

## REDISTRICTING'S ULTIMATE ANTIDOTE

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### ABSTRACT

*Critics of America's redistricting process frequently harp on two foundational issues: how the lines are drawn and who gets to draw them. In one provocative article, Professor Ned Foley proposes a solution that addresses both issues, potentially solves the problems of partisan and racial gerrymandering, and empowers a new generation of engaged, educated, and dynamic voters. The catch? Foley's proposal of self-districting is so outside-the-box that some readers might dismiss it out of hand. To do so would be a mistake. Even if self-districting doesn't live up to its billing as the "ultimate antidote to gerrymandering," the very thought experiment prompts us to think hard about who we are as a people, what kind of democracy we want to live in, and how much (if at all) geography matters for politics in the current age of information and mobility. Furthermore, self-districting is a reminder that different groups of people will (and should!) take turns pulling the levers of government over time, and that election losses and concessions are the heartbeat of a healthy democracy.*

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## INTRODUCTION

Redistricting is a mess. Or so laments Ned Foley in his article *Self-Districting: The Ultimate Antidote to Gerrymandering*.<sup>1</sup> For Professor Foley, redistricting is problematic for two reasons: first, because it necessarily divides American voters into *geographic* districts and, second, because the *government* gets to decide where to draw the lines.<sup>2</sup> Geographically-constrained districts might have made sense in a world where people rarely traveled more than a few miles from their homes, but today one's local geography is less salient as an ideological bond compared to other characteristics like one's race or gender or partisan affiliation. To the extent that geographic districts are created to ensure a responsive and representative government, some districts will naturally enhance the electoral power of some voters over others, e.g., partisans in safe districts, moderates in competitive districts, and non-White voters in some districts. It thus becomes problematic for the government to draw the lines because the U.S. Constitution forbids state actors from treating people differently based on their political beliefs (First Amendment) or on

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<sup>1</sup> Edward B. Foley, *Self-Districting: The Ultimate Antidote to Gerrymandering*, 111 KY L.J. \_\_\_\_ (2023).

<sup>2</sup> *Id.* at 1. Foley's proposal calls for "relax[ing] the connection between a district and geography" and calls government-controlled districting "fraught with the prospect of partisan abuse."

their race or ethnicity (Fourteenth Amendment). According to Professor Foley, “it’s time to rethink the entire enterprise of redistricting.”<sup>3</sup>

Foley is hardly the first to criticize these problematic features of redistricting,<sup>4</sup> but his proposed remedy might just be the most radical idea ever suggested to reform America’s redistricting process. In *Self-Districting*, Foley argues that individuals should be able to choose the composition of their own legislative districts, and that these districts should be based on any trait or characteristic the individual chooses so long as there are enough like-minded individuals to ensure that districts are equally populated.<sup>5</sup> If left-handed brunettes would like to form a district, that should be their prerogative. If Asian-Americans would like to form a district, they should be able to. If a Republican would like to form a district with other Republicans, more power to them. If everybody in the same zip code would like to be represented by the same person, that should be their choice presuming (as in all cases) that there are sufficient numbers to maintain population equality between districts.<sup>6</sup> The upshot of self-districting is that *individuals* should be able to choose their districts based on any criteria they choose, and these choices should be the product of *mobilization* and not government decree. In Foley’s account, a shift to self-districting would resolve the pathologies inherent in partisan gerrymandering *and* racial gerrymandering while at the same time

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<sup>3</sup> *Id.* at 1.

<sup>4</sup> For examples of the critique that geographic districts are problematic, see Bernard Grofman, *For Single-Member Districts, Random is Not Equal*, in REPRESENTATION AND REDISTRICTING ISSUES 55, 55–58 (Bernard Grofman, Arend Lijphart, Robert McKay & Howard Scarrow eds., 1982) and LANI GUINIER, THE TYRANNY OF THE MAJORITY 121 (1994) (“It’s districting in general...that is the problem.”). For examples of the critique that government actors draw the lines, see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) and Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998), and *Holder v. Hall*, 512 U.S. 874, 905 (1994) (J. Thomas concurring) (“Worse still, it is not only the courts that have taken up this project...the States themselves...have begun to gerrymander electoral districts...”).

<sup>5</sup> *Foley supra* n. 1 at 8 (n. 12) (“it would be permissible under current federal law for a state to have noncontiguous or overlapping districts as part of a self-districting system, as long as those districts elected a single member of Congress and comply with applicable equal population requirements of the Constitution.”).

<sup>6</sup> *Foley supra* n. 1 at 21 (“If the traditional criterion of geography is most important to them, then voters can make this choice. But if racial identity, occupational or other economic status, or some other characteristic is a more important basis for their representation in the legislature, then self-districting permits voters to register this alternative choice as well.”).

empowering a new generation of engaged, educated, and dynamic voters.<sup>7</sup> It will come as no surprise, then, that Foley refers to self-districting as “the ultimate antidote to gerrymandering.”<sup>8</sup>

There is something very intuitive about self-districting. Recent media has reported that Democrats owe their success to Black women,<sup>9</sup> that Donald Trump is still “king of the poorly educated,”<sup>10</sup> that most Mormons support the Republican Party while remaining skeptical of Trump,<sup>11</sup> that Sarah Palin helped John McCain among White women voters,<sup>12</sup> that LGBTQ voters are growing as a bloc in a way that will “fundamentally reshape the American electoral landscape,”<sup>13</sup> that Democrats have recently made inroads among rural voters,<sup>14</sup> that young voters were key to Joe Biden’s 2020 victory,<sup>15</sup> and that the Republican Party is getting growing support from Latino voters.<sup>16</sup>

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<sup>7</sup> See *infra* Section II.

<sup>8</sup> *Supra* n. 1.

<sup>9</sup> Taylor Crumpton, *Black women saved the Democrats. Don’t make us do it again*, WASH. POST (Nov. 7, 2020) at <https://www.washingtonpost.com/outlook/2020/11/07/black-women-joe-biden-vote/>.

<sup>10</sup> Stephen Dinan, *Donald Trump still king of the ‘poorly educated,’* WASH. TIMES (Sept. 29, 2020) at <https://www.washingtontimes.com/news/2020/sep/29/donald-trump-still-king-poorly-educated/>.

<sup>11</sup> Hannah Fingerhut & Brady McCombs, *Most Mormons back GOP, but fewer support Trump*, AP NEWS (Nov. 29, 2018) at <https://apnews.com/article/dfa9f5a8c265432c998ebaddf2603102>.

<sup>12</sup> Frank Newport, *Did Palin Help McCain Among White Women?* GALLUP (Sept. 24, 2008) at <https://news.gallup.com/poll/110638/Did-Palin-Help-McCain-Among-White-Women.aspx>.

<sup>13</sup> HRC Staff, *New Report: LGBTQ+ Voters Becoming One of the Fastest Growing Voting Blocs in the Country, Projected to Represent Nearly One-Fifth of Voters By 2040 and Fundamentally Reshape American Electoral Landscape*, HUMAN RIGHTS CAMPAIGN (Oct. 13, 2022) at <https://www.hrc.org/press-releases/new-report-lgbtq-voters-becoming-one-of-the-fastest-growing-voting-blocs-in-the-country-projected-to-represent-nearly-one-fifth-of-voters-by-2040-and-fundamentally-reshape-american-electoral-landscape>.

<sup>14</sup> Ximena Bustillo, *Democrats made midterm gains in rural areas. Can they keep them?* NPR: ALL THINGS CONSIDERED (Nov. 28, 2022) at <https://www.npr.org/2022/11/28/1139127543/democrats-made-midterm-gains-in-rural-areas-can-they-keep-them>.

<sup>15</sup> Poppy Noor, *Surge in youth voter turnout may have helped propel Biden to victory*, THE GUARDIAN (Nov. 9, 2020) at <https://www.theguardian.com/us-news/2020/nov/09/youth-turnout-us-election-biden-victory-young-voters>.

<sup>16</sup> Adriana Gomez Licon & Acacia Coronado, *GOP sees slight Latino vote gains, painful candidate loses*, AP NEWS (Nov. 20, 2022) at <https://apnews.com/article/2022-midterm-elections-miami-race-and-ethnicity-racial-injustice-cbf587e647900019b502a9cfb93ac6d>.

Whether or not these headlines and reports accurately capture the underlying electoral dynamics in the U.S. (causal relationships in politics are notoriously difficult), the sentiments expressed in these news stories are manifestations that we naturally think of ourselves in demographic and ideological terms as much as we do in geographic terms. Our race and ethnicity, our gender and educational attainment, our sexual orientation and religious affiliations, and even our occupation are likely more important determinants of our political preferences than our zip code or street address. Foley's proposed self-districting simply endorses this reality and pushes it to its logical extreme. Setting aside alternative reforms to redistricting that are currently having a moment in American politics, such as at-large elections with ranked choice voting,<sup>17</sup> self-districting preserves the norm of single-member districts while leaning heavily into identity politics.

It might be tempting to write off self-districting as too fantastical to take seriously. But that would be wrong. Let's not forget that off-the-wall ideas sometimes become on-the-wall ideas enshrined into law and endorsed by courts.<sup>18</sup> More importantly, self-districting prompts us to think hard about who we are as a people, what kind of democracy we want to live in, and how much (if at all) geography matters for politics in the current age of information and mobility. Furthermore, self-districting is a reminder that different groups of people will (and should!) take turns pulling the levers of government over time, and that both election wins *and* losses are the heartbeat of a healthy democracy.

The lessons of Foley's thought experiment arrive not a minute too soon. State legislatures—the institutions that draw congressional and state legislative districts in a majority of states—are increasingly exhibiting

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<sup>17</sup> “Ranked Choice Voting Information,” FairVote.org at <https://fairvote.org/our-reforms/ranked-choice-voting-information/> (last accessed Jan. 4, 2022) (“As of December 2022, 63 American jurisdictions have RCV in place, reaching approximately 13 million voters. This includes 2 states, 2 counties, and 59 cities. Military and overseas voters cast RCV ballots in federal runoff elections in 6 states.”). *See also* Jimmy Balsler, *Ranked-Choice Voting: Legal Challenges and Considerations for Congress*, CRS REPORT (Oct. 12, 2022) at <https://crsreports.congress.gov/product/pdf/LSB/LSB10837> (“RCV has been adopted in at least 50 jurisdictions across the United States, including for statewide and federal elections in Maine and Alaska.”).

<sup>18</sup> *See, e.g.,* Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012) at <https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/>.

anti-democratic behavior.<sup>19</sup> Skepticism of their continued control over the redistricting process is natural. America's deeply polarized electorate and alarmist political culture has raised the stakes of election outcomes, with a record number of voters admitting that if their party loses an election the opposing party will "destroy America as we know it."<sup>20</sup> The 2021 American Perspectives Survey found that thirty-six percent of respondents believe the "use of force is necessary to stop the disappearance of traditional American values and way of life."<sup>21</sup> Thus, a reform like self-districting that would expand notions of political representation beyond the duality of major party politics feels like a breath of fresh air.<sup>22</sup> Self-districting might also have something to say about the increasing numbers of high-profile candidates who have refused to concede their election and blamed their loss on fraud and cheating,<sup>23</sup> and about candidates who promise voters that if they are elected, their party will never lose another election.<sup>24</sup> Self-districting has the potential to disrupt these trends.

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<sup>19</sup> See JACOB M. GRUMBACH, *LABORATORIES AGAINST DEMOCRACY* (2022) and DAVID PEPPER, *LABORATORIES OF AUTOCRACY* (2021).

<sup>20</sup> Mark Murray, 'Anger on their minds:' *NBC News Poll Finds Sky-High Interest and Polarization Ahead of Midterms*, NBC News (Oct. 29, 2022) at <https://www.nbcnews.com/meet-the-press/first-read/anger-minds-nbc-news-poll-finds-sky-high-interest-polarization-ahead-m-rcna53512> ("80% of Democrats and Republicans believe the political opposition poses a threat that, if not stopped, will destroy America as we know it.").

<sup>21</sup> Daniel A. Cox, *After the Ballots Are Counted: Conspiracies, Political Violence, and American Exceptionalism: Findings from the January 2021 American Perspectives Survey*, SURV. CTR. ON AM. LIFE (Feb. 11, 2021), <https://www.americansurveycenter.org/research/after-the-ballots-are-counted-conspiracies-political-violence-and-american-exceptionalism/> ("A majority (56 percent) of Republicans support the use of force as a way to arrest the decline of the traditional American way of life. Forty-three percent of Republicans express opposition to this idea. Significantly fewer independents (35 percent) and Democrats (22 percent) say the use of force is necessary to stop the disappearance of traditional American values and way of life.").

<sup>22</sup> This is especially true in a world where more people identify as independent than either Republican or Democrat. See "Trends in Party Identification, 1939-2014," Pew Rsch. Ctr. (April 7, 2015) at <https://www.pewresearch.org/politics/interactives/party-id-trend/>.

<sup>23</sup> Prominent examples include Stacy Abrams in 2018 Georgia Gubernatorial race, Donald Trump in 2020 Presidential race, and Kari Lake in 2022 Arizona Gubernatorial race.

<sup>24</sup> Patrick Marley, *Candidate Promises Republicans can Take Permanent Control of Wisconsin*, WASH. POST (Nov. 1, 2022) at <https://www.washingtonpost.com/politics/2022/11/01/election-2022-latest-news/#link-BLQLPJK5YRHS7GHUTU5G7GIYVU> ("Republicans will never lose another election in Wisconsin after I'm elected governor," construction executive [and Republican Gubernatorial candidate] Tim Michels told supporters Monday at a campaign stop.").

Although it's unlikely one party will permanently control the government, it's not inconceivable. Consider that Democrats controlled the House of Representatives for sixty of the sixty-four years between 1931–1995.<sup>25</sup> However, it is inconceivable that left-handed brunettes or Mormons or Asian Americans will permanently control the government. If political districts were organized along these lines, the expectations of voters and the sense of entitlement among candidates would likely change in a way that would be more conducive to concessions and shared governance.

In short, self-districting exposes some of the deepest fissures in America's contemporary political environment. This is an important contribution on its own. The fact that self-districting is so outlandish is an additional feature and not a bug. The proposal that Foley outlines in *Self-Districting* is incomplete, would require the ironing out of several details, and is almost certainly not politically viable. Never mind. Foley has persuasively shown that any meaningful solution to America's gerrymandering problem will require outside-the-box thinking.<sup>26</sup> *Self-Districting* is a shot across the bow to reformers that incremental change—a shift from federal courts to state courts, the endorsement of the Efficiency Gap over partisan symmetry, the establishment of independent commissions—is ultimately not up to the task at hand. In this way, *Self-Districting* is a notable contribution to the redistricting literature: it is thoughtful, it is fun, and it will hopefully be generative of a new wave of scholarship that deeply rethinks the way our representative government is organized.

## I. SELF-DISTRICTING AND IDENTITY POLITICS

The most provocative, and in my mind the most promising, aspect of self-districting is its de-emphasis on geography.<sup>27</sup> Redistricting has always privileged geography.<sup>28</sup> Even when those in power aim to amplify the voices of certain populations, they are bound by “traditional redistricting criteria” that are almost exclusively related to geography: compactness,

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<sup>25</sup> *History, Art & Archives, U.S. House of Representatives*, “Party Government Since 1857,” (Jan. 14, 2023) <https://history.house.gov/Institution/Presidents-Coinciding/Party-Government/>.

<sup>26</sup> Foley, *supra* n. 1 at 1 (“It’s time to rethink the entire enterprise of redistricting.”).

<sup>27</sup> Foley, *supra* n. 1 at 1 (“To make [self-districting] work, it would be necessary to relax (although not entirely sever) the connection between a district and geography.”).

<sup>28</sup> Foley, *supra* n. 1 at 21 (“Traditionally, geography has been the basis of dividing citizens for legislative representation, especially in the United States.”).

contiguity, and the preservation of city and county boundaries.<sup>29</sup> There are both practical and theoretical reasons for organizing political districts by geography. Practically, effective representation requires elected officials to engage with their constituents and vice versa. Historically, this engagement happened door-to-door, at campaign events, or in the town square. Compact and contiguous districts can be quite helpful to ensure that these interactions happen. Theoretically, people who live near each other share important characteristics that are relevant for effective representation: they might work in the same industry, suffer from the same infrastructure failures, and share the benefits of local development. Geographic districts ensure that elected representatives are members of the same community as their voters, send their kids to the same schools, shop at the same stores, drive over the same potholes, etc. These shared experiences are thought to increase the likelihood of effective representation.

Geography is not the only shared characteristic of candidates and voters, however.<sup>30</sup> Individuals share many important things with each other that are relevant for effective representation and yet not necessarily related to geography: racial identity, religious affiliation, partisan identification, gender, and age to name a few. African-Americans might feel more kinship with other African-Americans than they do with people who shop at their same grocery store. Retirees might have an opinion about Social Security reform that is more in line with other retirees than with people who happen to live in their same neighborhood. Why privilege geography over these other characteristics? As Justice Warren wrote in the Supreme Court's important decision establishing the one-person-one-vote doctrine, "[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests...Again, people, not land or trees or pastures, vote."<sup>31</sup> Geography might be a good proxy for shared political beliefs or aspirations, but it also might not be. Why not let voters reveal their own preference with respect to this proxy?

Geography is not neutral. To the extent that individuals with similar experiences and/or socio-economic status have sorted themselves into

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<sup>29</sup> See Yunsieg P. Kim & Jowei Chen, *Gerrymandered by Definition: The Distortion of "Traditional" Districting Criteria and a Proposal for their Empirical Redefinition*, 2021 WISC. L. REV. 101 (2021). Also included in the traditional criteria is the requirement for equi-populous districts.

<sup>30</sup> Foley, *supra* note 1 at 21 ("Traditionally, geography has been the basis of dividing citizens for legislative representation, especially in the United States. But geography is by no means the only possible basis, or the only one used historically.").

<sup>31</sup> *Reynolds v. Sims*, 377 U.S. 533, 532, 580 (1964).



homogeneous neighborhoods, drawing compact and contiguous electoral districts can take advantage of this sorting and ensure representation by packing like-minded voters together.<sup>32</sup> Compact and contiguous electoral districts can also combat the homogeneity of this sorting by cracking like-minded neighborhoods into more competitive districts.<sup>33</sup> What is the right thing to do? It turns out that there is no right answer. Instead, there is a fundamental tradeoff between representation and competition, both of which are desirable traits for a healthy representative democracy. Again, why not let voters reveal their own preferences as to this tradeoff?

Self-districting provides voters this exact opportunity. As Foley writes:

“If the traditional criterion of geography is most important to them, then voters can make this choice. But if racial identity, occupational or other economic status, or some other characteristic is a more important basis for their representation in the legislature, then self-districting permits voters to register this alternative choice as well.”<sup>34</sup>

Inasmuch as there is very little research capturing voter preferences about this tradeoff between representation and competition, the revealed preferences in self-districting would provide reliable empirical evidence on this important question for the first time.<sup>35</sup>

And what about the need for candidates and elected officials to mingle with their constituents in order to understand their political preferences? Candidates for office and representatives have increasingly

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<sup>32</sup> Justin Levitt, *A Citizens Guide to Redistricting*, Brennan Ctr. Report (2010 ed.) at 58.

<sup>33</sup> *Id.* at 57.

<sup>34</sup> Foley, *supra* note 1 at 21.

<sup>35</sup> There is a small literature evaluating voter preferences of this tradeoff in the context of delegate vs. trustee models of representation in political science. *See, e.g.,* Alan Frizzell, *In the Public Service*, in DAVID SMALL (ED.) DRAWING THE MAP: EQUALITY AND EFFICACY OF THE VOTE IN CANADIAN ELECTORAL BOUNDARY REFORM 251, 258 (reporting the results of a Canadian survey about preferences related to delegates vs. trustees).

relied on e-mail communication,<sup>36</sup> Twitter feeds,<sup>37</sup> TikTok,<sup>38</sup> and other social media to engage with their constituents, even in a world where districts are drawn in a way that privileges geographic compactness and contiguity. The reality is that advances in information technology, public opinion polling, and travel have changed the landscape of politics in the United States. Because of these advances in technology, a congressional district of 600,000 randomly assigned Democrats (or Catholics or Puerto Ricans) is likely to be represented as effectively in 2022 as a district of 600,000 Democrats (or Catholics or Puerto Ricans) who are clustered in a half dozen zip codes.

In other words, it is time that we revisit the primacy of geography. Demoting geography, however, is only half of the self-districting project. The more controversial move is what Foley advocates as a replacement: empowering voters to self-select into districts based on demographic and economic characteristics. This shift poses its own risks. One of the sharpest criticisms against districts organized according to the race of its inhabitants was articulated in a concurrence by Justice Thomas in *Holder v. Hall*:

“We have involved the federal courts, and indeed the Nation, in the enterprise of systematically dividing the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of political apartheid. Blacks are drawn into “black districts” and given “black representatives”; Hispanics are drawn into Hispanic districts and given “Hispanic representatives”; and so on. Worse still, it is not only the courts that have taken up this project. In

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<sup>36</sup> “Social Media in Congress: The Impact of Electronic Media on Member Communications,” CRS REPORT R44509 (May 26, 2016) (noting on p. 5 that “the amount of postal mail sent to Congress dropped by more than 50% [between 1995-2011], from almost 53 million pieces of mail in 1995 to fewer than 22 million pieces in 2011. But it has been replaced by over *three hundred million* emails. By 2011, postal mail was 7% of all mail coming to Capitol Hill.”) (emphasis in original).

<sup>37</sup> Blake Robert Mills, *Take it to Twitter: Social Media Analysis of Members of Congress*, TowardsDataScience.com (Aug. 7, 2021) at <https://towardsdatascience.com/take-it-to-twitter-sentiment-analysis-of-congressional-twitter-in-r-ee206a5b05bc> (“Twitter has now become a primary way for congressional members to engage with their constituents and express their opinions on policy issues.”).

<sup>38</sup> Max Cohen, *Meet the Politician Who Lives on TikTok*, POLITICO (Aug. 14, 2020) at <https://www.politico.com/news/magazine/2020/08/14/politicians-using-tiktok-matt-little-395620>.

response to judicial decisions and the promptings of the Justice Department, the States themselves, in an attempt to avoid costly and disruptive Voting Rights Act litigation, have begun to gerrymander electoral districts according to race.”<sup>39</sup>

It is worth noting that self-districting has the potential to render constitutional challenges based on discrimination moot since district membership would be determined by the voters themselves and not forced on them by a state actor. That is not a small thing. But even if individuals are not forced into demographically homogeneous districts by federal statute, or court order, or Justice Department directive, or state legislative action, the question remains whether our politics are best served by organizing ourselves into tribal districts. In *Shaw v. Reno*, Justice O’Connor warned that racial gerrymandering “may balkanize us into competing racial factions.”<sup>40</sup> In my mind, this concern about balkanization is a serious one, and extends beyond race. Any serious attempt at self-districting would need to confront this threat as it relates to other traits as well.

To be sure, in practice the threat might not materialize. Although Foley endorses self-districting and its promise to provide an equal opportunity for *any* identity to wield political power, his focus is really on one particular kind of identity: partisanship.<sup>41</sup> His running example pitting social progressives against constitutional conservatives, and MAGA Patriots against Democrats is purposefully stylized to illustrate self-districting while avoiding some of the thorny questions about balkanization raised above.<sup>42</sup> Here I wonder whether Foley has telegraphed more than he realizes. It is quite possible given the logistics and strategy of self-districting that partisan identity will be the only kind of identity that can attract enough individuals to form a district. Indeed, Foley acknowledges a Duverger-like incentive for groups to self-organize according to more general characteristics such that political parties or other partisan identity groups are more likely to be successful at recruiting members than more specific personal demographic traits.<sup>43</sup> To the extent

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<sup>39</sup> *Holder v. Hall*, 512 U.S. 874, 905 (1994) (J. Thomas concurring) (internal citations and quotations omitted).

<sup>40</sup> *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

<sup>41</sup> Foley, *supra* n. 1 at 11.

<sup>42</sup> *Id.* at 11–14.

<sup>43</sup> Foley, *supra* n. 1 at 9 (“it might be strategically advantageous for a single “Urban” group to recruit all city-dwelling voters in the state, and then subdivide itself into as many

this is true, the effects of balkanization could be mitigated.<sup>44</sup> The question is whether a model of self-districting that explicitly limits district formation to political beliefs and/or partisan identity would deliver the same benefits that Foley seeks. To the extent that self-districting is a vehicle for *descriptive* representation in America's legislatures of racial minorities, women, LGBTQ, veterans, teachers, etc., such limitations would likely leave advocates unsatisfied. To the extent that self-districting is a vehicle for *substantive* representation, partisan self-districting would still hold a lot of promise.

## II. SELF-DISTRICTING AND DEMOCRACY

Setting aside the potential pitfalls of tribal balkanization, some may wonder whether voters are even up to the task of self-districting. The information costs of self-districting are significantly higher than the information costs of our current districting scheme, which means that self-districting would require an electorate that is more engaged, more educated, and more dynamic than the status quo. Can self-districting elevate America's electorate?

### A. Thickening American Democracy

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districts as it obtains based on the total number of voters it recruits, rather than risk not qualifying for any district if it segments itself in advance among too many different self-defined groups.”).

<sup>44</sup> It is certainly true that partisan balkanization also carries some risk, particularly if extremist ideologies are able to capture districts. Foley does acknowledge this risk and argues that it would be easier to control these extremists in a government of coalitions (as would be the case with self-districting) than in a two-party government. *See* Foley, *supra* note 1 at 20 (“There is the obvious risk in PR systems, as shown by the experience of European politics, that political parties advocating extremist ideologies will capture legislative seats and may be required to be included within multi-party coalitions in order to form a governing majority in the legislature. On the other hand, recent experience in the United States has shown that its system of two-party politics is not immune from the effects of political extremism. Indeed, in the United States, an extremist faction within one of the two major parties may capture control of that party, and if that party wins control of the government, the extremist faction will wield power within the two-party system. An extremist minority therefore may be able leverage itself into dominance even more effectively in American's current two-party system than in a PR system, where even if the extremist minority faction may be part of the governing majority coalition, its role in that coalition can be kept more easily in check by the other members of the majority coalition.”)

Democracy scholars have long distinguished between weak or thin conceptions of democracy and strong or thick conceptions of democracy, based on the institutions and processes of a given democratic system.<sup>45</sup> In their Election Law casebook, Jim Gardner and Guy Charles summarize this spectrum of democracy and identify the characteristics that define these terms:

“Thinner forms of democracy tend to conceive of democratic citizens in individualistic terms, to place few demands on citizens other than occasional voting, and to understand democratic processes of collective decision making as relying on the aggregation, or summing, of the particularized, personal preferences of many individuals. In contrast, thicker forms of democracy tend to conceive of democratic citizens as constituting a meaningful community that makes decisions collectively through engaged discussion and deliberation, thereby requiring of citizens considerably deeper, more involving, and more consistent participation in democratic politics, as well as a predisposition to abandon private, personal interests when they conflict with the common good.”<sup>46</sup>

Self-districting would undoubtedly thicken America’s democracy for a number of reasons. First, self-districting works because voters, by definition, form meaningful communities within their districts. Second, self-districting demands discussion and deliberation. The first-stage election where voters choose their district requires significantly more information and more deliberation than voting in a primary election where voters can rely on name recognition or party cues or even abstain without losing the chance to vote in the general election. In a system of self-districting, voters must self-assess their preference set, evaluate that preference set against a list of potential districts, and then estimate the odds that their preferred district will attract enough members to exceed the population threshold.

Is America’s electorate up for this level of engagement? Perhaps. American voters are notoriously ignorant about political issues<sup>47</sup> and

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<sup>45</sup> See, e.g., BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (2004)

<sup>46</sup> JAMES A. GARDNER & GUY-URIEL E. CHARLES, *ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM* 22 (3d ed. 2023, forthcoming).

<sup>47</sup> See, e.g., Michael Schudson, *America’s Ignorant Voters*, 24 *WILSON Q.* 16 (2000).

comparatively low voter turnout is sometimes cited as evidence that American voters are lazy.<sup>48</sup> On the other hand, not much is asked of American voters; voting is as convenient as ever, political ads are ubiquitous (thus lowering the information costs of voting), and approximately half of the states don't permit ballot initiatives or referenda.<sup>49</sup> It could be that Americans are only as engaged as they need to be and, thus, if self-districting were adopted and implemented, Americans would respond in kind. Count me among the optimistic; I think American voters are up for the challenge. There is already evidence that Americans are becoming more politically engaged,<sup>50</sup> more politically astute,<sup>51</sup> and more likely to turn out (2020 saw the highest turnout in 100 years<sup>52</sup>). America's democracy is too thin, in my opinion, and I applaud Foley for pushing us to think about ways to thicken it.

### B. Political Pluralism Revived

Perhaps the most hopeful aspect of self-districting is the way that it would revive a sense of political pluralism and remind us that in a country as diverse as ours, no one group or ideology or political party can adequately represent everybody. This reminder is welcome in today's hyper-polarized political environment. By refocusing voters on the power of their identity and beliefs, self-districting has the potential to combat the recent rise in authoritarian government actions. Robert Dahl, the father of American political pluralism wrote that "by suppressing autonomy and preventing the public manifestation of conflicts and cleavages, a hegemonic regime can prevent the development of pluralistic social and political order."<sup>53</sup> Self-districting is Foley's attempt to fight back against such hegemonic regimes, which he does by recentering voter autonomy

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<sup>48</sup> See, e.g., Paul E. Haney, *Apathy and laziness also cause low voter turnout*, ROCHESTER CITY (Aug. 7, 2018) at <https://www.rochestercitynewspaper.com/rochester/apathy-and-laziness-also-cause-low-voter-turnout/Content?oid=7502472>.

<sup>49</sup> "How Many States Permit Initiatives?" BALLOTPEDIA [https://ballotpedia.org/How\\_many\\_states\\_permit\\_initiatives](https://ballotpedia.org/How_many_states_permit_initiatives) (last accessed Jan. 4, 2023).

<sup>50</sup> See, e.g., Mark Schmitt, *Could Higher Levels of Political Participation Become the New Normal?* NEW AMERICA (July 6, 2021) at <https://www.newamerica.org/the-thread/could-higher-levels-of-political-participation-become-the-new-normal/>.

<sup>51</sup> See, e.g., Todd Donovan, *Ranked choice voting in the US is contested but not confusing*, LSE USAPP BLOG (Sept. 8, 2022) at <https://bit.ly/3QtwxMd> (reporting a "high level of understanding [of ranked choice voting] among voters.").

<sup>52</sup> Kevin Schaul, Kate Rabinowitz & Ted Mellnik, *2020 Turnout is the Highest in over a Century*, WASH. POST (Nov. 5, 2020) at <https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/>.

<sup>53</sup> Robert A. Dahl, *Pluralism Revisited*, 10 COMP. POL. 191, 191 (1978).

and then advocating for productive negotiations and adjudications of political conflicts and cleavages in the open.<sup>54</sup> What attracts me most to the idea of self-districting is its potential to generate more tolerance among American citizens. I find great resonance between self-districting and this passage from William Galston:

“One thing above all is clear, because the likely result of liberal pluralist institutions and practices will be a highly diverse society, the virtue of tolerance will be a core attribute of liberal pluralist citizenship. This type of tolerance does not mean wishy-washiness or the propensity to doubt one’s own position, the sort of thing Robert Frost had in mind when he defined a liberal as someone who cannot take his own side in an argument. It does not imply, or require, an easy relativism about the human good; indeed, it is compatible with engaged moral criticism of those with whom one differs. Toleration rightly understood means the principled refusal to use coercive state power to impose one’s views on others, and therefore a commitment to moral competition through recruitment and persuasion alone.”<sup>55</sup>

In a world with self-districting, where people are organized into a multitude of groups, power will necessarily change hands frequently as different groups take turns at the helm of government. This shared governance structure de-incentivizes individual groups from coercively imposing their views on others, lest they face similar coercion at the hands of another group. And the assumption is (and should be) that individuals will find themselves out of power at multiple points in their lives. This is crucial. Democracy is a process, not an outcome. Thus, a commitment to democracy requires individuals to care enough about their candidates and causes that they actively promote them and vote for them, but to not care so much that they are unwilling to acknowledge defeat. As the political journalist Libby Nelson has written, acknowledging defeat is perhaps the most powerful endorsement of democracy possible:

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<sup>54</sup> See William A. Galston, *The Idea of Political Pluralism*, 49 *MORAL UNIVERSALISM & PLURALISM* 95, 107 (2009) (“Fundamental tensions rooted in the deep structure of human existence cannot be abolished in a stroke but must rather be acknowledged, negotiated, and adjudicated with due regard to the contours of specific cases and controversies.”).

<sup>55</sup> *Id.* at 98.

“Political scientists have found that people’s perceptions of whether an election is legitimate are easily affected by how their preferred candidate responds—a close election where the loser concedes gracefully is considered as valid as a landslide. We think the winner of an election gets all the power. But it turns out that the loser can control something even more important: the perception of democratic legitimacy.”<sup>56</sup>

Much like self-districting has the potential to elevate democratic engagement and voter mobilization, I am optimistic that self-districting would contribute to perceptions of democratic legitimacy. The narrower the identity of groups that wield power, the more obvious that these groups must share power. Some Republicans and Democrats currently believe that they should control the levers of government permanently and that electoral losses are not true losses, but merely the result of cheating by the other party.<sup>57</sup> The sustainability of America’s democracy demands that people recognize power must change hands from time to time. In my mind, self-districting would increase the frequency of these transitions and the number of people who accept it. Of all its potential contributions to democracy and the rule of law, this might be self-districting’s most important one.

### III. SELF-DISTRICTING IN PRACTICE

Although Foley’s proposal is politically unpalatable at the current moment, his intuitions are exciting and I hope that his paper will generate more outside-the-box scholarship on potential redistricting reform and the future of representative democracy. If *Self-Districting* is a starting point for such research, then I hope to flag a few places where scholars might focus their attention.

First, to the extent that *Self-Districting* draws our attention to the non-geographic determinants of partisan identity, how might we predict what categories individuals would choose as their basis for representation? And why? Political ideology is multi-faceted and intertwined with personal identity. For example, surveys have shown that voters prefer to be

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<sup>56</sup> Libby Nelson, *Donald Trump Just Said he Might Not Concede if Clinton Wins*, VOX Oct. 19 (2016) at <https://www.vox.com/2016/10/19/13341712/presidential-debate-donald-trump-concede>.

<sup>57</sup> See *supra* n. 23–24.



represented by individuals who share the same racial and ethnic background, but that this preference is closely tied to the partisanship of the voters.<sup>58</sup> This preference is true whether voters are from racially homogeneous districts or multiracial ones.<sup>59</sup> The research on same-gender representation is a bit more mixed and based on stereotypes as well as issue saliency.<sup>60</sup> What about the intersection of race and gender? Or the intersection of race and class? There is some emerging research on voter participation by these cross-sections, but not on the preferences for representation.<sup>61</sup> A better understanding of these preferences would go a long way to understanding the potential effects of self-districting. Imagine if self-districting incorporated ranked choice voting at the first step. Each voter would be given the choice to choose from among multiple categories. Now imagine a voter would prefer to be in a district with other coethnic voters, but if there weren't enough others who want to identify that way their second choice would be to join a district of urban voters. If there weren't enough urban voters make a district then the voter might choose to be in a district with other Democrats. More experimental survey research about how individuals view their own political identities would be very welcome on this question.

Second, how should we view *Self-Districting* among other forms of preference aggregation, such as ranked choice voting and proportional representation? As a first step, imagine that self-districting is implemented, but limited such that districts can only be formed based on party affiliation or partisanship. Presumably, such a system would give third and fourth parties a more legitimate shot than the status quo and be more likely to push us toward more proportional representation. But how much more? And how different would the outcomes be compared to currently-in-use ranked choice voting methods? In other words, what

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<sup>58</sup> See, e.g., Stephen Ansolabehere & Bernard L. Fraga, *Do Americans Prefer Coethnic Representation? The Impact of Race on House Incumbent Elections*, 68 STAN. L. REV. 1553 (2016).

<sup>59</sup> Danielle Casarez Lemi, *Do Voters Prefer Just Any Descriptive Representative? The Case of Multiracial Candidates*, 19 PERSP. ON POL. 1061 (2021).

<sup>60</sup> See, e.g., Kira Sanbonmatsu, *Gender Stereotypes and Vote Choice*, 46 AM. J. POL. SCI. 20 (2002); Gail McElroy & Michael Marsh, *Candidate Gender and Voter Choice: Analysis from a Multimember Preferential Voting System*, 63 POL. RES. Q. 822 (2010); Beth Reingold, *Concepts of Representation among Female and Male State Legislators*, 17 LEG. STUD. Q. 509 (1992).

<sup>61</sup> Daniel Laurison Hana Brown & Ankit Rastogi, *Voting Intersections: Race, Class, and Participation in Presidential Elections in the United States 2008-2016*, 65 SOC. PERSP. 768 (2022)

would self-districting give us that other systems don't? Empirically, are the end games that different?

Third, how should we best understand the tradeoffs inherent in self-districting? For example, Nick Stephanopoulos has written that "heterogeneous districts [] are linked to lower participation, less effective representation, and greater legislative polarization. Districts drawn pursuant to homogenizing criteria have the opposite consequences and are also more conceptually consistent with an electoral system that is founded on the principle of territorial representation."<sup>62</sup> Thus, because self-districting is designed to generate more homogeneous districts, we might expect to see higher voter participation and lower legislative polarization; important countervailing benefits to the potential risk of balkanization. However, self-districting is decidedly *not* "founded on the principle of territorial representation" and so its relationship to prior research on homogeneous districting deserves more exploration. In general, more research on the promises and pitfalls self-determined districts would provide a better sense of the tradeoffs inherent in its adoption.

#### CONCLUSION

Foley's proposal for self-districting feels like a playful take on a long-standing dispute. But its playfulness belies a deep engagement with one of political theory's most vexing challenges. Self-districting would require that every American engage in political introspection, assess their communal relationships and values, and hold their representatives accountable. That is a tall order. But anything less may not be sufficient to address the "collapse of government-controlled districting" that Foley has outlined. What *Self-Districting* lacks in political viability, it more than makes up for by laying the groundwork for future scholarship that "rethinks the entire enterprise of redistricting." Foley has carved out a space in our field for such generative work before, and with *Self-Districting* he has delivered again.

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<sup>62</sup> Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 775 (2013).