

INSIGHTS FROM *DEMOCRACY AND DISTRUST* BEARING ON *RUCHO* AND PARTISAN GERRYMANDERING

*Vikram David Amar*¹

The courts, in interpreting the Constitution, should not override the will of the majority in the name of values that supposedly transcend majority rule. Instead, judges should try to make representative democracy more democratic. They should try to make democracy work according to its own underlying principles. That is the simple, powerful thesis of *Democracy and Distrust*: the courts should be in the business of reinforcing and perfecting, not second-guessing, the work of representative government.²

Such is the way David Strauss, at about the time John Hart Ely's *Democracy and Distrust* turned 25, distilled its essence. And Strauss' is, I think, a very fair distillation. As the first chapter of Ely's landmark book makes clear, the commitment to constitutionalism that Americans have shared all the way back to founding is grounded on popular acceptance of the "legitimacy of the majority's verdict."³ That "government by the majority"⁴ has not always or consistently been reflected in all the Constitution's provisions—to say nothing of the caselaw the Supreme Court has developed—ought not to obscure the very majoritarian essence of the document itself.⁵

1. Dean and Iwan Foundation Professor of Law, University of Illinois College of Law. I thank the editors of *Constitutional Commentary*, and the participants in the live event commemorating the fortieth anniversary of the publication of John Hart Ely's *DEMOCRACY AND DISTRUST* held at the University of Illinois at Urbana-Champaign, for their helpful suggestions. In this Essay, I discuss what Ely said and believed by reference to the book, and do not canvass his much wider set of writings.

2. David Strauss, *Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely*, 57 *STAN. L. REV.* 761, 761 (2004).

3. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 6 (1980).

4. *Id.*

5. To be sure, as Ely himself acknowledges, *id.* at 5–6, there were many ways in which the Constitution was not, at least initially, majoritarian. Yet, as Ely and others have

As Ely's work, having turned forty, is now fully middle-aged, examining how American constitutionalism has been living up to Ely's prescriptions seems a worthwhile task. In some respects, Ely, were he still alive, would certainly be disappointed. The slew of state laws recently passed after the election of 2020 in several Republican states making exercise of the franchise more difficult⁶ certainly represents a step in the opposite direction from the one Ely lays out. In other respects, Ely might be heartened: in theory at least, he would likely embrace the National Popular Vote interstate compact plan that, if implemented sensibly, could move the country away from the unfortunate situation, that Ely himself points out the Constitution permits, in which "a President [is] elected without a popular majority or plurality nationwide."⁷

What about the work of the Court—a major if not the dominant theme in *Democracy and Distrust*? Ely believed that courts could and should make democracy run better. And here too recent cases present a bit of a mixed bag. I expect Ely would not be thrilled with the 2013 ruling in *Shelby County v. Holder*,⁸ given its essential preference for preserving an (unenumerated) equality among states over eliminating barriers to voting, but he might embrace last year's rulings by the Roberts Court in the

pointed out, "[t]he very process of adopting the Constitution was designed to be, and in some respects it was, more democratic than any that had preceded it The document itself, providing for congressional elections and prescribing a republican form of government for the states, expresses its clear commitment to a system of representative democracy at both the federal and state levels." *Id.* at 5. And although "[t]here have also existed throughout our history limits on the extent of the franchise and thus on government by the majority, . . . the development again, and again it has been a *constitutional* development, has been continuously, even relentlessly, away from that state of affairs." *Id.* at 6 (emphasis in original).

6. See, e.g., Nick Corasaniti, *Georgia G.O.P. Passes Major Law to Limit Voting Amid Nationwide Push*, N.Y. TIMES (Mar. 25, 2021), <https://www.nytimes.com/2021/03/25/us/politics/georgia-voting-law-republicans.html>; Nick Corasaniti & Reid J. Epstein, *Florida Enacts Voting Restrictions; Texas Moves to Follow*, N.Y. TIMES (May 6, 2021), <https://www.nytimes.com/live/2021/05/06/us/joe-biden-news>.

7. ELY, *supra* note 3, at 6. For a general discussion of the NPV compact's promise (and perils), see generally Vikram David Amar, *Overcoming Partisan Objections to Electoral College Reform: How Red States Could (and Should) Adopt the National Popular Vote Interstate Compact But Defer Implementation Until 2032*, JUSTIA (Apr. 19, 2019), <https://verdict.justia.com/2019/04/18/overcoming-partisan-objections-to-electoral-college-reform>, and sources linked therein; Vikram David Amar, *How to—Carefully—Surmount the Electoral College*, THE ATLANTIC (Jan. 14, 2020), viewable at: <https://www.theatlantic.com/ideas/archive/2020/01/national-popular-vote/604861>.

8. 570 U.S. 529 (2013).

2021] *INSIGHTS FROM DEMOCRACY AND DISTRUST* 335

*Chiafalo v. Washington*⁹ and *Colorado Department of State v. Baca*¹⁰ pairing of cases, which enable states to curtail the incidence and undemocratic effects of so-called “faithless” electors.

What about aggressive partisan gerrymandering? Here too, the Elyan scorecard might be mixed. Certainly the Court’s upholding (albeit over the dissent of Chief Justice Roberts and other conservatives) of the transfer of districting power from the elected legislature to an independent citizen redistricting commission in *Arizona Legislature v. Arizona Independent Redistricting Commission (AIRC)*¹¹ in 2015, effected by the state’s direct-democracy initiative device, is something Ely could have celebrated. But what of *Rucho v. Common Cause*¹² four years later, and the question it addressed of whether the Court and the U.S. Constitution themselves have a role to play, not just in permitting creative political workarounds for partisan gerrymandering but in regulating and reining in the practice directly? In *Rucho*, an emphatic but closely divided (5–4) Court, led by Chief Justice Roberts, proclaimed that claims that partisan gerrymandering tactics (by states or by Congress) run afoul of the U.S. Constitution are “political questions” that lie outside the federal judiciary’s competence and beyond its jurisdiction, and are thus “nonjusticiable;” such questions, the Court said, must be resolved by institutions other than the federal courts. Would Ely embrace this outcome? Yet again, I think a careful reading of *Democracy and Distrust* offers something to both sides.

One prominent aspect of Chief Justice Roberts’ majority opinion in *Rucho* related to the administrability of any doctrinal rule seeking to regulate partisan gerrymandering—a consideration Ely might well appreciate. As Roberts observed, a huge barrier to judicial involvement is the absence of consensus on what the baseline for “fair” treatment of a minority political party would look like:

The initial difficulty in settling on a “clear, manageable and politically neutral” test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure

9. 140 S. Ct. 2316 (2020).

10. 140 S. Ct. 2316 (2020).

11. 576 U.S. 787 (2015). Although the *AIRC* ruling was 5–4, see *infra* note 22 for an explanation of how Roberts and other conservatives seem to have come to accept the *AIRC* holding.

12. 139 S. Ct. 2484 (2019).

of “unfairness” in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking [the practice of distributing voters among districts so as to maximize the number of safe seats for the majority party] so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, “[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature.” (citation omitted).

On the other hand, perhaps the ultimate objective of a “fairer” share of seats in [a legislative] delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its “appropriate” share of “safe” seats. . . . Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.¹³

Given this, any judicially imposed guidepost would look result-oriented and unwieldy: “Deciding among [the] different visions of fairness [that people may advocate for in districting] poses basic questions that are political, *not legal*. *There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral*. Any judicial decision on what is ‘fair’ in this context would be an ‘unmoored determination’ of the sort characteristic of a political question beyond the competence of the federal courts.”¹⁴

As noted above, Ely might very well sympathize with Chief Justice Roberts here, and at least acquiesce in Roberts’ suggestion that the federal courts need stay out of this quagmire because of the absence (as of yet) of a clear, easy-to-administer litmus test. Indeed, this is the basis on which Ely ultimately defends the so-called malapportionment rulings—in Ely’s mind among the most important, albeit most controversial, decisions decided by the Warren Court, and the ones that provide the best indication of how Ely might approach modern partisan gerrymandering. As Ely puts it, the idea “that there can be no administrable standard

13. *Rucho*, 139 S. Ct. at 2500.

14. *Id.* (emphasis added).

2021] *INSIGHTS FROM DEMOCRACY AND DISTRUST* 337

for determining the legality of apportionments . . . is nothing short of silly. . . . For the very standard the Court chose in the landmark *Reynold v. Sims*—the “one person, one vote” standard—is certainly administrable. “*In fact administrability is its strong suit, and the more troublesome question is what else it has to recommend it.*”¹⁵

For Ely, the threat that malapportionment posed to “government by the majority” required a response by the Court, but not a response that “would have involved the Court in difficult and unseemly inquiries into the [very contextual] power alignments prevalent in the various states whose plans came before it.”¹⁶ Quoting Professor Deutsch, Ely worried that “a steady diet” of such a nuanced and context-specific doctrinal approach might not be “accept[ed]” by “our society.”¹⁷

But what of the merits of the notion that, putting aside an administrable test, partisan gerrymandering offends constitutional ideals? After all, though Chief Justice Roberts’ opinion in *Rucho* can be understood (and may be styled) as a political question “jurisdictional” ruling, it is probably better understood as a decision on the merits, that the federal Constitution simply does not speak to partisan gerrymandering, putting aside what kind of judicial remedy might be feasible if it did. In this regard, note that Chief Justice Roberts says not only that the federal Constitution lacks any “clear, manageable and politically neutral”¹⁸ principles to govern judicial resolution, but that “there are no legal standards discernible in the” document relating to the question of excessively partisan gerrymandering.¹⁹ “Discernible” means detectable, perceptible, observable. To say that the Constitution contains no discernable legal standards to regulate an activity is to say there is nothing that we can observe (and thus know of) in the Constitution that limits the activity. It would be one thing if the Constitution explicitly provided that “legislatures regulating the time, place and manner of elections shall not be excessively influenced by partisan politics,” and federal courts stayed out because they didn’t feel comfortable drawing lines to decide when influence was “excessive.” But that

15. Ely, *supra* note 3, at 120–21 (emphasis added).

16. *Id.* 124.

17. *Id.*

18. *Rucho*, 139 S. Ct. at 2500.

19. *Id.*

is not what Chief Justice Roberts found. He concluded, after canvassing the usual constitutional sources of text, structure and history, that the Constitution lacks any “discernible” standard, *much less* one that is judicially manageable. Elsewhere he reinforced this distinction between discernibility and manageability by reminding that the challengers failed to identify a constitutional standard that is “judicially discernible *and* manageable.”²⁰ The absence of any visible/discernible standard means simply that there is no (constitutional) *law* here to apply—which is why the Chief Justice said the question presented was not a “legal”²¹ one—and therefore the challenged conduct, while perhaps very bad, is not (constitutionally) unlawful. (To be clear, I am not saying I necessarily agree with Chief Justice Roberts’ conclusion that no provision of the federal Constitution substantively constrains gerrymandering. I think at the very least if majority rule were frustrated over a sustained period of time—which frustration, rather than a generic concern with partisanship, is the real constitutional value at stake—the Republican Guarantee Clause, discussed more below, would apply. But for present purposes I am not critiquing the Chief’s conclusion so much as trying to understand it on its own terms.)²²

20. *Id.* at 2502 (emphasis added).

21. *Id.* at 2500.

22. If *Rucho* is a ruling on the merits, this means, among other things, that state courts, while free to regulate partisan gerrymandering in the name of state constitutions, would not be permitted to invoke the federal Constitution as the source of substantive constraint. See Vikram David Amar, *Advice for State Courts in the Aftermath of Rucho*, JUSTIA (Jul. 18, 2019), <https://verdict.justia.com/2019/07/18/advice-for-state-courts-in-the-aftermath-of-rucho>. More broadly, the confusion over the two quite different but often conflated ideas that are often invoked confusingly in political-question rulings—the absence of any legal norm, and the absence of a judicially manageable test to apply—really traces back to carelessness by the great Justice William Brennan when he discussed and summarized political-question thinking in the seminal *Baker v. Carr* case, and where he housed within a single factor “a lack of *judicially discoverable and manageable* standards for resolving” a particular claim. *Baker v. Carr*, 369 U.S. 186, 215 (1962) (emphasis added). Chief Justice Roberts used “discernible” rather than “discoverable,” but the idea is the same—and it is a different idea from that of “manageab[ility].” The Court has been careless about keeping separate the very distinct concepts of abstention and ruling on the merits in other important political-question contexts too, including the *Nixon v. U.S.* judicial impeachment case, see Vikram David Amar, *Exactly What Are the Rules Concerning Supreme (or Other Federal) Court Review of Impeachment Proceedings*, JUSTIA (May 13, 2019), <https://verdict.justia.com/2019/05/13/exactly-what-are-the-rules-concerning-supreme-or-other-federal-court-review-of-impeachment-proceedings>.

Even as *Rucho* rejected a role for the federal Constitution in regulating partisan gerrymandering, it is noteworthy that Chief Justice Roberts’ majority opinion, joined by the other more conservative Justices, effectively sanctioned the voter-created independent redistricting commission notion that was the subject of controversy in the *AIRC* case. By

2021] *INSIGHTS FROM DEMOCRACY AND DISTRUST* 339

Would Ely agree with this, or instead conclude that partisan gerrymandering poses the same substantive threat to majority rule that malapportionment did? I'm not sure. On the one hand, Ely does say the combination of the Republican Guarantee Clause (a provision he thinks is justiciable) and the Fourteenth and subsequent amendments makes the case that each American should have equal political power an attractive one:

[Since the time the Guarantee Clause was adopted], [n]ot only has the Fourteenth Amendment underscored our commitment to equality in the distribution of various goods—particularly, one has to suppose, those that are crucial to one's ability to protect oneself respecting the distribution of all others—but several other amendments, in fact most of the recent ones, have extended the franchise to persons who previously had been denied it, thereby reflecting a strengthening constitutional commitment to the proposition that all qualified citizens are to play a role in the making of public decisions.²³

He also suggests, albeit cryptically, in endnote number 60 to the text on page 124, that “[t]he reasons for judicial intervention are just as compelling when, say, 65 percent of the voters vote themselves 80 percent of the effective legislative power as when the representatives of 40 percent of the voters secure for themselves 55 percent of the effective power.”²⁴

So perhaps, in his mind, absolute equality (or the nearest thing to that) in “effective legislative power” is the constitutionally required norm, and we need simply to keep working to find a rule in the partisan gerrymandering domain as we did in the malapportionment setting that implements and administers the equality command.

But Ely might also be read to validate a fallback provision (that I believe has significant textual and historical support) on the merits of partisan gerrymandering. In his analysis/defense of the malapportionment rulings, he acknowledges that a plausible

endorsing, albeit as a way of placating people who might otherwise view his majority opinion as partisan hackery, the constitutional permissibility of direct democracy state-constitutional-amendment measures similar to Arizona's that had been adopted in other states, e.g., Colorado and Michigan—see *Rucho*, 139 S.Ct. at 2507—Chief Justice Roberts (and the conservatives who joined him) essentially accepted the *AIRC* Court's holding and rationale, even though he had penned a loud (if not particularly careful) dissent in that case.

23. ELY, *supra* note 2, at 123.

24. *Id.* at 239, endnote 60.

reading of the Constitution—or at least of the Republican Guarantee Clause that does most of the work in his analysis—need not be so aggressive, and would indeed draw a distinction between a 65-percent majority tightening its hold on government and a 40-percent minority seizing the reins of power in the first place. In particular, Ely credits the plausibility of Justice Stewart’s suggestion that under the Constitution districting devices and practices merely “must be such as not to permit the systematic frustration of the will of a majority of the electorate of the State.”²⁵ At a minimum, Ely suggests, the Constitution ought to be read to ensure this.

All this raises the key questions: How might we be able to prevent partisan gerrymandering from threatening majority rule, and might malapportionment differ from partisan (including very aggressive partisan) gerrymandering on this score? Although in answering these questions I am going beyond what Ely explicitly said (and so he may not fully agree with my suggestions), I am building on his insights and following, if you will, his lead.

With respect to malapportionment, as Ely explained, if unequally weighted vote systems are valid—that is, if meaningful deviation from the one-person, one-vote baseline is constitutionally unobjectionable—in the state legislature, then there is no easy stopping point to prevent minorities from governing majorities, and for the long haul. If the votes of some persons can count for a bit more than the votes of other persons, then the votes of some persons can legitimately count for a lot more than those of other persons;²⁶ if malapportionment in principle were accepted as constitutionally unproblematic, then a very small number of individuals could easily control a supermajority of districts, and thus a supermajority of the legislature that could do whatever it wanted, notwithstanding

25. *Id.* at 123–25 (analyzing and crediting Stewart’s formulation as stating a principle the Republican Guarantee Clause is “capable of containing”). Justices that have served on the Court after Justice Stewart have not often returned to Stewart’s phrasing here, and Justice Kennedy in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), might be read to reject Stewart’s notion, see *Vieth*, 541 U.S. at 308, but Justice Breyer in *Vieth* appears to embrace it, see *id.* at 361. And I note that a plurality of four Justices in *Davis v. Bandemer*, 478 U.S. 109 (1986), also seem to draw the distinction that Stewart does—between undemocratic outcomes in a single election cycle versus more durable suppression of majoritarian will. See *id.* at 133 (opinion of Justice White joined by Justices Brennan, Marshall and Blackmun).

26. ELY, *supra* note 2, at 120, 122. Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (the power to tax a little suggests the power to tax a lot).

2021] *INSIGHTS FROM DEMOCRACY AND DISTRUST* 341

what the governor—and the majority who presumably voted the governor in—preferred.

Partisan gerrymandering might be distinguishable from this specter in two respects. First, if a 40-percent minority (to use Ely's example) is able to have its votes given extra weight via old-fashioned malapportionment, there is no political risk that the minority group will end up with less power than it deserves. By contrast, if a 40-percent minority tries via aggressive partisan gerrymandering to spread its members out perfectly ("crack and pack," that is) so as to make up a reliable majority in a majority of the legislative districts, there are consequences to miscalculation—the minority may end up with *fewer* seats than it would have absent the partisan line-drawing, if its assumptions about who is on its team and who is not turn out to be flawed even in relatively small ways. To be clear, I am not suggesting that a minority could never thread the needle here and succeed in disempowering a majority. Perhaps Big Data and an increasingly polarized America make such calculation errors less likely today. But the potential for mischief here is certainly not as great as it would have been in the malapportionment realm had the Warren Court not put an end to those shenanigans.

All of this brings us to a second potential distinction. As noted above, if 40 percent can overweight their votes via malapportionment, they could in theory capture well more than 2/3 of the legislative seats. That is hugely important because it would enable this minority to override gubernatorial vetoes. And governors' elections, because they are statewide, are largely immune from the effects of all kinds of malapportionment, indeed largely immune from the adverse effects of manipulation of district lines and size more generally. Yet even if in today's world a 40-percent minority could use partisan gerrymandering to capture a majority of legislative seats, capturing a veto-proof 2/3 of the seats of the legislature would be that much harder still. And so gubernatorial elections might generally serve as a backstop to protect against what Justice Stewart called the "systematic frustration of the will of a majority of the electorate of the State."

The importance of gubernatorial elections free from the influence of gerrymandering as a backstop to safeguard Republican Guarantee Clause principles has not been fully appreciated. Consider, for example, the way Mississippi until very recently elected governors. Prior to last November's election,

Mississippi's constitution provided for a unique process of gubernatorial selection.²⁷ Alone among the states, Mississippi required a successful candidate in gubernatorial elections to win both: 1) a majority (rather than just a plurality) of statewide votes; *and* 2) a majority of the Mississippi House of Representatives districts (the Electoral Count Rule). If no candidate satisfied both of these requirements, the state House of Representatives selected the governor from the two top popular-vote getters. The only time the House has decided a gubernatorial election was in 1999, when it picked Democrat Ronnie Musgrove, who had won a narrow popular-vote plurality (but not a majority) in a four-way election. No Democrat had since been elected governor.

A lawsuit filed a few years back in federal court challenged this unusual process in Mississippi. The complaint alleged that the Mississippi system, which was added to the Mississippi constitution in 1890, was tainted by invidious racial motives and operated to violate the federal constitutional rights of African American registered voters in the state. And the plaintiffs also contended that the so-called Electoral Vote Rule violated the Constitution's one-person, one-vote principle the Supreme Court has recognized for legislative elections, insofar as someone could win a majority of state House districts but get far fewer votes than her opponent statewide. (The plaintiffs further asserted that the Mississippi scheme violated the federal Voting Rights Act.)

To be sure, the most well-known of the so-called malapportionment cases the Supreme Court has decided, such as the 1964 cases of *Wesberry v. Sanders*²⁸ and *Reynolds v. Sims*,²⁹ invalidated the use of legislative districts within a state (for purposes of electing congresspersons and state legislators, respectively) that are significantly different in population size. Prior to these cases in the 1960s, some legislative districts (typically in an urban region with a high percentage of people of color) would frequently have far more persons in them than other (often rural and whiter) districts, even though each district would

27. For additional background on the Mississippi gubernatorial regime, see Vikram David Amar & Jason Mazzone, *Evaluating the Lawsuit Attacking Mississippi's Distinctive Method of Picking Governors: Part Three in a Series*, JUSTIA (Dec. 12, 2019), <https://verdict.justia.com/2019/12/12/evaluating-the-lawsuit-attacking-mississippi-distinctive-method-of-picking-governors>, and earlier parts of the series of essays linked therein, on which I build here.

28. 376 U.S. 1 (1964).

29. 377 U.S. 533 (1964).

elect one representative to the legislature.

But the Warren Court's work in this realm was not limited to legislative elections. In particular, in *Gray v. Sanders*,³⁰ the Court in 1963 (the year *before Wesberry* and *Reynolds*) invalidated a Georgia so-called "county unit" system for tabulating votes in primary elections for statewide office, including the governorship. Under Georgia's system, "[c]andidates for [statewide office] nominations who received the highest number of popular votes in a county were considered to have carried the county and to be entitled to" a certain number of county unit votes.³¹ A candidate for governor (or U.S. Senator) needed a "majority of the county unit vote [to be] nominated." But the number of county unit votes allocated to each county was not proportional to that county's population. For example, Fulton County (which includes Atlanta and a large African American population) had about 14 percent of the state's people, but Fulton County's six county unit votes made up only 1.5 percent of the total 410 county unit votes in the state. As the Court would observe in describing *Gray* in a later case, "[t]he result was that the number of votes of persons living in large counties was given no more weight in electing state offices than was given to a far fewer number of votes of persons residing in small counties. This discrimination against large[-]county voters was held to deny them the equal protection of the laws."³²

A potentially significant distinction between Mississippi's gubernatorial election regime in 2019, on the one hand, and the schemes invalidated in *Wesberry*, *Reynolds*, and even *Gray*, on the other, is that every state House district in Mississippi today (each of which selects a member to the lower house of the Mississippi legislature) contains (in order to comply with *Reynolds*) an equal (or nearly so) number of persons. In other words, there is no overt discrimination against more populous areas of the state under Mississippi's modern regime the way there was in each of the cases described above from the 1960s.

Notwithstanding this possible distinction, the federal district judge to whom the case had been assigned did, prior to the state voters repealing the Electoral Count Rule last November,³³ issue

30. 372 U.S. 368 (1963).

31. *Id.* at 371.

32. *Fortson v. Morris*, 385 U.S. 231, 233 (1966).

33. See Ballotopedia entry showing voter repeal of provision requiring a candidate to win a majority of state legislative districts to win any statewide office, [BALLOTPEDIA](#),

some provisional rulings musing on the merits, calling Mississippi's scheme into question.³⁴ Although the judge (Judge Jordan) denied preliminary injunctive relief, he opined that plaintiffs had established a likelihood of success on their one-person, one-vote challenge, pointing to the fact that the Supreme Court in *Gray*, in footnote 12, asserted (albeit in dicta) that Georgia's regime would be problematic "even if [county] unit votes were allocated strictly in proportion to population," because of the winner-take-all nature of earning county unit votes.³⁵ To explain what it saw as the problem, the Court in footnote 12 provided an example: even assuming county unit votes were allocated in strict proportion to each county's population, "if a candidate won 6,000 of 10,000 [popular] votes in a particular county, he would get the entire unit vote [for that county], the other 4,000 votes for a different candidate being worth nothing and being counted only for the purpose of being discarded."³⁶

In a 1971 case several years later (*Gordon v. Lance*),³⁷ the Court echoed this observation from *Gray*'s footnote 12, saying indeed that the *Gray* Court "held that the county-unit system would have been defective even if unit votes were allocated strictly in proportion to population," because of the problem of votes for a losing candidate being "discarded."³⁸ Although *Gordon* characterized *Gray*'s footnote 12 as a "h[o]ld[ing]," I should mention that this remark in *Gordon* was itself not essential to *Gordon*'s outcome. But after *Gordon*, this part of *Gray* is pretty well established.

The reasoning behind *Gray*'s footnote 12 certainly could have been crisper, insofar as many American elections see votes for losing candidates that are "discarded" in this way. For example in any election for a legislator within a district (not to mention election for a statewide office like U.S. Senator), all the votes of candidates other than the leading vote getter are discarded in the sense that these votes do not determine the selection of the representative of that district, nor the partisan

[https://ballotpedia.org/Mississippi_Ballot_Measure_2_Remove_Electoral_Vote_Requirement_and_Establish_Runoffs_for_Gubernatorial_and_State_Office_Elections_Amendment_\(2020\)](https://ballotpedia.org/Mississippi_Ballot_Measure_2_Remove_Electoral_Vote_Requirement_and_Establish_Runoffs_for_Gubernatorial_and_State_Office_Elections_Amendment_(2020)) (last visited Sept. 3, 2021).

34. *McLemore v. Hosemann*, 414 F. Supp. 3d 876 (S.D. Miss. 2019).

35. *See Gray*, 372 U.S. at 381, n. 12.

36. *Id.*

37. 403 U.S. 1 (1971).

38. *Id.* at 4 (emphasis added).

2021] *INSIGHTS FROM DEMOCRACY AND DISTRUST* 345

makeup of the legislature as a whole. (In parliamentary systems, by contrast, where each party earns a proportional share of the legislature's total number of seats based on that party's share of voter support in the entire state/nation, perhaps votes are not discarded in this way, but nothing in the Constitution requires that American elections within states follow the parliamentary model.)

But this wasted (or unequal) vote concern ought to be problematic in gubernatorial elections, if we think governors are a backstop to counteract otherwise unchecked partisan gerrymandering of the legislature and give effect to the Constitution's "guarantee" that there be no "systematic frustration of the will of a majority of the electorate of the State."

The district judge's ruling in the Mississippi case, and the Court's instincts in *Gray* and *Gordon* (at least as applied to Governor's elections) thus seem correct, but there is one more case complicating things. In 1966, three years after *Gray* but five years before *Gordon*, the Court in *Fortson v. Morris*,³⁹ by a 5–4 vote, upheld a (now obsolete) system in which Georgia's governor was elected by the Georgia General Assembly if no gubernatorial candidate received a majority of statewide votes, even though the party that controlled a majority of Assembly seats might have lacked majority or plurality voter support statewide because of the vote-discarding, winner-take-all nature of legislative district elections (a feature that, as explained above, is potentially exacerbated by partisan gerrymandering). As the Court majority observed in *Fortson*, "[t]here is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor. . . . The method [of legislative selection of governor that Georgia] chose for this purpose was . . . well known and frequently utilized before and since the Revolutionary War. Georgia Governors were selected by the State Legislature [without any popular election being held for governor at all] until 1824."⁴⁰ And, said the Court, none of this was called into question by *Gray*.

Importantly, the *Fortson* Court did not address, much less distinguish, the Court's observations in footnote 12 of *Gray*.

39. 385 U.S. 231 (1966).

40. *Id.* at 234.

Instead, the *Fortson* Court read *Gray* as being simply about a case in which votes from more populous counties were given less weight than votes from less populous counties, in clear violation of one-person one-vote.⁴¹

Some observers might try to harmonize *Fortson* with *Gray/Gordon* by saying that it is perfectly permissible for a state to make use of legislative districts (provided they are of equal population size) to elect persons (e.g., state legislators) who then select the governor; but a state may not use legislative districts to create non-human determinants (such as unit votes) that are then employed *automatically* to select governors *without any intermediation of individual representatives*.

But in my view (and I would hope Ely's as well) a better course would be to say that *Gordon's* forceful reading of *Gray* effectively overruled *Fortson*, and that this reading of the Constitution is compelling once we bear in mind one of the lessons Ely teaches us—that Justice Stewart's admonition about safeguarding against voting practices that threaten a "systematic frustration of the will of a majority of the electorate of the State" identifies a minimal floor of Republican Guarantee principles. Especially in light of increasingly effective and dangerous partisan gerrymandering, extending the one-person one-vote norm to gubernatorial elections is, as it was in the legislative setting, an administrable approach that protects against important violations.⁴² Notwithstanding *Fortson*, then, states should *not* be

41. The *Fortson* Court characterized *Gray's* holding by saying in that case the "discrimination against large county voters was held to deny them the equal protection of the laws." *Id.* at 233.

42. Perhaps this reasoning calls into question *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964), a case Ely defends, since in *Lucas* the malapportionment related to only one house of the legislature, a house that could not (even with a Gerry-rigged supermajority) govern on its own. Ely doesn't address this feature of *Lucas*, but instead rejects the notion that popular blessing of the malapportionment was not a cure-all. On this point he seems correct. Certainly a one-time popular blessing of a scheme that could work to entrench the minority rule in the future is troubling. As to the power of Coloradans to undo the scheme, a supermajority of voters (currently 55 percent) is required, at least now if not in 1964, under the state constitution for voters to amend the document. Now perhaps a 50+ percent majority could try to repeal the provision that requires 55 percent, and then undo malapportionment if it seems not to have been working, but that sequence is complicated.

Circling back to the fact that only one house was malapportioned in *Lucas*, Ely might—had he addressed this point—have responded by reiterating that administrability is crucial in this realm, and a rule that distinguishes between one-house vs. two-house malapportionment may begin to become less easy to apply in practice. Or perhaps when pressed Ely would concede that *Lucas* is open to question under Stewart's more bare-

2021] *INSIGHTS FROM DEMOCRACY AND DISTRUST* 347

free to emulate the federal model with respect to election of the chief executive, and instead must count the votes of all voters within the state completely equally and against each other, regardless of the legislative district in which one lives.⁴³

bones understanding of Republican Guarantee and equality norms, an understanding that Ely characterizes as plausible but does not wholeheartedly commit to, *see supra* note 25.

43. In this regard, it bears mentioning that under Section 2 of the Seventeenth Amendment governors rather than state legislatures are allowed to fill temporary Senate vacancies, because governors are free from corrosive effects of malapportionment. See U.S. CONST., amend. XVII, § 2. For a discussion of how this factor played into the process by which the Seventeenth Amendment was enacted, see Vikram David Amar, *Are Statutes Constraining Gubernatorial Power to Make Temporary Appointments to the United States Senate Constitution Under the Seventeenth Amendment?* 35 HASTINGS. CONST. L.Q. 727, 744–50 (2008).

