup>22</sup> A government must demonstrate—not simply assert—that it had a factual basis to conclude that unless it drew lines based on race, it would have been sued and would have lost.<sup>23</sup>

The 14th Amendment bars governments from drawing districts predominantly on the basis of race, with the possible exception of situations where the VRA requires it. In Goldilocks terms, map-drawing cannot be “too hot” in its use of race.

## II. OVERVIEW OF EXISTING REDISTRICTING APPROACHES AND PROPOSALS FOR REFORM

### A. No Existing Approach Prevents Litigation or Guarantees Victory

No approach jurisdictions have taken to redistricting spares them litigation. A jurisdiction cannot safely engage in non-racial districting. Those avoiding the use of *any* racial data in their drawing of districts get sued for violating Section 2 of the VRA, and they lose.<sup>24</sup>

17 Miller v. Johnson, 515 U.S. 900, 916 (1995).

18 Bethune-Hill v. Va. St. Bd. of Elections, 137 S. Ct. 788, 798 (2017) (citing Miller, 515 U.S. at 916).

19 Bethune-Hill, 137 S. Ct. at 800-01 (citing Miller, 515 U.S. at 920).

20 Cooper v. Harris, 137 S. Ct. 1455, 1464, 1469 (2017).

21 Bethune-Hill, 137 S. Ct. at 801. Cooper left Bethune-Hill’s statement of the law on this accurate, despite the plurality’s analysis of an asserted strict scrutiny defense, as it did not find that any compelling state interest had been demonstrated. Cooper, 137 S. Ct. at 1469-72. While no decisions have resolved the matter, there is reason to doubt that, were the Court confronted with the issue, it could conclude that an otherwise unconstitutional plan was constitutionally required by statute.

22 Bethune-Hill, 137 S. Ct. at 801 (citing Ala. Legis. Black Caucus, 135 S. Ct. at 1274).

23 Cooper, 137 S. Ct. at 1471 (“To have a strong basis in evidence to conclude that Section 2 demands such race-based steps, the [jurisdiction] must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions—including effective white bloc-voting—in a new district created without those measures.”) (citing *Gingles*, 478 U.S. at 56).

24 See Covington, 2017 U.S. Dist. LEXIS 215089 (map drawn with no consideration of race invalidated).

A jurisdiction cannot safely draw districts conscious of protected minorities by complying with the bright-line concentration rules suggested by Supreme Court Section 2 precedent. The Supreme Court may have just affirmed a ruling that Section 2 “requires the creation of a legislative district” for a cohesive group “constitut[ing] a numerical majority of the voting population in the area under consideration[.]”<sup>25</sup> extolling “the majority-minority rule” as “unlike any [alternative] standards” in producing “an objective, numerical test” that “provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2.”<sup>26</sup> But those following that “straightforward guidance” still get sued for violating the equal protection demands of *Shaw v. Reno*, and they lose.<sup>27</sup>

A jurisdiction cannot safely defer to the requests of a protected class’ representatives and give the group what it says it wants in a districting plan. Those adopting districts for protected classes, requested by those communities’ representatives as fair treatment of the communities get sued for violating the equal protection demands of *Shaw v. Reno*, and they lose.<sup>28</sup>

A jurisdiction’s lawmakers cannot even safely call in a designated hitter and have a nominally non-partisan panel redistrict for them.<sup>29</sup> Those who do so can still get sued under both Section 2 and the 14th Amendment, and they can still lose.

### B. Proposed Remedies Remedy Nothing

The remedies most often proposed by voting rights activists do not address any of these concerns, or even make a fair map more likely to emerge.<sup>30</sup> Three of the most common proposals would utterly fail on both scores.

The most commonly proposed redistricting reform would transfer responsibility for redistricting from elected officials to appointed, ostensibly non-partisan commissions.<sup>31</sup> But such

25 Bartlett v. Strickland, 556 U.S. 1, 9 (2009).

26 *Id.* at 18-19.

27 Perez v. Abbott, 2017 U.S. Dist. LEXIS 3501 (Tex. N.D. 2017) (acknowledging Texas’ intentional use of Bartlett’s straightforward guidance to craft a congressional district where members of a minority constituted more than 50% of electorate, and nevertheless holding that district to be unconstitutional because the state allowed race to predominate in drawing it).

28 See Abbott, 138 S. Ct. at 2334-35.

29 See Harris, 993 F. Supp. 2d 1042 (Arizona established a redistricting commission composed of non-politicians and was still sued under the 14th Amendment; while it prevailed in this suit, there is no reason to believe that successors uniformly will).

30 This is so under either (a) anything like a common-sense understanding of fairness or (b) a more scholarly interpretation of the term, like the requirements that one would select behind a hypothetical veil of ignorance. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971).

31 The “first major bill of the 116th Congress[.]” entitled the “For the People Act[.]” includes a provision requiring states to “use nonpartisan redistricting commissions to draw new congressional maps.” Paul Blumenthal, *House Democrats Introduce Their Sweeping New Reform Bill*, HUFFINGTON POST (Jan. 4, 2019), [https://www.huffingtonpost.com/entry/house-democrats-for-the-people-act\\_us\\_5c2eb491e4b08aaf7a97bff3](https://www.huffingtonpost.com/entry/house-democrats-for-the-people-act_us_5c2eb491e4b08aaf7a97bff3). Additionally, “[s]everal states have seen

redistrictings are as likely to be subject to litigation as those drawn by legislatures.<sup>32</sup> And their usage does not address the central question of how map-making will comply with the relevant competing legal obligations; it says nothing about what data may or must be used to draw a legally acceptable map, but merely changes the officials who vote on the resulting proposals. Given that all modern legislators rely on counsel for substantive advice throughout their redistricting processes,<sup>33</sup> and that redistricting commissions use the same kinds of counsel for the same kinds of advice,<sup>34</sup> there is no obvious reason to expect that the methods or data employed would differ in any way following a shift to commissions. Nor does a move to commissions promise fairer results. California moved from legislatively crafting its maps to having them drawn by commission before 2011, and it emerged with a more aggressive gerrymander than the parties had drawn for themselves in decades.<sup>35</sup> Indeed, shifting decisionmaking from elected officials to appointed commissions promises no improvements, and it threatens to undermine what little transparency and political accountability are currently present in the system.

Other reformers have proposed requiring redistricters to analyze (and minimize) the “efficiency gap” in their proposed maps.<sup>36</sup> “Efficiency gap” analysis, which featured prominently in the *Gill* litigation,<sup>37</sup> assesses the “fairness” of a map by scoring the partisan preferences of all voters and looking to equalize the number of “wasted” votes cast for the candidates of each party, across districts. In 2018, Missouri adopted it in a constitutional

amendment to attempt to address redistricting concerns.<sup>38</sup> But the efficiency gap does not address any issue relevant to the *Gingles* framework, so fully employing it likely would not reduce the chances of a court invalidating a map under Section 2. Given that our case law already recognizes that race and party often closely correlate and forbids map-drawers from making racial decisions under a thin veneer of partisan language,<sup>39</sup> reliance on the efficiency gap instead of directly on racial data does not promise to avoid constitutional litigation of *Shaw*-type claims.

Another proposal would have maps define multi-member rather than single-member districts. Under such a plan, the top several finishers in each large, multi-member district would win seats, rather than the top finisher in each small, single-member district.<sup>40</sup> This would allow minorities surrounded by larger communities with divergent preferences to elect representation to the extent of their share of the included, larger district. But even this more analytically rigorous proposal would not fully address the Goldilocks problem. Drawing fewer districts still involves drawing lines and deciding whom to put inside and outside of them. While scaling up and allocating proportionally within such districts may *reduce* the opportunities for redistricting mischief, wherever there are lines, they can be challenged. It is worth remembering that *Gingles* itself invalidated a multi-member district.

### III. A NEW SOLUTION: ABOLISHING DISTRICTS

While single-member districts are traditional—and there can be wisdom in sticking to tradition—the Constitution does not require them, nor is any other element of our current electoral regime legally necessary. We need not, for example:

- a) award power through single-member district elections;
- b) select candidates through primary and general elections;
- or
- c) use the intermediary of single-party nominations.

A state or locality could choose a different approach on one or all of these dimensions.<sup>41</sup> Governments around the world—and even

---

voters passing referenda to create independent, bipartisan redistricting commissions. States should create such commissions if they want a fair, transparent process for redistricting.” Billy Corriher and Liz Kennedy, *Distorted Districts, Distorted Laws*, CENTER FOR AMERICAN PROGRESS (Sep. 19, 2017), <https://www.americanprogress.org/issues/democracy/reports/2017/09/19/439164/distorted-districts-distorted-laws/>.

32 See, e.g., *Harris*, 993 F. Supp. 2d 1042.

33 See, e.g., *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 803 (M.D.N.C. 2018) (“*Through private counsel*, the committees engaged” an expert “to draw the new congressional districting plan.”) (emphasis added); *Harding v. Cty. of Dallas*, 2018 U.S. Dist. LEXIS 143125, \*3 (N.D. Tex. 2018) (“The Commissioners Court retained J. Gerald Hebert, Esquire (“Hebert”) and Rolando L. Rios, Esquire (“Rios”) as outside redistricting counsel. Hebert, in turn, employed Matt Angle (“Angle”) . . . to assist in drawing and presenting redrawn district maps for consideration.”); *Texas v. U.S.*, 887 F. Supp. 2d 133, 185 (D.D.C. 2012) (“Ryan Downton, the general counsel to the House Committee on Redistricting . . . was the principal drafter of the Congressional Plan.”).

34 *Harris*, 993 F. Supp. 2d at 1051 (“The Commission has authority to hire legal counsel[.]”); *id.* at 1056 (“Before beginning to adjust the grid map, the Commission received presentations on the Voting Rights Act from its attorneys . . .”); *id.* at 1056-7 (“The Commission originally operated on [an] assumption . . . based on [one of its lawyers] report . . .”).

35 See Olga Pierce and Jeff Larson, *How Democrats Fooled California’s Redistricting Commission*, PRO PUBLICA (Dec. 21, 2011), <https://www.propublica.org/article/how-democrats-fooled-californias-redistricting-commission>.

36 See Nicholas Stephanopoulos & Erin McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015).

37 *Gill*, 138 S. Ct. at 1924-25, 1932-33.

---

38 Samuel King, *Missouri’s New Redistricting Rules are Unique in the U.S., and not Immune from Changing*, KCUR (Dec. 5, 2018), <https://www.kcur.org/post/missouri-s-new-redistricting-rules-are-unique-us-and-not-immune-changing#stream/0>. Mo. Const. Art. IV, Sec. 2 (amended November 2018).

39 See, e.g., *Abbott*, 138 S. Ct. at 2314 (acknowledging that “because a voter’s race sometimes correlates closely with political party preference . . . , it may be very difficult for a court to determine whether a districting decision was based on race or party preference,” and stating that a mooted prior map had been found to have used partisan calculations to accomplish racial goals). See also *LULAC v. Clements*, 999 F.2d 831, 860-61 (5th Cir. 1993) (en banc) (“recogniz[ing] that even partisan affiliation may serve as a proxy for illegitimate racial considerations[.]”); *Page v. Va. State Bd. of Elections*, 58 F.Supp.3d 533, 549 (Va. E.D. 2014) (rejecting evidence of partisan rather than racial motivation as pretextual “post-hoc political justification” and invalidating district as unconstitutional).

40 See, e.g., *Rush*, *supra* note 1, at 401-02.

41 Current federal law would prohibit such experimentation in the allocation of congressional seats. 2 U.S.C. § 2c. While nothing in the Constitution requires the election of representatives through single-member districts,

in one of our own states—prove the availability of alternatives. Consider two examples of approaches that differ from the American norm.

Israeli election law treats the entire country as a single electoral district in national elections.<sup>42</sup> Voters cast their ballots in elections to the Knesset, the national legislature, not for individual members, but for parties.<sup>43</sup> Israel makes it relatively easy for parties to form and participate in elections; every one of its national elections sees new parties splinter from old ones, or old parties merge into new ones.<sup>44</sup> Before each election, each participating party must publish its “list” of proposed representatives.<sup>45</sup> Once votes are tallied, seats in the resulting Knesset are awarded proportionately based on the total share of the votes received by each party (above the minimum threshold for inclusion).<sup>46</sup> Subject to rounding rules and minimal share provisions, a party that wins a third of the vote takes a third of the seats in the 120-member Knesset; as a result, the first 40 candidates on its published list are elected to the legislature.

New York presents another contrast to the American norm. Like most other states and jurisdictions, New York allocates seats in its state assembly to the winners of elections in single-member districts. But like Israel, New York makes it easy for parties to obtain ballot access. In 2018, New York gave eight parties automatic ballot access for their candidates: the Democratic Party, the Republican Party, the Conservative Party of New York State, the Working Families Party, the Green Party, the Libertarian Party, the Independence Party, and the Serve America Movement. Unlike most jurisdictions, New York allows different parties to

nominate the same candidates for the same posts, regardless of whether those candidates are members of the nominating party or even intend to participate in its primary election. As a result, when New Yorkers vote for offices, they often see the same candidate appearing on a number of ballot lines; for example, in 2018, the Democratic, Working Families, and Independence Parties nominated the same candidate for the governorship, as did the Conservative and Republican Parties. In any given race, the votes cast for any nominee are summed—a vote for Andrew Cuomo is a vote for Andrew Cuomo, regardless of which party the voter chose—and the candidate with the most votes is elected.

A state or locality could adopt a merged version of these two regimes. Texas, for example, has been tied up in litigation over its various legislative maps for at least twelve of the last seventeen years. Texas could ease its rules concerning ballot access, allowing voters to cast their votes for governor and other state-wide offices as New York does; this would mean individuals could vote for Greg Abbott as the candidate of the Republican Party, or as the candidate of hypothetical alternative parties like Empower Texas, Texas Right to Life, and the Liberty Caucus. But Texas could simultaneously adopt the Israeli approach to allocating seats in its state legislature proportionately, rather than by district, thereby allowing every community (however defined) to elect its proportional share of the legislature. Seats could be awarded, as in Israel, in order of precedence on party lists, beginning with the party receiving the most votes.

The resulting elections would have no districts and no opportunities for gaming of district lines. The state’s role in allocating power would be entirely removed, shifting the onus for such decisions entirely to the electorate and the organizational capacities of candidates and parties. Imagine a community dispersed across the state, which included 10,000 West Texans in Lubbock who share political preferences with 10,000 South Texans in McAllen and 10,000 East Texans in Lufkin. Assuming easy ballot access for parties allows them to organize their own party, that community would win exactly the same representation as a community of 30,000 people in Houston. As long as the state’s ballot-access rules are sufficiently loose to allow such a group to gain access to the ballot as a new party (to the extent members feel that other parties have not given them an adequate chance of electing their preferred candidates), the group’s ability to elect its preferred candidates would be determined entirely by the number of votes in its camp, without regard to the presence or antipathy of any surrounding local majorities or to any choice by the state as to whether members of the group have enough in common to allow their coordinated action.

#### IV. THE PROPOSED SYSTEM WOULD BE IMMUNE FROM LEGAL CHALLENGE

##### *A. No Section 2 Challenge Could Survive a Motion to Dismiss*

This system would not be subject to attack under Section 2. *Gingles*’ second and third preliminary factors would be rendered impossible to prove, since it would be impossible for a local majority to block any local minority’s ability to elect its preferred candidate. As these are threshold requirements for a successful Section 2 suit, the impossibility of satisfying them guarantees that no action brought could survive a motion to dismiss.

---

Congress has the express constitutional authority to make rules concerning the “Manner of holding Elections for . . . Representatives.” U.S. CONST. art. 1, sec. 4. Until and unless Congress repeals Section 2c, no state could award its congressional seats through an alternative method.

42 Basic Law: The Knesset, 1958, S.H. 69, Art. 4, available at [https://www.knesset.gov.il/laws/special/eng/basic2\\_eng.htm](https://www.knesset.gov.il/laws/special/eng/basic2_eng.htm). See also *Elections for the Knesset*, The Knesset (last visited Feb. 4, 2019), [https://knesset.gov.il/description/eng/eng\\_mimshal\\_beh.htm](https://knesset.gov.il/description/eng/eng_mimshal_beh.htm) (“The principle of country-wide elections states that Israel is a single electoral district insofar as the distribution of Knesset seats is concerned.”).

43 See *FAQ: Elections in Israel*, Israel Ministry of Foreign Affairs (last visited Feb. 4, 2019), [https://mfa.gov.il/MFA/AboutIsrael/State/Democracy/Pages/FAQ\\_Elections\\_Israel.aspx](https://mfa.gov.il/MFA/AboutIsrael/State/Democracy/Pages/FAQ_Elections_Israel.aspx) (“On election day, voters cast one ballot for a single political party to represent them in the Knesset.”).

44 See generally *Israel Elections: Political Parties*, Jewish Virtual Library: A Project of AICE, <https://www.jewishvirtuallibrary.org/israeli-political-parties>. As documented in the sublinks, therein, every Israeli national election to date has seen changes to the partisan composition of the Knesset. Indeed, over the course of this writing, Israel has concluded three national election, and it has seen parties that were not in the prior Knesset win seats in each.

45 *FAQ: Elections in Israel*, *supra* note 43 (“Prior to the elections, each party submits its list of candidates for the Knesset (in order of precedence). The parties select their candidates . . . in primaries or by other procedures. Only registered parties or an alignment of two or more registered parties can present a list of candidates and participate in the elections.”).

46 See *Elections for the Knesset*, *supra* note 42 (“The candidates of any given list are elected to the Knesset on the basis of the order in which they appear on it. If a certain party received sufficient votes for 10 seats, the first 10 candidates on its list will enter the Knesset.”).

Still, it is worth noting that this system would also preclude a finding at *Gingles*' totality of the circumstances stage that any redistricting decision of any government leaves "the political processes leading to nomination or election in the State or political subdivision . . . not equally open to participation by members of" any community "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."<sup>47</sup> This would be so both because there would be no state action to challenge as potentially dilutive, and because, even if there were, where every community receives proportional representation, no community could claim to have been denied the same opportunity to elect its candidates afforded any other.

*B. No 14th Amendment Challenge Would Succeed*

Similarly, if jurisdictions draw no districts, race can never be held to predominate in the drawing of districts. In the absence of any allocative decision in which to include racial considerations, there would be no decision to even hypothetically analyze under strict scrutiny. No plaintiff could bring any 14th Amendment challenge that could survive the motion to dismiss phase of litigation.

V. CONCLUSION

Whether directly, through appeals to fairness, or indirectly, through *Gingles*' totality of the circumstances test, most people gauge whether an election is producing fair results by considering whether it has enabled groups to elect officials in numbers roughly proportionate to their share of the electorate. Proportional representation directly addresses these concerns. Common proposals like map-drawing commissions do not address them at all. If those campaigning for electoral reform really want to avoid litigation and obtain fairer results, they will shift gears and pursue an alternative to single-member districting schemes.

---

<sup>47</sup> 52 U.S.C. § 10301(a) and (b).

