

American Democracy in the 21st Century: A Retrospective

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AMERICAN DEMOCRACY IN THE 21ST CENTURY: A RETROSPECTIVE

BY DAVID O'BRIEN AND PAM KELLER*

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Thank you very much for the kind introduction. We truly appreciate the invitation to join you in Boise and speak at this conference, not only as an excuse to visit the West Coast and see your lovely beaches but also because it gives us an opportunity to discuss one of the most pivotal but (in our opinion) underappreciated subjects of the past two hundred years: the gradual revolution within American democracy that occurred throughout the twenty-first century. We realize that “revolution” may strike some as an extreme claim, particularly since, as we’ll see, so few of the individual reforms were new ideas by the time of their adoption.¹ Novelty aside, we think “revolution” is the right word to use. The sheer scope of the changes to America’s electoral processes and institutions has created what is now a profoundly different—and better—democracy than what the nation had in the dramatic and tumultuous early years of that century.

It’s important that we understand this “revolution” was not a singular process. It was the product of many disparate efforts and reforms all arising from the ferment of the same dysfunctional system. Each individual change that contributed to the revolution has a unique story, with its own set of characters and motivations. We can only touch on some of the more prominent examples here, but we encourage the audience to read or download further on the various examples we discuss in more detail.² Nevertheless, there are three broad similarities that each of our examples share. First, they were typically the result of a crisis. Second, as noted above, nearly all of the changes in the initial decades of the revolution had been in use elsewhere, either in elections abroad or domestically at the sub-national level. Third, the changes were overwhelmingly intended to broaden and empower the electorate. The changes we’ll discuss touched on a variety of topics, but they fit into

* Any citations dated after 2020 are fictitious.

1. Some scholars have referred to it as “the Great Catching Up” of American democracy. See Abba Church & Eban Hill, *Doing the Right Thing After Exhausting the Alternatives: Voting Rights and Electoral Institutions in the American Ancien Régime* (2183).

2. See, e.g., ELECTORAL SYSTEMS OF OLD EARTH: A COMPARATIVE ANALYSIS, (Aggregator 476B9 ed., 2207); CHURCH & HILL, *supra* note 1; Anne Lewis & Alexander Murphy, *Serving the Public Trust: Municipal Elections and Urban Governance from 1987-2087*, 38 DELTA CITY PUB. POL’Y REV. 67–138 (2095).

the same larger pattern: let more people vote, make voting easier, and make those votes more meaningful.

I. THE FIRST STEPS

From the perspective of modern historians, it's extraordinarily appropriate that the 21st century began weeks after one of the most contentious elections in American history. While today we often think of the 2000 presidential election as a distant and abstract historical controversy along the lines of the elections of 1824, 1876, or even 2048, it was a deeply polarizing and disturbing experience for Americans at the time. Millions of voters who had spent their lives confident that theirs was the strongest and fairest democracy on Earth were suddenly confronted with the reality that elections in America were far more complicated and fragile than they had believed. Subsequent elections, particularly the 2016 presidential election, contributed to public doubt about the electoral process. Other factors soon joined the controversial elections in undermining public confidence in elections and government. Issues like partisan gerrymandering and campaign finance, which had not previously attracted much attention beyond a small circle of scholars and "wonks," became subjects of public attention in the years following the post-2010 congressional redistricting and the Supreme Court's decision in *Citizens United v. Federal Election Commission*.³ Voter identification laws drew similar public attention and were alternately defended as a necessary measure to prevent widespread voter fraud or denounced as a cynical attempt at voter suppression.

By the 2020s, faith in the electoral process was at a low ebb. Many feared that democracy was facing a global crisis, much as it had a century earlier. Fortunately for those of us here today, this public channeled this discontent into a desire to repair and reform democratic processes and institutions rather than a rejection of democracy altogether. Congress' initial steps, while seeming to be basic and common-sense measures now, were considered sweeping at the time and set the stage for the next phase of reform.

One of the first reforms was to protect and restore voters' access to the polls regardless of their race, repairing the damage done by the now-infamous *Shelby County*.⁴ In 2013, the Supreme Court invalidated Section 5 of the Voting Rights Act (VRA), ending a decades-long practice of preclearance and effectively reducing the power of the VRA.⁵ Claiming that there was no evidence to support that racially-motivated voter suppression efforts were ongoing, the majority struck down the requirement that certain jurisdictions with a history of discriminatory voting practices clear any changes in voting laws or practices with the Department of Justice.⁶ In essence, *Shelby* removed legal protections against discrimination in voting, or, in the words of one commenter, "handed the country an era of renewed

3. See David Daley, *Ratf**ked: The True Story Behind the Secret Plan to Steal America's Democracy* (2016); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

4. E. Frazier, *Undoing Shelby*, N.Y. TIMES, Sept. 2025.

5. *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

6. *Id.* at 557.

white racial hegemony.”⁷ From our perspective over two centuries later, *Shelby* represents tragic reversal of progress for American democracy.

After years of gridlock and pressure from civil rights groups, Congress eventually passed the Voting Rights Advancement Act (VRAA).⁸ The VRAA created a new coverage formula, applicable to all states, relying upon a finding of repeated voting rights violations in the previous 25 years.⁹ Unlike the VRA’s original coverage formula, the VRAA’s 25 year period “rolled” (i.e., continuously moved) to keep pace with current conditions, ensuring that only states with a recent record of racial discrimination are covered and thus meeting some of the *Shelby* Court’s criticisms of the original Act.¹⁰ States with a record of violations were covered under this program for ten years, with the option to “graduate” out of the program if they demonstrated compliance and consideration of voters’ rights.¹¹ The VRAA specifically screened for measures that historically oppressed voters on a discriminatory basis (such as voter ID laws or a decrease in multilingual voting materials) and took precautions to protect previously targeted groups, such as Alaskan natives and Native Americans.¹²

Alongside the VRAA, Congress passed the For the People Act.¹³ The For the People Act instituted a raft of reforms, including nonpartisan redistricting commissions to address partisan gerrymandering, a national voter registration program, limitations on states’ ability to purge voter rolls, a donation matching system, and more stringent campaign finance disclosure rules.¹⁴

As time went on, Congress supplemented these laws with legislation implementing automatic and same-day voter registration, to guarantee that all eligible voters were guaranteed to be able to participate in the elections.¹⁵ In response to the COVID-19 pandemic of 2020 and the steady increase in hurricanes that frequently threatened to disrupt elections in the Gulf Coast and Atlantic states, Congress required states to allow no-excuse absentee voting for federal elections, enabling citizens to vote from their own homes without worrying about traveling to the polls or experiencing difficult wait times.¹⁶

While not typically considered an election reform, we would be remiss if we didn’t mention DC statehood. Washington, DC, was unusual among national

7. Vann R. Newkirk II, *How Shelby County v. Holder Broke America*, ATLANTIC (July 10, 2018), <https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/>.

8. Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong. (2019).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. See For the People Act, H.R. 1, 116th Cong. (2019) [hereinafter H.R. 1]. At the time, the For the People Act was commonly referred to as HR1, which was the bill number it was assigned the first time it was introduced. See *id.*; see e.g., Ella Nilsen, *House Democrats Just Passed a Slate of Significant Reforms to Get Money Out of Politics*, VOX (Mar. 8, 2019, 11:25 AM), <https://www.vox.com/2019/3/8/18253609/hr-1-pelosi-house-democrats-anti-corruption-mcconnell>.

14. H.R. 1, *supra* note 14.

15. See *Automatic Voter Registration, a Summary*, BRENNAN CTR. FOR JUST. (July 10, 2019), <https://www.brennancenter.org/our-work/research-reports/automatic-voter-registration-summary>.

16. See David Roberts, *Voting by Mail is Fair, Safe, and Easy. Why Don't More States Use It?*, VOX (May 27, 2017, 12:16 PM), <https://www.vox.com/policy-and-politics/2017/5/27/15701708/voting-by-mail>.

capitals of the era in the inability of its residents to elect representatives to Congress.¹⁷ Making DC a state fully enfranchised hundreds of thousands of citizens. Recognizing a need for consistency and spurred by the demands of activists inspired by DC's success, Congress began offering this option to all US territories beginning with Puerto Rico, allowing them to choose statehood or begin the path to independence in free association with the United States, as former territories like Palau and the Marshall Islands had done decades earlier. At last, citizens in all US jurisdictions were eligible to vote and to fully participate in the political process, establishing the principle we now take for granted that all citizens on American territory are entitled to the same rights and representation as any other.¹⁸

At this point, American democracy has approached a state that you may begin to recognize. By the beginning of the 2030s, a voter would have a much easier time voting than they would have in the preceding decades. If they wished, they could stay at home and vote by mail or they could go to their local polling place. If they chose the latter, the polling place would likely be adequately staffed and equipped regardless of the demographic makeup of the area it served. The legislative districts for which the voter selected candidates wouldn't be drawn to favor a particular political party or incumbent. This was all undeniably positive and led to fairer elections than at any previous point in American history. There was still a long way to go, however. The voter would still have only two viable parties to choose from in most races. Single-winner districts, no matter how fairly drawn, still led to wasted votes and unrepresentative outcomes. The Electoral College still loomed as a threat to popular will. While these remaining problems needed bold solutions, many necessary reforms already existed on a state-level.

II. THE LABORATORIES OF DEMOCRACY: STATE-LEVEL SOLUTIONS

Focusing solely on Congress can give the misleading impression that election reform in the 21st century was characterized by long periods of stasis punctuated by sudden bursts of change. In reality, there were dramatic developments at the state and local levels leading to a resurgence in innovation and reform not seen since the Progressive Era. Most congressional action of the era merely followed the path set by state and local reformers. States like California, Oregon, and Washington passed their own voting rights acts as Supreme Court decisions began to undermine the efficacy of the federal VRA.¹⁹ Both independent redistricting

17. Washington, DC, residents could elect a single non-voting delegate to the House of Representatives and were able to vote for President and Vice President after passage of the Twenty-Third Amendment to the Constitution. U.S. CONST. amend. XXIII. Lack of congressional representation was a continuous source of resentment among the city's population, causing the local government to inscribe the American Revolutionary slogan "no taxation without representation" onto the official license display attachments of ground cars registered in the city. Rachel Kurzius, *Washingtonians Don't Love Taxation Without Representation, Not-So-Shocking Poll Finds*, DCIST (Nov 1, 2018, 12:50 PM), <https://dcist.com/story/18/11/01/washingtonians-dont-love-taxation-without-representation-not-so-shocking-poll-finds/>.

18. Inhabitants of the off-world colonies would likely dispute that this remains true, as indicated by the recent protests on Ganymede.

19. California Voting Rights Act, CAL. ELEC. CODE § 14025 (West 2020); Oregon Voting Rights Act, OR. REV. STAT. ANN. § 255.405 (West 2019); Washington Voting Rights Act of 2018, WASH. REV. CODE ANN.

commissions and no-excuse absentee voting arose in the states as well, setting the example for Congress to later follow.²⁰

Some of the most ambitious and innovative reforms working their way through states and localities involved voting methods. Scholars of the era generally classify America, along with Canada and the United Kingdom, as being one of the last major holdouts for single-winner first-past-the-post voting (FPTP).²¹ While this was true for most federal and state-level elections, American voters also routinely voted in elections using methods such as block voting, numbered posts, various forms of runoffs, limited voting, the single non-transferable vote (SNTV), cumulative voting, and various forms of ranked choice voting, such as instant runoff voting and the single transferable vote, depending on their location and the office up for election.²²

The instant runoff form of ranked choice voting initially saw the most interest in the first part of the 21st century.²³ After the contentious 2000 presidential election led to claims that a third party candidate had acted as a “spoiler” by siphoning votes away from one of the two major party candidates, many Americans became interested in finding ways to negate the “spoiler effect” that is endemic to FPTP.²⁴ Instant runoff voting (IRV), which allows voters to rank candidates, eliminating the last-place candidate and transferring votes to the voter’s next ranking until a candidate can be declared the winner, presented an appealing solution. San Francisco adopted IRV in 2002, followed by other Bay Area cities and the Twin Cities in Minnesota, with cities from Portland, Maine to Santa Fe, New Mexico following suit.²⁵ Maine became the first state to use it for federal elections

§ 29A.92.900 (West 2019). This process began before the *Shelby* decision. California passed the first state-level voting rights act in 2001, partially in response to *Thornburg v. Gingles*, 478 U.S. 30 (1986). See California Voting Rights Act, CAL. ELEC. CODE § 14025 (West 2020). *Shelby* (along with the Trump Administration’s failure to pursue any new VRA cases) added a new urgency to state-level efforts. Tierney Sneed, *Trump’s DOJ Has Not Filed a Single New Voting Rights Act Case*, TALKING POINTS MEMO (Mar. 5, 2020, 9:32 AM), <https://talkingpointsmemo.com/muckraker/trumps-doj-has-not-filed-a-single-new-voting-rights-act-case>.

20. L. Pullitzer, *States Lead the Way with Electoral Reforms*, ELECTION L. NOW, June 1, 2015.

21. Ryan Snow, *The First Democracy, The Last Holdout*, January 23, 2015.

22. *Jurisdictions Using Fair Representation Voting*, FAIRVOTE, https://www.fairvote.org/jurisdictions_using_fair_rep (last visited May 21, 2020).

23. “Ranked choice voting” or “RCV” is a blanket term to refer to several voting methods using a ranked ballot that function by eliminating last-place candidates and transferring votes for those candidates until a winner or winners are declared. *Ranked Choice Voting*, BALLOTEDIA, [https://ballotpedia.org/Ranked-choice_voting_\(RCV\)](https://ballotpedia.org/Ranked-choice_voting_(RCV)) (last visited May 21, 2020). “Instant runoff voting” refers to the single-winner version of RCV while “the single transferable vote” or “STV” refers to the proportional multi-winner version of RCV. *Id.*

24. David Daley, *An End to Spoiler Candidates*, DEMOCRACY (Nov. 1, 2018), <https://democracyjournal.org/arguments/an-end-to-spoiler-candidates/>.

25. *Where It’s Used*, RANKED CHOICE VOTING RESOURCE CTR., https://www.rankedchoicevoting.org/where_used (last visited May 21, 2020). San Francisco was not the first American city to adopt IRV. *Id.* Ann Arbor, Michigan used it for a brief period during the 1970s. *Id.* The method was well-established internationally at the time, where it was most prominently used in Australia to elect its House of Representatives and in Irish presidential elections. *Id.*

in 2018.²⁶ By 2020, nearly 10 million Americans of voting age were living in jurisdictions that used RCV.²⁷

Following the spread of IRV came a resurgence of interest in proportional voting methods. Although most democracies began adopting proportional voting methods in the mid-19th century, proposals to adopt proportional voting for Congress were narrowly defeated during that era.²⁸ While the United States had no tradition of using proportional representation in national elections, it had a history of using proportional and semi-proportional voting methods in state and local races.²⁹ For example, Illinois had used cumulative voting, a semi-proportional voting method, to elect its House of Representatives from 1870–1980 and Puerto Rico had used SNTV, another semi-proportional method, to elect the at-large members of its legislature since 1952.³⁰ At the local level, cumulative voting had become an accepted remedy for VRA violations by the end of the 20th century and limited voting had been used in many municipal elections since the 19th century.³¹

America also had a long (albeit often forgotten) history of using proportional representation in local elections. During the Progressive Era, several cities, such

26. *Id.*

27. *Data on Ranked Choice Voting*, FAIRVOTE, https://www.fairvote.org/data_on_rcv#research_snapshot (last visited May 21, 2020). While it was the most common voting method adopted at this time, it was not the only method under consideration. *Id.* In 2018, for example, Fargo, ND adopted approval voting, wherein voters can vote for as many candidates as they wish, with the candidate receiving the most (although not necessarily a majority) of the votes declared the winner. Kelsey Piper, *This City Just Approved a New Election System Never Tried Before in America*, VOX (Nov. 15, 2018, 9:20 AM), <https://www.vox.com/future-perspective/2018/11/15/18092206/midterm-elections-vote-fargo-approval-voting-ranked-choice>.

28. Michael Lewandowski, *History of Congressional Elections: A Timeline*, FAIRVOTE (Feb. 2019), <https://fairvote.app.box.com/v/CongressElectionHistory>.

29. “Proportional representation” refers to “[a] group of voting systems used in many democracies whose major goal is to ensure that parties and political groups are allocated seats in legislative bodies in proportion to their share of the vote. For example, a party receiving 30% of the national vote should receive approximately 30% of the seats in the national legislature.” *Glossary of Terms*, FAIRVOTE, <https://www.fairvote.org/glossary> (last visited May 21, 2020). “Semi-proportional representation” refers to methods where “proportional outcomes (groups winning seats according to their population percentage) in elections may be produced, but are not guaranteed.” FAIRVOTE, INTRODUCTION: THE RIGHT TO VOTE 41, <http://archive.fairvote.org/media/pep/newlondontestimony.pdf> (last visited May 21, 2020). A semi-proportional method “generally produce[s] electoral results that are between the proportionality of full [proportional] representation systems and the disproportionality of winner-take-all systems.” *Glossary of Terms*, FAIRVOTE, *supra*.

30. See P.R. CONST. art. III, § 3; *Spotlight: Illinois*, FAIRVOTE, https://www.fairvote.org/spotlight_illinois (last visited May 21, 2020). Both methods are used to elect multiple seats at-large. P.R. CONST., *supra*, at § 3; FAIRVOTE, *supra*. Under cumulative voting, voters may cast as many votes as there are seats to be filled. *Glossary of Terms*, FAIRVOTE, *supra* note 29. Voters may award one vote each to different candidates or all them to a single candidate or any other variation they choose. *Id.* Under SNTV, voters may vote for a single candidate. *Id.* In both methods, the candidates with the most votes are elected. *Id.* In an election to elect a three-member body under either method, for example, the winners would be the three candidates with the most votes. *Id.*

31. See Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30 ST. LOUIS U. PUB. L. REV. 97, 97–138 (2010); Chris Hughes, *Rich Tradition of Minority Party Representation Continues in Pennsylvania and Connecticut*, FAIRVOTE (Nov. 13, 2015), <https://www.fairvote.org/rich-tradition-of-minority-party-representation-continues-in-pennsylvania-and-connecticut>. Under limited voting, voters can award votes to fewer candidates than there are seats to be filled. Hughes, *supra*. In Philadelphia, for example, voters may vote for up to five candidates for the city’s seven at-large council seats. *Id.* While its use is common enough for scholars to refer to it by a unique name, SNTV is really just a form of limited voting. *Glossary of Terms*, FAIRVOTE, *supra* note 29.

New York, Cleveland, and Cincinnati, adopted the single transferable vote (STV), the proportional multi-winner form of ranked choice voting as a good government reform.³² During its brief period of prominence, the single transferable vote made a noticeable impact on those cities that used it. Under STV, Cincinnati elected its first African-American city councilmember in 1931.³³ Cleveland elected the first woman to its council in 1923.³⁴ In New York, it disrupted the Tammany Hall-led Democratic Party's previously-assured lock on a council supermajority while third parties won greater representation.³⁵ (Students of history will note that this is before Cleveland became the national capital). By the middle of the 20th century, however, a variety of factors, including a racist backlash to increased minority representation and the desire of party machines to regain their supremacy, led to the repeal of STV everywhere but Cambridge, MA.³⁶

The growth of ranked choice voting seen in the early years of the 20th century extended to STV as well. Growth was slow at first. Minneapolis, MN adopted STV for its Park and Tax Boards in 2006 but while legislation and ballot measures were introduced elsewhere no other jurisdiction followed them until over a decade later.³⁷ In 2019, Eastpointe, MI adopted STV to settle a VRA lawsuit, using it to remedy the vote dilution caused by the city's use of block voting to elect its city council.³⁸ Later that year, the city of Palm Desert, CA adopted the method to settle a vote dilution case brought under the California Voting Rights Act.³⁹ The

32. See Jesse Docter & Theodore Landsman, FairVote, Proportional Representation in New York City: New York City's Experiment with Proportional Representation and Multi-Party Democracy (2017). <https://d3n8a8pro7vhmx.cloudfront.net/fairvote/pages/6914/attachments/original/1562779453/pdf-version-pr-in-new-york-infogram-report-images.pdf?1562779453>; Alex Ault, FairVote, The Forgotten Results & Future Promise of Ranked Choice Voting in Ohio (2018), <https://fairvote.app.box.com/v/RCV-in-Ohio>; see also Jack Santucci, *Party Splits, Not Progressives*, 45 Am. Pol. Res. 494 (2016).

33. Ralph A. Straetz, PR Politics in Cincinnati: Thirty-Two Years of City Government Through Proportional Representation 109 (1958).

34. Kathleen L. Barber, A Right to Representation: Proportional Election Systems for the Twenty-First Century 100 (2001).

35. DOCTER & LANDSMAN, *supra* note 31, at 12.

36. Richard Engstorm, *Cincinnati's 1988 Proportional Representation Initiative*, 9 ELECTORAL STUD. 217 (Sept. 1990).

37. RANKED CHOICE VOTING RESOURCE CTR., WHERE IT'S USED, <https://drive.google.com/file/d/1NrrlwPUgzAgybhawG0uijXhtVinckca/view> (last visited May 21, 2020).

38. *Id.* "Block voting" is an at-large, winner-take-all voting method. *Glossary of Terms*, FAIRVOTE, *supra* note 29. Voters may vote for up to as many candidates as there are seats to be filled. *Id.* The primary drawback of this method is that a bare majority (or even a plurality) of the electorate could win every seat, shutting minority groups out of representation entirely. It was a common way to elect local government bodies in the 20th and early 21st centuries and a frequent target of vote dilution suits brought under the VRA. See Francesco Trebbi *et. al.*, *Electoral Rules and Minority Representation in U.S. Cities*, 123 Q.J. ECON. 325, 326 (2008) (describing block or "at-large" voting as one of the "traditional voting rules" for American municipal elections); see also *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2646 (2013) (Ginsburg, J., dissenting) (noting that the use of block or "at-large" voting in 183 local jurisdictions in Alabama was the subject of a single line of VRA cases in the late 20th century). Confusingly, it was often referred to as simply "at-large voting" even though it was just one of many different voting methods that elected seats on an at-large basis. *Glossary of Terms*, FAIRVOTE, *supra* note 29.

39. Sherry Barkas, *Palm Desert Lawsuit Settlement Includes Two-District Elections; Ranked-Choice Voting System Possible for 2020*, DESERT SUN (Dec. 12, 2019), <https://www.desertsun.com/story/news/local/palm-desert/2019/12/12/palm-desert-reaches-california-voting-rights-act-settlement/4410780002/>.

proliferation of state voting rights (many of which contained explicit provisions for proportional and semi-proportional remedies) and renewed enforcement of the VRA by subsequent presidential administrations led to a steady growth of local governments adopting STV.

The growing use of STV in local elections, combined with the growing public opposition to gerrymandering and the desire to end the increasingly contentious legislative battles over redistricting, spurred a renewed interest in proportional representation for higher-level elections. “Gerrymandering” is a foreign concept to most of us today, something we mostly treat as one answer among many in the long list of reasons historians give to explain the polarized politics and legislative inaction that defined the country a century ago. When we think about it at all, we usually think of grotesquely shaped districts and the self-evident absurdity of allowing self-interested parties to direct the process, but gerrymandering is fundamentally about wasted votes. A “wasted vote” in this context is a vote that is not used to elect a candidate, because it was either cast for a losing candidate or because it was cast for a candidate who did not need that vote to win.⁴⁰ Gerrymandering is essentially maximizing your opponent’s wasted votes while minimizing your own.⁴¹ Proportional representation, on the other hand, drastically reduces the *total* number of wasted votes in an election, making the kind of precise and aggressive gerrymandering seen in the early twenty-first century impractical (if not impossible).⁴²

Many forms of proportional representation were proposed at this time, but STV proved to be more appealing to the American electorate than the types of party list methods common in other parts of the world.⁴³ The single transferable vote allows voters to vote for individual candidates rather than parties and maintain a degree of geographic representation by retaining districts (albeit multi- instead of single-member districts) instead of electing entire legislatures at-large.⁴⁴ For similar reasons, some reformers and legislators began to consider hybrid proportional systems, such as mixed-member proportional and parallel voting, that also retain those characteristics. By the end of the twenty-first century, fifty-three of the nation’s then-sixty-two states had at least one legislative chamber elected by proportional methods. Today, only Southeast Dakota and the Commonwealth of

40. This was evident in the practices known at the time as “packing” and “cracking.” “Packing” means drawing a district to contain as many voters from a disfavored group as possible, forcing large numbers of them to waste their votes by casting them for a candidate who didn’t need them to win. *Gerrymandering*, FAIRVOTE, https://www.fairvote.org/gerrymandering#gerrymandering_key_facts (last visited May 21, 2020). “Cracking” means spreading members of the group thinly across several districts, forcing them to waste their votes on candidates without enough support to win. *Id.*

41. *Id.*

42. Matthew Yglesias, *The Real Fix for Gerrymandering is Proportional Representation*, VOX (Nov. 6, 2017), <https://www.vox.com/policy-and-politics/2017/10/11/16453512/gerrymandering-proportional-representation>.

43. A “party list” system is one where each political party submits lists of candidates that it is standing for election and voters then cast votes for their preferred party. *Variations of Party List Systems: Closed List, Open List and Free List*, FAIRVOTE, <http://archive.fairvote.org/factshts/partylst.htm>

(last visited May 21, 2020). The seats are allocated to each party in proportion to the share of the vote it receives. *Id.* It was one of the most common methods of proportional representation by the beginning of the 21st century. *Id.*

44. *More About Ranked Choice Voting*, FAIRVOTE, https://www.fairvote.org/rcv#how_rcv_works (last visited May 21, 2020).

Alleghany do not use any form of proportional representation for state-level elections (though it is a regular source of debate in their legislatures).

If you turn your attention to the holographic map behind us, you will see the growth of proportional representation throughout mid- and late-twenty-first century. If you look to the areas we now call “Media California” and “Michiconsin,” you’ll see . . . hold on . . . [*indistinct whispering*]. Sorry, we seem to be having some technical difficulties. Does anyone here know . . . [*indistinct whispering*]. We’re sorry about this. Let’s press on while this gets sorted out.

There is one other subnational development worth addressing: the gradual spread of what we will broadly refer to as “sortition.” Sortition—the practice of randomly selecting representatives by lottery—is familiar to classicists from its use by the ancient Athenians.⁴⁵ Twenty-first century Americans were already familiar with the concept through the jury system.⁴⁶ Many of the independent redistricting commissions that arose from the push to eliminate gerrymandering used a modified version, in which members were randomly selected from a pre-screened applicant pool. While few at the time took suggestions of using sortition to elect legislatures seriously, the idea gained some traction for use in the context of citizen advisory bodies. The Republic of Ireland had used sortition in 2012 to select the majority of its constitutional convention and again in 2016 for a citizens’ assembly to deliberate on other political and constitutional questions.⁴⁷ The two bodies had managed to make recommendations on traditionally divisive issues like same-sex marriage, abortion, and the country’s criminalization of blasphemy, sending the issues to voters for a final resolution by plebiscite.⁴⁸

The Irish example proved a useful precedent for resolving contentious and polarizing issues. Review commissions for local charters and state constitutions gradually began incorporating aspects of sortition and many jurisdictions incorporated sortition-selected citizen bodies in their referendum process, placing the review and approval of proposed ballot measures in the hands of the public rather than (in many cases) interested public officials. In a time of deep division and cynicism, these citizen assemblies were appealing because they avoided the suspicion most voters held of elected officials and were far less likely to be captured by (or popularly associated with) the special interests that were able to dominate the legislatures of the era and create chokepoints to prevent the passage of crucial reforms. In many situations where deadlock and stasis seemed intractable, the use of a citizen assembly and subsequent referendum was able to break the logjam.

45. *What is Sortition?*, SORTITION FOUND., https://www.sortitionfoundation.org/what_is_sortition (last visited Apr. 29, 2020).

46. *Id.*

47. *Convention on the Constitution*, CITIZENS INFO., https://www.citizensinformation.ie/en/government_in_ireland/irish_constitution_1/constitutional_convention.html (last updated Feb. 27, 2019).

48. *Id.*; *Citizens’ Assembly*, CITIZENS INFO., https://www.citizensinformation.ie/en/government_in_ireland/irish_constitution_1/citizens_assembly.html (last updated Jan. 14, 2020).

III. CONGRESS TAKES ACTION

Eventually, ideas adopted at the state level began to percolate up into Congress. The institution had already felt some of the results of state innovation. Starting with Maine in 2018, many states had begun to elect their congressional delegations by the single-winner form of ranked choice voting.⁴⁹ The trend of state and local legislatures abandoning FPTP for proportional voting methods likewise resulted in an increasing number of members of Congress arriving already familiar with other methods. Unlike previous generations of members who had only known FPTP or some form of runoff, new classes contained members who were comfortable with alternatives. Many new members with experience serving in state legislatures found they preferred the experience of running for and serving a body that wasn't driven by the peculiar dynamics of FPTP.

Here you can see . . . [*aside*] Do we have the map working yet? No? Is it the file or is it the . . . [*indistinct whispering*] Well, there seems to be an issue with the presentation AI so we'll make the maps available online.

Moving on, self-interest was a motivation as well. Political and demographic groups that were frequently underrepresented by FPTP saw their representation and influence improve in states that adopted proportional representation. This created a constituency for reform within Congress, one driven by the promise of the concrete political benefits that are often a powerful motivator for legislators.

The growing support for proportional representation in Congress was buoyed by growing public dissatisfaction with the results of FPTP. The growth of independent redistricting commissions had managed to curb the more egregious election outcomes associated with gerrymandering but even that safeguard could not eliminate the problems inherent in using winner-take-all elections in single-winner districts.⁵⁰ As long as candidates could win with a mere plurality of the vote then the possibility remained that a party could win a majority of seats without a majority of votes, no matter how neutrally districts are drawn.⁵¹ This dynamic was seen in two other prominent FPTP holdouts of the era. Both Canada and the United Kingdom relied on independent, nonpartisan bodies to draw districts (or "ridings" and "constituencies" respectively).⁵² However, in their 2019 national elections, control of each country's House of Commons went to a party who had not received a majority of the vote. In the United Kingdom, the Conservative Party received a majority of seats despite receiving less than a majority of the vote.⁵³ In Canada, the

49. Katharine Q. Seelye, *Maine Adopts Ranked-Choice Voting. What Is It, and How Will It Work?*, N.Y. TIMES (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/us/maine-ranked-choice-voting.html>.

50. D. Stimson, *Independent Redistricting Committees Alone Can't Fix the Problems*, ATLANTIC (2020).

51. Andrew Rawnsley, *Opinion, Our Archaic First-Past-The-Post System is Alarming Unfit For A Multi-Party Age*, GUARDIAN (June 9, 2019), <https://www.theguardian.com/commentisfree/2019/jun/09/our-archaic-first-past-post-system-alarming-unfit-multi-party-age>.

52. Stimson, *supra* note 51.

53. In the United Kingdom, the Conservative Party received 43.6% of the vote but won 56.2% of the seats in the House of Commons. *Results of the 2019 General Election*, BBC NEWS, <https://www.bbc.com/news/election/2019/results> (last visited May 21, 2020).

Liberal Party won more seats than the rival Conservative Party despite winning fewer votes and was able to form a minority government.⁵⁴

Another issue was the substantial minority (or majority in districts with a plurality winner) of voters living in districts where their representatives did not share their views or have their support. Even though significant numbers of Republicans lived in urban areas and Democrats lived in rural districts, both groups found it increasingly difficult to be heard by their congressional delegations or their national parties, accelerating partisan realignment on geographic lines.⁵⁵ By eliminating these kinds of wasted votes, proportional representation offered a way out of this cycle, as well as allowing other parties the opportunity to grow.

The Fair Representation Act (FRA) was the solution Congress accepted. The FRA not only required every state to elect Congressional representatives through the single transferable vote, using multi-winner rather than single winner districts, but also prohibited the use of single-member districts.⁵⁶ The use of STV increased competition while also encouraging positive campaigns, since candidates had to campaign to be voters' second and third choices. It also ensured that the winner actually had majority support and that votes were not wasted. Likewise, the use of multi-winner districts allowed for better representation and allocation of representatives. By making districts larger and multi-member, the FRA effectively countered the effects of gerrymandering, by ensuring that the representatives would actually be proportional to the political composition of the electorate. Although originally focused on the House, the FRA was combined with provisions of the Ranked Choice Voting Act in the ensuing legislative negotiations to elect the Senate by IRV as well.⁵⁷

Congress followed the FRA with an expansion in the size of the House. Political scientists had long noted that Congress was an unusually small body for the size of the United States when compared to other national legislatures.⁵⁸ While there was no constitutional restraint on expanding the House, Congress had not done so since 1929, doing nothing to restrict the nation's population explosion since then and steadily increasing the number of constituents each member represented.⁵⁹ The expansion in the size of the House was billed as a way to make the House more representative of the population and promote constituent services, but there was also a more selfish motivation at work. Many representatives, concerned that the shift to a different voting method and multi-winner districts would jeopardize their own chances at reelection, decided that adding new seats would give them a better

54. In Canada, the Liberal Party received 33.1% of the vote but won 46.5% of the seats in the House of Commons. The Conservative Party, on the other hand, received 34.4% of the vote but won only 35.8% of seats. *Canada Votes 2019: Party Standings*, CBCNEWS, <https://newsinteractives.cbc.ca/elections/federal/2019/results> (last visited May 21, 2020).

55. Bob Abeshouse, *The Disunited States: How Partisan Politics Is Polarizing The US*, AL JAZEERA: U.S. (Aug. 2, 2019), <https://www.aljazeera.com/indepth/features/disunited-states-partisan-politics-polarising-190801094457547.html>.

56. Fair Representation Act, H.R. 4000, 116th Cong. (2019).

57. Ranked Choice Voting Act, H.R. 4464, 116th Cong. (2019).

58. Editorial, *Opinion: America Needs a Bigger House*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/interactive/2018/11/09/opinion/expanded-house-representatives-size.html>.

59. Permanent Apportionment Act of 1929, 2 U.S.C. § 2a (2018).

chance at holding onto their own. While not exact, the House was closer than it ever had been to being, in the words of John Adams, “in miniature, an exact portrait of the people at large.”⁶⁰

The fundamental reevaluation of America’s democratic institutions inspired popular support for several new constitutional amendments. First, an affirmative right to vote was added to the Constitution. Contrary to most Americans’ perception at the time, the right to vote is not explicitly guaranteed in the Constitution, but rather has been read in as a fundamental right through substantive due process.⁶¹ Establishing an explicit right to vote in the Constitution guaranteed the voting rights of every citizen of voting age, ensured that every vote is counted correctly, and protected citizens against attempts to disenfranchise eligible voters. Second, taking yet another page from state and local reform movements, was an amendment to lower the voting age. This effectively increased the voting age population, generating newfound excitement for democratic participation and instilling voters with the habit of voting earlier in life.⁶²

IV. THE PRESIDENTIAL ELECTIONS

Congress was not the only institution to undergo dramatic electoral change. Voters also began to realize the flaws inherent in the presidential nomination system. Historians now mark 2020 as the death of the caucus system. Widely publicized failures and their exclusive nature made them seem like an unrepresentative and embarrassing anachronism.⁶³ However, the primaries themselves were not without flaws. Specifically, as the number of candidates grew and the primary season became more and more dramatic, fears of an eventual brokered party convention grew.⁶⁴ Likewise, those who voted early in the primary season were frustrated when the candidate they voted for dropped out, feeling as if their votes had been wasted.⁶⁵ However, in 2020, four states used ranked choice voting in their Democratic presidential primary, allowing votes to be reallocated if the first-choice candidate had withdrawn from the race or did not surpass the delegate threshold.⁶⁶ Voters soon saw the benefits of ranked-choice voting in

60. John Adams, *Thoughts on Government*, in 1 PAPERS OF JOHN ADAMS (Robert J. Taylor et al. eds., 2003), <http://press-pubs.uchicago.edu/founders/documents/v1ch4s5.html>.

61. *Harper v. Va. State Bd. of Elections*, 383 US 663, 665, 670 (1966) (stating voting is a fundamental right).

62. See *Top Ten Reasons to Lower the Voting Age*, NAT’L YOUTH RTS. ASS’N, <https://www.youthrights.org/issues/voting-age/top-ten-reasons-to-lower-the-voting-age/> (last visited May 21, 2020).

63. Paul Waldman, Opinion, *The Time Has Come to Kill the Iowa Caucuses*, WASH. POST (Feb. 4, 2020), <https://www.washingtonpost.com/opinions/2020/02/04/time-has-come-kill-iowa-caucus/>; John McCormick, *Democrats Call for End of Iowa Caucuses After Results Debacle*, WALL STREET J. (Feb. 4, 2020), <https://www.wsj.com/articles/democrats-call-for-end-of-iowa-caucuses-after-results-debacle-11580834954>.

64. David Daley & Rob Richie, *Democrats Could Face a Disaster at a Brokered Convention. Here’s How the DNC Can Avoid It*, SALON (Feb. 21, 2020), <https://www.salon.com/2020/02/21/democrats-could-face-a-disaster-at-a-brokered-convention-heres-how-the-dnc-can-avoid-it/>.

65. Editorial, *Opinion: The Primaries Are Just Dumb*, N.Y. TIMES (Feb. 26, 2020), <https://www.nytimes.com/2020/02/26/opinion/democrats-primary-south-carolina.html>.

66. Russell Berman, *A Step Toward Blowing Up the Presidential-Voting System*, ATLANTIC (Sept. 20, 2019), <https://www.theatlantic.com/politics/archive/2019/09/ranked-choice-voting-2020/598303/>.

primary elections, including more civil campaigns and nominees with a broader base of support within the party,⁶⁷ and urged other states to follow suit. Eventually, most states had adopted ranked choice voting for presidential primaries, allowing voters to have more influence in selecting their party's nominee and have their vote be more effective.⁶⁸ Following Maine's lead, many states began to use RCV for the general presidential election as well, preventing concerns about spoiler candidates.

One of the most controversial and eagerly awaited changes occurred next. For decades, the abolition of the often-criticized Electoral College had been but an unlikely dream. After several elections where the winner of the popular vote was not the winner of the electoral college, including twice in the five elections between 2000 and 2016, frustration reached a breaking point.⁶⁹ As its critics declared, "the Electoral College is our greatest threat to democracy."⁷⁰

Worse, the Electoral College demonstrated to be disconnected to and unrepresentative of the American people. Since the Electoral College operates on a winner take all system for the allocation of delegates, the margin a candidate wins by is irrelevant. As such, a candidate merely needs to win as many states as possible. Given the composition of the country, with several "safe" states for each party,⁷¹ candidates were forced to focus on a few swing states. This hyper focus on a minority of the states meant that politicians ignored virtually all of the other states in their effort to win over the swing states and their all-important delegates.⁷²

The initial solution to the Electoral College was a workaround that began life at the state level: the National Popular Vote Interstate Compact (NPVIC), which was an important and necessary step to the abolition of the Electoral College. The NPVIC was an agreement among states to allocate their electoral votes to the winner of the popular vote.⁷³ Thus, the NPVIC would effectively use the Electoral College to elect the winner of the popular vote without actually dismantling the outdated structure.⁷⁴ Due to rising discontent with the Electoral College, enough states had joined the compact for it to take effect within a few decades of its creation.⁷⁵ The NPVIC worked as intended throughout the first several election cycles of its existence. With every vote being distributed to a candidate, the previous "red

67. Rob Richie, *How to Un-Break the Primaries: Let Voters Rank Their Top Choices*, WASH. POST (Feb. 28, 2020), <https://www.washingtonpost.com/outlook/2020/02/28/how-un-break-primaries/?arc404=true#RICHE>.

68. Elle Woods, Ranked Choice Voting in Presidential Primaries Produces Less Wasted Votes, N.Y. TIMES, Feb. 16, 2022.

69. Tara Law, *These Presidents Won the Electoral College—but Not the Popular Vote*, TIME (May 15, 2019), <https://time.com/5579161/presidents-elected-electoral-college/>.

70. Janelle Bouie, Opinion, *The Electoral College Is the Greatest Threat to our Democracy*, N.Y. TIMES (Feb. 28, 2019), <https://www.nytimes.com/2019/02/28/opinion/the-electoral-college.html>.

71. *Monopoly Politics 2020*, FAIRVOTE, https://www.fairvote.org/monopoly_politics (last visited May 21, 2020).

72. Andrew Prokop, *Why the Electoral College is the Absolute Worst, Explained*, VOX (Dec. 19, 2016), <https://www.vox.com/policy-and-politics/2016/11/7/12315574/electoral-college-explained-presidential-elections-2016>.

73. *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE, <https://www.nationalpopularvote.com/written-explanation> (last visited May 21, 2020).

74. *Id.*

75. In order for the compact to take effect, it required a sum of 270 electoral votes (the number required to win the Presidency) among its member states. *Id.*

state” versus “blue state” became increasingly irrelevant as campaigns now had to broaden their appeal to voters in states that were once ignored. As one political analyst quipped, “there were no swing states anymore, just swing voters.”⁷⁶ However, there was always the risk that states would withdraw from the compact. After the disastrous election of 2048 led to a total reevaluation of the presidential election process, there was finally enough support for a constitutional amendment to abolish the electoral college, rendering the NPVIC obsolete and ensuring direct election of the President.

V. LESSONS FOR TODAY

Now that we’ve discussed how we arrived here, let’s consider the present and think about it from the perspective of a century or two from now. The country is currently facing a very different set of challenges to its democratic institutions and traditions than those it faced 200 years ago. There are, however, parallels we can use to compare the two eras.

For example, the question of suffrage. Who gets to vote and under what circumstances? This question has lingered and grown since the country’s earliest days. The nation eliminated restrictions based on economic status, then race-based restrictions through the Reconstruction Amendments passed in the aftermath of the Slaveholders’ Rebellion,⁷⁷ then gender through the Nineteenth Amendment.⁷⁸ The Twenty-Sixth Amendment began the process of lowering the voting age to its current level.⁷⁹ The elimination of felon disenfranchisement ended the practice of conditioning suffrage on the absence of criminal status, which in practice maintained some of the old restrictions on economic status and race. Statehood for DC and other territories ended the practice of denying suffrage based on geographic residency (on Earth, at least). Each step expanded the orbit of suffrage to include more groups, growing the number of those who could fully participate in our democracy.

There is now a new set of questions about how far this expanding orbit should extend. We take the presence of sophisticated AI for granted. While there is still intense debate about how similar it is to human cognition, it is clear that the more advanced units can understand consequences, evaluate options, make decisions, have preferences, and any other mental characteristic that would be necessary to vote. They already have limited legal status thanks to intense advocacy by the sapient rights movement, providing them with limited due process in circumstances involving permanent shutdown or significant changes to their underlying code. Our economy is almost entirely reliant on them and their labor (for lack of a better term) and they often experience the effects of public policy decisions and failures. Should they, as some are now advocating, receive full citizenship rights, including the right to vote? This would create a host of new issues that we have not had to address before. At what point does an AI reach the point where it qualifies? How do you address the risk of voter fraud with entities that can change their physical appearance and (theoretically) duplicate themselves? How would we even begin to

76. F.C. Sassy, *NPVIC Changes the Game*, BBC News (April 2028).

77. U.S. CONST. amends. XIV–XVI.

78. *Id.* amend. XIX.

79. *Id.* amend. XXVI.

calculate the value of whatever an in-kind donation by an immensely powerful AI would be?

These questions don't end with AI either. Although full human cloning is still officially illegal in the United States, many other countries are grappling with these questions in regard to clones. If we expand citizenship and suffrage beyond humans, then what about the sovereign pods descended from the genetically enhanced dolphins that escaped Woods Hole in the 2080s? And while we've had no in-person contact with them so far, what if any of the inhabitants of Gliese 667 Cc someday decide to settle in our solar system?

To take another example, what about political representation for the offworld colonies? The trip to and from Triton, for instance, takes far too long to send Representatives to keep up with the House's two-year cycle. Triton's inhabitants have been arguing for years that the current practice of allowing delegates to sessions and hearings remotely is inadequate. The delay in transmissions caused by the distance, frequent communications outages by solar flares and the Sun's transit between there and Earth, and the simple inability of their delegates to be "in the room where it happens" all undermine their ability to have consistent and effective congressional representation. If we can't find a way around these issues, then demands for independence will only spread.

Obviously, these are complex questions that we will not figure out in the next few decades or even century. However, it is clear that we have made tremendous progress in the last 200 years, and that that progress will lay the groundwork for future solutions. While our democracy remains a work in progress, we continue, as always, to move towards "a more perfect union." Thank you. *[Applause]*

I believe we have time for a few questions. I've been asked to remind you that these must be *questions* and anyone attempting to merely give their own views or make a comment posed as a question will be automatically teleported out of the lecture hall by their ID badge in accordance with conference policy. Who's first?

END OF TRANSCRIPT

