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# Approximating Democracy: A Proposal for Proportional Representation in the California Legislature

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**APPROXIMATING DEMOCRACY:  
A PROPOSAL FOR  
PROPORTIONAL REPRESENTATION IN THE  
CALIFORNIA LEGISLATURE**

*Allan Ides\**

*The State of California elects a bicameral legislature through a first-past-the-post electoral system. Beginning in 2012, the election of California state legislators will be through an open primary, two-round system. Neither of these electoral systems provides for proportional representation in the legislature. Accordingly, neither system leads to a truly representative democracy. The author recommends that the state adopt a proportional representation electoral system—specifically, a mixed-member system—as a more democratic alternative to the plurality/majority systems now in place or projected to be implemented in 2012. In addition, the author explains why the state legislature should be unicameral and increased in size from the current 120 legislators to 320.*

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*“The pure idea of democracy . . . is the government of the whole people by the whole people, equally represented. Democracy as commonly conceived and hitherto practiced is the government of the whole people by a mere majority of the people, exclusively represented. The former is synonymous with the equality of all citizens; the latter, strangely confounded with it, is a government of privilege, in favour of the numerical majority, who alone possess practically any voice in the State.”*

John Stuart Mill\*\*

### I. INTRODUCTION

The state of California maintains a bicameral legislature composed of a state senate and an assembly.<sup>1</sup> The state senate consists of forty members, each of whom voters elect to serve a four-year term representing a specific, single-member state senate district.<sup>2</sup> The assembly consists of eighty members, each of whom voters elect to serve a two-year term representing a specific, single-member assembly district.<sup>3</sup> Under the current electoral system, named candidates for each district enter into an electoral contest against one or more other candidates for the privilege of representing that district. The candidate receiving the most votes wins, regardless of whether that candidate receives an absolute majority of the votes cast.<sup>4</sup>

This method of electing members to a legislative body is sometimes referred to as a First-Past-the-Post (FPTP) system or, more descriptively, as a “plurality single-member district system.”<sup>5</sup>

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\*\* JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 132 (1861).

1. CAL. CONST. art. IV, § 1.

2. CAL. CONST. art. IV, § 2(a); CAL. ELEC. CODE §§ 21100–21140 (West 2003).

3. CAL. CONST. art. IV, § 2(a); ELEC. §§ 21200–21280.

4. ELEC. § 15450. Beginning in 2012, pursuant to Proposition 14, Top Two Primaries Act, which was approved by California voters on June 10, 2010, the electoral system for the state legislature and for California’s congressional seats will be changed to a two-round system under which the two leading candidates in the first round will face one another in a second round runoff. See *infra* text accompanying note 28. A number of lawsuits have been filed challenging the constitutionality of Proposition 14. See *California Proposition 14, Top Two Primaries Act (June 2010)*, BALLOTPEdia, [http://ballotpedia.org/wiki/index.php/California\\_Proposition\\_14,\\_Top\\_Two\\_Primaries\\_Act\\_\(June\\_2010\)](http://ballotpedia.org/wiki/index.php/California_Proposition_14,_Top_Two_Primaries_Act_(June_2010)) (last visited Oct. 23, 2010).

5. INT’L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, ELECTORAL SYSTEM DESIGN: THE NEW INTERNATIONAL IDEA HANDBOOK 28 (2005) [hereinafter ELECTORAL SYSTEM DESIGN].

FPTP is a type of winner-take-all electoral method in which the winner of the election contest is awarded the seat and in which the losers, no matter how close the vote, take nothing.<sup>6</sup> FPTP is common throughout the United States and is a relatively simple system that focuses on the election of identified individual candidates who, if elected, are expected to be responsive to the constituency that elected them.

As an alternative to winner-take-all electoral systems, many modern democracies, including most European nations, have adopted systems premised, at least in part, on the principle of proportional representation (PR).<sup>7</sup> The basic idea behind PR is that in a representative democracy the composition of the governing legislature should approximate the actual preferences of the electors.<sup>8</sup> Thus, under a “party list” PR system, typical of many nations, if 40 percent of the electors vote for Party A, 35 percent vote for Party B, and 25 percent vote for Party C, the legislature will be similarly composed. The proportional goal can also be accomplished through a single-transferable-vote (STV) system in which “voters rank-order candidates in multi-member districts,”<sup>9</sup> though this particular electoral system tends to be used most often for the election of smaller government bodies, such as city councils and school boards. For example, Cambridge, Massachusetts, has been using STV to elect its city council since 1941.<sup>10</sup>

A third alternative is the mixed-member proportional (MMP) system.<sup>11</sup> In an MMP system, some legislators are elected under a plurality system, such as FPTP (or a similar majority-premised alternative), while others are elected using some version of a PR system (either party list or STV, most typically, the former).<sup>12</sup> The MMP system can result in a bicameral legislature (with each branch

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6. Other electoral systems falling within the “plurality/majority” rubric include block vote, party block vote, alternative vote, and two-round system. *Id.* For a more detailed description of these alternatives, see *id.* at 44–56.

7. *Id.* at 23–24 tbl.1, 30–33 tbls.2 & 3, fig.2.

8. *Id.* at 29.

9. *Id.*; see also *id.* at 71–77 (describing STV generally and providing a case study of the Republic of Ireland, which has used STV to elect its lower house of Parliament since 1921).

10. The City of Cambridge provides detailed information on its electoral system at [http://www.cambridgema.gov/election/Proportional\\_Representation.cfm](http://www.cambridgema.gov/election/Proportional_Representation.cfm).

11. ELECTORAL SYSTEM DESIGN, *supra* note 5, at 29.

12. *Id.* at 91, 95.

elected under one or the other system) or in a unicameral legislature (with the overall composition of that legislature reflecting the rough proportionality of composite preferences expressed through the combined FPTP and PR elections). The unicameral form of MMP, combining FPTP and party-list PR, has been used in Germany since 1949 (with various modifications over the years).<sup>13</sup>

This Article proposes a system for the election of California legislators that moves away from the state's exclusive reliance on FPTP, a reliance that, as explained below, is distinctly problematic from a democratic point of view. The ultimate goal is to offer an alternative to FPTP that increases California's potential to achieve a system approximating a true, representative democracy. It must be noted at the outset, however, that no electoral system is perfect from a democratic perspective and that the success of whichever system the people of a state choose depends in significant part on both the engagement of the electorate and the civic virtue of the elected representatives. There are, however, degrees of imperfection and plenty of room for comparative evaluation. An examination of these factors might well lead us toward a closer affiliation with the democratic ideals.

## II. THE PROS AND CONS OF VARIOUS OPTIONS

This part will discuss and assess the pros and cons of what might be called standard electoral systems. The discussion here is not meant to be exhaustive, but it is meant to provide a fair assessment of various realistic options and to provide enough information to begin an intelligent dialogue.<sup>14</sup>

### A. *Single-Member Districts—Plurality and Majority Systems*

#### 1. Single-Member Districts

Let us focus first on the single-member district (SMD) aspect of this equation. One of the potential advantages of plurality/majority systems is that such systems create an identifiable link between the

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13. An official English version of the German Federal Elections Law is available at <http://www.bundeswahlleiter.de/en/bundestagswahlen/rechtsgrundlagen/bundeswahlgesetz.html>.

14. For a detailed and meticulous study of electoral systems worldwide, see ELECTORAL SYSTEM DESIGN, *supra* note 5. For an accessible primer on those systems, see DAVID M. FARRELL, ELECTORAL SYSTEMS: A COMPARATIVE INTRODUCTION (2001). For an excellent and balanced bibliography, see DOUGLAS J. AMY, REAL CHOICES/NEW VOICES 94–98 (2d ed. 2002).

electd representative and the residents of a geographically distinct SMD. To the extent that these districts represent true communities of interest, a system premised on SMDs can promote a healthy form of democratic pluralism.<sup>15</sup> In addition, district representatives often provide some form of community outreach, and even if most citizens do not rely on that outreach or cannot even identify their district representative, others depend on it. And a district representative certainly has a re-election incentive to attend to the needs of the district. It is probably true that the value of the representative-constituent relationship is somewhat romanticized and exaggerated,<sup>16</sup> particularly if the district has been gerrymandered to be politically safe. But it is also true that this relationship is a familiar and comfortable part of American politics and that it does provide some benefits to the community that might otherwise be overlooked under a more geographically remote system.

## 2. Plurality Systems: First-Past-the-Post

The clear advantage of FPTP stems in part from its familiarity and in part from its lack of complexity. As to the former, FPTP is very American in the sense that it identifies a clear and immediate winner at the end of the day—the candidate with the most votes. We like that. It is also the system we know. We like that even better. As to the lack of complexity, FPTP is easy to use and easy to understand. The voter is given a list of candidates; she selects one. The candidate receiving the most votes is awarded the seat, and the party securing the most seats earns a majority-rule mandate to govern.

Some would further argue that FPTP systems have the positive effect of discouraging third parties by promoting a healthy two-party system, under which voters have a distinct choice between opposing political ideologies.<sup>17</sup> In addition, post-election, that clear choice is

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15. See James A. Gardner, *What Is "Fair" Partisan Representation, and How Can It Be Constitutionalized? The Case for a Return to Fixed Election Districts*, 90 MARQ. L. REV. 555, 576–82 (2007).

16. See ROBERT RICHIE & STEVEN HILL, REFLECTING ALL OF US 30–31 (1999); Max Kaase, *Personalized Proportional Representation: The "Mode" of the West German Electoral System*, in CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES 155, 162 (Gerald M. Pomper ed., 1984) (noting empirical evidence of the absence of such ties under the West German electoral system).

17. See generally ELECTORAL SYSTEM DESIGN, *supra* note 5, at 141 (discussing the phenomenon of third-party discouragement in the British FPTP system).

reflected in a single-party, majority government with a distinct and identifiable minority opposition. If the voters disapprove of the majority party's performance in office, they can vote that party out. "Toss the bums out," we like to say.<sup>18</sup> (Though most often we let them stay.) Moreover, so the argument goes, a two-party system leads to long-term stability since the governing majority has no need to form potentially unstable coalitions with nonmajority parties.<sup>19</sup>

FPTP and two-party systems do tend to be mutually reinforcing.<sup>20</sup> It is not clear, however, that the creation or preservation of a political duopoly is a positive development, for there is a certain arrogance of entitlement that flows from the comfort of knowing that one is only temporarily on the windward side of a revolving door.<sup>21</sup> In addition, if the voters "toss the bums out" in one election cycle, it makes no sense to invite the old bums back simply because the more recently elected bums have also performed poorly. A little instability in the ruling class might be a good thing, allowing for more than an occasional side-door entry. It is also not clear that two-party systems provide clear choices, other than a choice between the brands that particular parties represent. While the two parties may have distinct political bases, one on the right and the other on the left, the homogeneity between them is

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18. For a particularly pointed defense of FPTP as part of a parliamentary system, see Michael Pinto-Duschinsky, *Send the Rascals Packing: Defects of Proportional Representation and the Virtues of the Westminster Model*, 36 REPRESENTATION 217 (1999), available at <http://www.informaworld.com/smpp/content-db=all~content=a780452474>.

19. *But see* Rick Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Corruption*, 1997 SUP. CT. REV. 331, 342–62 (1997) (surveying and critiquing the political science literature on two-party stability).

20. The thesis that plurality systems lead to a party duopoly is known as Duverger's Law. *See* MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* (1954); *see also* AMY, *supra* note 14, at 94–98 (discussing the veritable one-party system in some parts of the United States, as well as the plight of minor parties under the SMP system); Josep M. Colomer, *It's Parties That Choose Electoral Systems (or, Duverger's Laws Upside Down)*, 53 POL. STUD. 1, 1–21 (2005) (hypothesizing that the number of parties dictates the choice of electoral systems, rather than the other way around); Stephen L. Fisher, *The Wasted Vote Thesis*, 5 COMP. POL. 293, 293–99 (1973) (considering the idea of the wasted vote in light of the Federal Republic of Germany's dualistic electoral system combining single-member constituencies with PR).

21. *See* AMY, *supra* note 14, at 88–108 (noting that plurality rules, bolstered by tradition, foster two-party systems and disadvantage minor parties, thereby virtually ensuring the continued dominance of the two major parties); RICHIE & HILL, *supra* note 16, at 6 ("Winner-take-all elections prop up our two-party monopoly . . . [and] new parties in the United States are almost completely shut out of representation.").



equally palpable. Finally, it seems distinctly undemocratic to favor an electoral system that discourages third parties and nonmainstream viewpoints, essentially creating a wasted-vote phenomenon.<sup>22</sup> New alternatives and perspectives may in fact emerge through the evolving associations between dominant and minority parties. A true democracy ought to operate across a wide spectrum of these possibilities.<sup>23</sup>

There are other unfavorable consequences associated with FPTP. Among them are the increased use of political gerrymandering and the accompanying “safe-seat” agenda,<sup>24</sup> the promotion of negative campaigning in which attack ads dominate and policy debates play a marginal role,<sup>25</sup> the difficulty of electing racial minorities and women,<sup>26</sup> and low voter turnout.<sup>27</sup> None of these characteristics speaks well of this system.

### 3. Majoritarian Systems: Two-Round, Alternative Vote, and Condorcet Pairing

Some of the above deficiencies of FPTP can be avoided or ameliorated under a majority system, i.e., a system that awards victory to the candidate winning an absolute majority of the vote.

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22. See Fisher, *supra* note 20, at 293–99 (“[I]n cases where there are three parties operating under the single-majority . . . the electors soon realize that their votes are wasted if they continue to give them to the third party.” (quoting DUVERGER, *supra* note 20, at 226)). As an aside, it is interesting that we refer to all parties other than the two dominant parties as “third parties,” implicitly suggesting that a two-party system is the (preferred) norm.

23. See Richard L. Engstrom, *The Political Thicket, Electoral Reform, and Minority Voting Rights*, in FAIR AND EFFECTIVE REPRESENTATION? 3, 51–52 (2001) (citing various electoral-related shortcomings of the two-party system, e.g., Democratic and Republican candidates avoid taking clear positions on issues, thereby inhibiting debate over policy, voter confidence, and candidates’ accountability).

24. *Id.* at 6–12; see also ELECTORAL SYSTEM DESIGN, *supra* note 5, at 43–44 (delineating one of the criticisms of FPTP being its dependence on the drawing of electoral boundaries).

25. See AMY, *supra* note 14, at 74–77, 83–85.

26. *Id.* at 109–50 (comparing the performance of FPTP and PR systems with respect to the election of minorities and women); see also ELECTORAL SYSTEM DESIGN, *supra* note 5, at 37 (stating that since parties tend to put up their “most broadly acceptable candidate” in the FPTP system, women and minority candidates are often not put on the ballot); RICHIE & HILL, *supra* note 16, at 14–18 (stating that women and minority candidates are elected more often with a PR system, as well as the prevention of gerrymandering under the PR system); Wilma Rule, *Women’s Underrepresentation and Electoral Systems*, 27 POL. SCI. & POL. 689, 689 (1994) (comparing the percentages of women and minority elected officials under various electoral systems).

27. Arend Lijphart, *Unequal Participation: Democracy’s Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1, 7–8 (1997) (citing supportive studies).

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Majority systems can, however, be more costly and time-consuming to operate than FPTP systems since majority systems may require a second round of voting if no candidate achieves a majority in the first round. On the other hand, the notion of a majoritarian victory is, in itself, more appealing than the decidedly less democratic plurality alternative. I will consider two relatively common majority systems—Two-Round (TR) and Alternative Vote (AV)—and a third system, which has significant academic support, but which is not currently being used in the public sector—Condorcet Pairing (CP).

*a. Two-round*

TR systems require a second round of voting if no candidate receives a majority of the votes cast in the first round.<sup>28</sup> One version of TR is actually an extended FPTP system in which the winner of the second round, which usually involves more than two candidates, is determined by a plurality vote.<sup>29</sup> The primary function of this type of TR system is to eliminate truly marginal candidates identified in the first round, and thereby promote what might be called a strong or more credible plurality victory.<sup>30</sup>

In the second and most common version of TR, only the top two candidates advance to the second round.<sup>31</sup> The one who receives the most votes in that round will, of course, necessarily receive a majority of the votes cast in that round; hence, this system is nominally majoritarian. Theoretically, this type of TR system could be extended for multiple rounds, eliminating only the lowest-scoring candidate or candidates in each round, but this is apparently not considered a viable real-world option. On June 8, 2010, California voters approved an initiative—Proposition 14, Top Two Primaries Act—mandating a TR electoral system of this second type for all congressional and state elective offices.<sup>32</sup> This new system is slated

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28. ELECTORAL SYSTEM DESIGN, *supra* note 5, at 52–56.

29. *Id.* at 52.

30. *Id.*

31. *Id.*

32. See CAL. SEC'Y OF STATE, STATEMENT OF VOTE, JUNE 8, 2010, STATEWIDE DIRECT PRIMARY ELECTION 35 (2010), available at <http://www.sos.ca.gov/elections/sov/2010-primary/pdf/2010-complete-sov.pdf> (stating proposition passed with a 54 percent majority).

to go into effect in 2012; there are, however, a number of pending lawsuits challenging its constitutionality.<sup>33</sup>

One positive aspect of TR—regardless of type—is that, from a voter’s perspective, it is as simple as an FPTP system: the voter selects a single candidate in each round. The first type of TR, however, shares all the disadvantages of FPTP since it is, essentially, a two-round version of FPTP; the second type of TR, although nominally majoritarian, cuts the majority process short by eliminating all but the top two candidates from the first round. In addition, both versions of TR are disadvantaged by the administrative inefficiencies of conducting a second round, by the potential instability generated by a delayed result, and by a diminution of voter interest in the second round.

*b. Alternative vote, or instant runoff*

AV provides an instant runoff if no candidate secures a majority of first-round votes.<sup>34</sup> Under AV, the voter ranks all of the candidates on a single ballot.<sup>35</sup> If, for example, there are five candidates, the voter ranks each candidate from 1 (first preference) to 5 (fifth preference). If one candidate receives an absolute majority of the first-preference votes, then that candidate wins. If no candidate receives an absolute majority of the first-preference votes, then

the candidate with the lowest number of first preferences is “eliminated” from the count, and his or her ballots are examined for their second preferences. Each [of these] ballot[s] is then transferred to whichever remaining candidate has the highest preference in the order as marked on the ballot paper. This process is repeated until one candidate has an absolute majority . . . .<sup>36</sup>

The AV system is pragmatically superior to the TR system since AV avoids the negative consequences of holding a second-round vote. It is also superior to an FPTP form of TR in that, unlike that system, the AV system does not discourage third parties; rather, it encourages third parties by eliminating wasted votes and the threat of

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33. Bob Egelko, *Suit Over Prop. 13 Abolishing Party Primaries*, S.F. CHRON., July 30, 2010, at C1.

34. ELECTORAL SYSTEM DESIGN, *supra* note 5, at 47–49.

35. *Id.*

36. *Id.* at 48.

third-party spoilers. Similarly, AV induces dominant parties to seek support from minority parties in order to gain second-preference votes, a consequence that may enhance the legitimacy of the ultimate victor and, at the same time, promote the development of third parties.<sup>37</sup> AV is also superior, democratically, to the majority version of TR since that system allows only two candidates to advance to the second round and thereby artificially cuts short the calculation of actual voter preference.

AV is, however, more complicated than both forms of TR in that AV requires the voter to rank among the candidates listed, as opposed to the seemingly simpler task of selecting only one. But this moderate complexity has not proved to be problematical for those nations that have implemented AV systems. Notably, AV has been used successfully in Australia since 1918.<sup>38</sup>

*c. Condorcet pairing*

AV, TR, and FPTP are each subject to anomalies such that the winning candidate may not be the candidate preferred by a majority of the voters. This is most clearly seen in FPTP contests in which a third-party candidate operates as a spoiler, allowing the second-most-preferred candidate to defeat the first-most-preferred candidate.<sup>39</sup> A similar defeat of the most-preferred candidate also can occur under AV and TR systems. Consider the following AV hypothetical taken from Wikipedia:

[I]n a three-candidate field suppose that 40% of voters have the ranking XYZ, another 40% have the reverse ZYX, and the remaining 20% have Y as first preference. Here Y is eliminated in the first round of the count, despite being preferred by a (different) majority to each of X and Z.<sup>40</sup>

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37. *Id.* at 49.

38. For a description of Australia's AV system and its electoral consequences, see *Australia: The Alternative Vote System*, ACE ELECTORAL KNOWLEDGE NETWORK, [http://aceproject.org/ace-en/topics/es/esy/esy\\_au](http://aceproject.org/ace-en/topics/es/esy/esy_au) (last visited Oct. 10, 2010).

39. AMY, *supra* note 14, at 42–43; *see also id.* at 48–50 (noting the potential capriciousness of results under an FPTP system).

40. *Instant-Runoff Voting*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Instant-runoff\\_voting](http://en.wikipedia.org/wiki/Instant-runoff_voting) (last visited Oct. 10, 2010) (detailing the creation of the Condorcet method).

It is not clear that this outcome is a frequent phenomenon in real-world AV elections, but it is clear that such outcomes do, at least occasionally, occur in the real world.<sup>41</sup>

CP, which is designed to avoid the above-described “wrong-winner” phenomenon, is a method by which the electorate’s majority preference in a multi-candidate field is determined by a comparative examination of hypothetical “pairings” between each of the candidates.<sup>42</sup> Under the CP method, voters first rank candidates in a fashion similar to that used in AV. CP is not, however, an instant-runoff system. Rather, it establishes the majority preference by identifying the candidate who voters would prefer against every other candidate if separate head-to-head contests were held between that candidate and each of the other candidates.<sup>43</sup> If one candidate wins all of the head-to-head pairings, that candidate is the Condorcet winner, i.e., the candidate preferred by the majority over all other candidates separately considered.

If there is no Condorcet winner, which is sometimes referred to as a Condorcet paradox, one of several methods may be used to determine the victor.<sup>44</sup> These methods tend to be somewhat complicated, especially the most popular of them.<sup>45</sup> The advantage of CP in SMD elections is obvious: it avoids the “wrong-winner” phenomenon when a Condorcet winner can be identified. The disadvantage of CP is that it is more complicated and less familiar than any of the other SMD systems we have discussed thus far, and it is even more complicated when a Condorcet paradox occurs. CP is also disadvantaged, both politically and practically, by the fact that it is a relatively esoteric system with no current usages in the public sphere (unless one counts the primary elections of the Pirate Party of

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41. *Id.* (giving the Burlington, Vermont, mayoral election of 2006 as an example of this phenomenon).

42. *Id.*; *Condorcet Method*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Condorcet\\_method](http://en.wikipedia.org/wiki/Condorcet_method) (last visited Oct. 10, 2010); see *Marquis de Condorcet*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Marquis\\_de\\_Condorcet](http://en.wikipedia.org/wiki/Marquis_de_Condorcet) (last visited Oct. 10, 2010).

43. *Condorcet Method*, *supra* note 42.

44. *Voting Paradox*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Voting\\_paradox](http://en.wikipedia.org/wiki/Voting_paradox) (last visited Oct. 10, 2010).

45. *Schulze Method*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Schulze\\_method](http://en.wikipedia.org/wiki/Schulze_method) (last visited Oct. 10, 2010).

Sweden). There is also an argument that the Condorcet winner is not necessarily the “right” winner.<sup>46</sup>

#### 4. The Inherently Undemocratic Character of Single-Member District Plurality/Majority Electoral Systems

We have now considered several of the usual electoral systems available for SMD elections: FPTP, TR, AV, and CP. Even if we could erase (or adjust for) all of the previously observed flaws in those systems, each of these systems has another more significant flaw, namely, the inherently unrepresentative character of the SMD winner-take-all model. That is the precise point being made by John Stuart Mill in the quotation that introduces this Article. The victor after an SMD election does not, in fact, represent the entire constituency; rather, the victor represents only that part of the constituency that voted for him or (less likely) her. Winner-take-all does not mean that the winner share the power with the loser; it means loser-take-nothing. This problem can be compounded at the legislative level where a majority of the SMD-elected legislators represents significantly less than a majority of the electorate—a mere majority of the majority.<sup>47</sup>

Of course, if one accepts Joseph Schumpeter’s definition of democracy as nothing more than a competition for power between opposing political elites, the representational character of the legislative body is irrelevant.<sup>48</sup> Under this point of view, the victorious party embodies the democracy by virtue of having achieved the victory, and the victory democratically validates the exercise of power by the victor. From a more “representative” perspective on democracy, however, the representational composition of the lawmaking body provides the key to legitimating

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46. See Alec Slatky, *Why the Condorcet Criterion Is Less Important Than It Seems*, FAIRVOTE.ORG (Aug. 10, 2010), <http://www.fairvote.org/why-the-condorcet-criterion-is-less-important-than-it-seems/>.

47. See RICHIE & HILL, *supra* note 16, at 9–10. The authors give the following example: “Suppose, for example, that all representatives win their elections with only 50.1 percent of votes. A law passed with support from only 50.1 percent of the legislators then would have backing from only a quarter of votes cast.” *Id.*

48. JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269 (1942). In Schumpeter’s view, “[t]he democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.” *Id.*; see Allan Ides, *The American Democracy and Judicial Review*, 33 ARIZ. L. REV. 1, 11–14 (1991) (discussing Schumpeter’s model).

the exercise of governmental power.<sup>49</sup> To put it simply, Schumpeter's model tends to separate the government from the governed, the primary connection between the two being the electoral contest, while the participatory model tends to equate the government with the governed, the essential connection between the two being the representative nature of the elected governing institution. Consistent with this latter definition, the inherently unrepresentative outcome of SMD elections is properly characterized as undemocratic. As one nineteenth-century commentator put it, "[i]n a democratic government the right of decision belongs to the majority, but the right of representation belongs to all."<sup>50</sup>

This unrepresentative outcome also suggests that votes cast for the losers in SMD elections are always wasted in the sense that those losing votes have no importance once a winner is declared. They are like the losing tickets in a horse race—so much refuse. In short, the unrepresentative and undemocratic nature of legislatures chosen through SMD electoral systems is an inherent characteristic of SMD legislatures, and no SMD system of which I am aware can erase that inherency.<sup>51</sup>

It is actually slightly worse. More than occasionally the party securing a legislative majority in an SMD plurality/majority election does not itself receive a majority of the system-wide votes cast in the election. It is not uncommon for a party that secures only a plurality of the votes system-wide to end up with a majority of the legislative seats. This is particularly so when there are spoiler third parties in FPTP elections. When this happens, we have a system of "plurality rules." It can also happen that one party receives a majority of the system-wide votes but the opposing party wins a majority of the electoral contests. Here we have rule by minority or by "constructed majority" where the legislature does not even represent a plurality of the electorate.<sup>52</sup>

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49. *See* Ides, *supra* note 48, at 4–8 (discussing "participatory" theories of democracy).

50. GEORGE H. HALLETT, JR., *PROPORTIONAL REPRESENTATION* 5–6 (1940) (quoting Ernest Naville).

51. *See generally* AMY, *supra* note 14, at 25–51 (discussing the failures of the U.S. SMP system and potential advantages of the PR system).

52. *Id.* at 32–39 (citing examples in national elections); HALLETT, *supra* note 50, at 13–36 (citing examples in municipal elections); R.J. Johnston, *Seats, Votes, Redistricting, and the Allocation of Power in Electoral Systems*, in *CHOOSING AN ELECTORAL SYSTEM: ISSUES AND*

In short, SMD systems, whether plurality- or majority-driven, are inherently unrepresentative and may even run afoul of the majority-rule principle they purport to advance. As such, these systems are aptly described as disproportional systems,<sup>53</sup> and they provide, at best, a “partial” democracy.<sup>54</sup>

*B. Multi-Member Districts—Proportional Representation*

An alternative to an SMD plurality/majority electoral system is an electoral model built around a larger multi-member district (MMD) with representatives elected through a system-wide measure of proportionality.<sup>55</sup> PR-MMD is a type of party-list system since the voter votes for a party or party list, and membership in the legislature is awarded to nominees on the party list. The most obvious and significant benefit of such a system is that it achieves something approximating proportional representation of political parties in the legislature and thereby creates the reality of a working representative democracy. The difference between PR-MMD and the SMD systems discussed above is, in fact, the difference between an actual representative democracy and the façade of one.<sup>56</sup>

Other more specific benefits of party-list PR-MMD include fewer absolute losers and wasted votes; less of an incentive to engage in negative campaigning—a negative ad may hurt one opponent but help another—and more of an incentive for candidates to distinguish themselves on the issues; greater encouragement of

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ALTERNATIVES, *supra* note 16, at 59, 60–63 (citing such potential outcomes as one of the recognized ills of FPTP).

53. See AREND LIJPHART & BERNARD GROFMAN, PATTERNS OF DEMOCRACY 14–16 (1999).

54. LUNI GUINIER, LIFT EVERY VOICE 253, 253–56 (1998).

55. Alternatively, one could hold a statewide party-list PR election and avoid the MMD completely. In such a case, each party’s list could include as many nominees as the number of seats available in the legislature. I think such an approach would be inadvisable for two related reasons. If the party list were “closed,” allowing the party alone to determine the order in which its nominees will be awarded seats in the legislature, the party would be vested with too much power over the choice of representatives; if the party list were “open,” allowing the voter to rank the selected party’s nominees, the typical voter would be overwhelmed by the number of nominees on the list.

56. See HALLETT, *supra* note 50, for an interesting pre–World War II tract on the democratic value of PR in municipal elections.



new parties; more minorities and women elected; and a greater incentive to vote.<sup>57</sup>

There are, however, some negatives.<sup>58</sup> One potential drawback is that no individual legislator is charged with representing the geographic region in which any given voter lives. While each district would have representatives—multiple representatives—those representatives may be seen, and may see themselves, as representing their respective party and not the district. Hence, even though each district would have multiple representatives, there could be some attenuation of the traditional relationship between the individual representative and the constituent. Another way to think of this is that the MMD representatives may not be perceived as being individually answerable to the electorate. On the other hand, it is worth noting that under PR-MMD, should a constituent need to contact a representative, she will have a choice among the representatives of her region and may take some comfort in the fact that a member of her party serves as one of her representatives (if that is the case). Of course, and more generally, this potential negative assumes the real-world benefit of the representative-constituent relationship in SMD systems.

Other concerns with proportionality are that PR leads to instability since it often requires coalition governments,<sup>59</sup> encourages extremism and the creation of multiple minority parties,<sup>60</sup> and provides no clear governing mandate.<sup>61</sup> First, most of these concerns pertain to parliamentary systems in which a government can fall if a coalition collapses. In a non-parliamentary system such as ours, whether two-party or otherwise, coalitions are a normal and fluid part of the lawmaking process. The “collapse” of a coalition may

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57. See ELECTORAL SYSTEM DESIGN, *supra* note 5, at 57–58; see also John Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 182–188 (1984) (proposing PR as a constitutional solution to minority underrepresentation). See generally AMY, *supra* note 14; KATHLEEN L. BARBER, *A RIGHT TO REPRESENTATION: PROPORTIONAL ELECTION SYSTEMS FOR THE TWENTY-FIRST CENTURY* (2000) (explaining the mechanics of proportional voting and the advocacy for its implementation).

58. See ELECTORAL SYSTEM DESIGN, *supra* note 5, at 58–59.

59. Clark Hogan Taylor, *What Is a ‘Fair’ Electoral System?*, COLLECTIVE REVIEW (Apr. 27, 2010), <http://thecollectivereview.com/clark-hogan-taylor/what-is-a-fair-electoral-system.html>.

60. Douglas J. Amy, *Common Criticisms of PR and Responses to Them*, PR LIBRARY, [http://www.mtholyoke.edu/acad/polit/damy/articles/common\\_criticisms\\_of\\_pr.htm](http://www.mtholyoke.edu/acad/polit/damy/articles/common_criticisms_of_pr.htm) (last visited Oct. 10, 2010).

61. *Id.*

doom a piece of proposed legislation, but not a government.<sup>62</sup> More generally, potential instability has been successfully addressed in modern democracies by requiring minor parties to achieve some threshold of system-wide support—usually 5 percent or more—before being awarded representation in the legislature.<sup>63</sup> Similarly, this same threshold requirement should ameliorate any potential to promote extremism;<sup>64</sup> but more to the point, there is empirical evidence that PR governments in developed democracies tend to be more centrist, i.e., less extremist, than majoritarian democracies.<sup>65</sup> In any event, I would think that the rise of extremism is more likely a product of social conditions than it is of any particular electoral system, and, of course, majoritarian systems are not immune from extremism.<sup>66</sup> In a like fashion, the “problem” of minor parties disappears with the imposition of a reasonable threshold requirement and with the recognition that coalition collapse is structurally irrelevant in a nonparliamentary system. Finally, as to the absence of a mandate, it is true that in an SMD system the “majority” party has a mandate to govern, but the actual content of that mandate is far from clear and often not necessarily (or even likely) supported by a majority of the electorate or even by a majority of those who vote for the “majority” party.

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62. See Maurice Duverger, *Which Is the Best Electoral System?*, in CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES, *supra* note 16, at 31, 36–37 (after noting potential negatives of PR in parliamentary systems, suggesting that PR might be particularly appropriate in state legislatures in the United States); Johnston, *supra* note 52, at 68 (noting particular suitability of PR to non-parliamentary government systems such as that of the United States).

63. There is also support for the view that PR systems are more stable than FPTP systems. See ELECTORAL SYSTEM DESIGN, *supra* note 5, at 58 (“The West European experience suggests that parliamentary PR systems score better with regard to governmental longevity, voter participation and economic performance. The rationale behind this claim is that regular switches in government between two ideologically polarized parties, as can happen in FPTP systems, makes long-term economic planning more difficult, while broad PR coalition governments help engender a stability and coherence in decision making which allow for national development.”); see also ENGSTROM, *supra* note 23, at 50–54 (disputing the persuasiveness of the instability critique); FARRELL, *supra* note 14, at 193–98 (citing empirical evidence tending to refute the instability critique).

64. FARRELL, *supra* note 14, at 198–201.

65. G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS 175–229, 244–46 (2000).

66. *Id.* at 200 (citing the political rise of the right-wing National Front in France in the 1990s). And did I hear anyone say, “Tea Party?”

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*C. Mixed-Member Systems*

Clearly, both SMD and PR-MMD have benefits and drawbacks. An MMP system seeks to combine the positive aspects of each and simultaneously ameliorate the negatives. There are a variety of MMP systems.<sup>67</sup> For reasons that will be apparent below, I am going to focus on the form of MMP that results in a proportional unicameral legislature. Under this form, a portion of the legislature—let us say half—is elected in SMD contests; the other half is elected from MMD contests. The SMD and MMD results are then accommodated to the system-wide preferences and that accommodation results in a legislative composition that reflects system-wide proportionality. Thus, an MMP system with a proportional overlay preserves the representative-constituent relationship and perhaps improves on it by creating additional representational options for minor-party supporters. At the same time, this MMP system ameliorates the negative and undemocratic aspects of SMD by creating a legislature that is proportional to the preferences of the electorate.<sup>68</sup>

The chief drawback of this system is that it is more complex than our current system. The voter must vote twice on the same ballot: once for a district representative and once for a party. Some effort is required, therefore, to ensure that voters understand this dual responsibility and its consequences.

III. THE NEW CALIFORNIA CONSTITUTION—  
A PROPORTIONAL LEGISLATURE

For a wide range of reasons, many of which have been or will be highlighted in this symposium, it is evident that California needs a new constitution. Our current state constitution, which was designed in the nineteenth century, is now freighted with ad hoc provisions, many of which were adopted without adequate consideration for their system-wide consequences and long-term effects. Because of this, the California Constitution no longer works. The people of this state need and deserve a coherent constitution that embodies sound principles of democracy and good government—by which I mean an effective and just government—and that protects a clearly stated

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67. See Matthew Soberg Shugart & Martin P. Wattenberg, *Mixed-Member Electoral Systems: A Definition and Typology*, in MIXED-MEMBER ELECTORAL SYSTEMS: THE BEST OF BOTH WORLDS? 9, 9–24 (Matthew Soberg Shugart & Martin P. Wattenberg eds., 2001).

68. See ELECTORAL SYSTEM DESIGN, *supra* note 5, at 90–103.

“bill” of fundamental and enforceable human rights. My proposal should be understood as being a small but important part of this larger comprehensive constitutional reform project. I will refer to my proposal as the New California Constitution throughout this Article.

The short version of my proposal is this: The New California Constitution should provide for a unicameral legislature comprising (approximately) 320 legislators elected through an MMP system that combines SMD plurality/majority elections with open-party-list PR-MMD elections.<sup>69</sup> All members of the legislature would serve four-year terms and the entire legislature would stand for election together. As an adjunct to this proposal, I propose that the election of the governor, who would also serve a four-year term, be held in the middle of the legislature’s four-year term. In addition, the New California Constitution would vest the governor with the power to veto legislation, but any such veto could be overridden by a two-thirds vote of the legislature.

#### A. *Unicameral Legislature*

I see no credible reason for maintaining a bicameral legislature in the state of California (or in any state for that matter). The prototype bicameral system is the British, class-based

THE NEW CALIFORNIA CONSTITUTION

ARTICLE II. THE LEGISLATIVE BRANCH

Section 1. Legislature of the State of California. The legislative branch shall consist of a single chamber entitled the legislature of the state of California.

Section 2. Representatives. Members of the legislature shall be known as representatives and shall serve four-year terms commencing on the second Monday in January following their election.

model composed of a parliament divided between the House of Lords and the House of Commons. That model exists in the United Kingdom more in name than in practical effect, and even if that class-based structure retained some modern vitality, it is completely anathema to the American experience. Moreover, from a democratic perspective, the only difference between California’s state senate and assembly is the size of the district represented; our current bicameral system does not, in any fashion, purport to be based on class or prestige, or even regionally based. Both houses are now elected on a

69. Cf. Arend Lijphart, *Reforming the House: Three Moderately Radical Proposals*, 31 POL. SCI. & POL. 10, 10–12 (1998) (endorsing PR for the election of the U.S. House of Representatives).

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one-person-one-vote principle and the only structural distinction between the state senate and state assembly is the size of the population represented by each, with the state senate districts having double the population of the assembly districts. As phrased in a 2009 *Los Angeles Times* essay, the state senate and the assembly are “functionally indistinguishable.”<sup>70</sup>

Nor is there any sensible reason for imitating the bicameral model used by the federal government. Regardless of the merits that a bicameral model may have as a part of a federal system, those “federalism” concerns have no relevance whatsoever to the governance of a unified sovereign state such as California, which is, quite clearly, not a federal republic. Of course, California does have several culturally and economically distinct regions, but those regions can be fully represented by the political engagement of their population bases as properly represented in a one-house legislature.

One might argue that a bicameral system works as a legitimate check on democracy by requiring all proposed measures to satisfy the independent judgment of two distinct legislative bodies however those bodies are comprised. But this argument is premised on the assumption that democracy ought to be hobbled in this essentially random fashion. If both houses represent the same constituency—the state’s electorate—it is hard to see any long-term, structural benefit that would derive from making it harder to pass laws, other than supporting a principle that is essentially anti-government and anti-democracy.<sup>71</sup> The current two-house system does no more than hobble democratic decision making. In fact, when California’s current bicameral model is coupled with the various super-majority requirements imposed by the state’s constitution, California has a system of minority rule under which one-third-plus-one of either house can block needed and democratically supported legislation.

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70. Harold Meyerson, Op-Ed., *A One-House Legislature*, L.A. TIMES, Aug. 21, 2009, at A35. This excellent essay is well worth reading, as is the entire series of which this essay is a part. See Op-Eds. & Editorials, *The California Fix*, L.A. TIMES, Aug. 16–Oct. 19, 2009.

71. One might argue that a mixed-member bicameral system with one branch elected through SMD and the other through some form of PR would create opposing compositions that might reflect different values, each worthy of checking the other. But it is difficult to predict exactly what those values would be and how they would differ between the houses of the legislature, and more difficult yet to explain why one group of particular values should trump another, especially if the trumping value comes from an institution that does not reflect the political preferences of the electorate.

Of course, if the legislature, be it bicameral or unicameral, does not, in fact, represent the preferences of the electorate, one might legitimately distrust the so-called democracy. But that potential pertains to the electoral system and not to the bicameral or unicameral composition of the legislature. Moreover, in terms of checks and balances, the mid-session election of the governor, coupled with the governor's veto power, should provide a more-than-adequate check on potential democratic excess.

*B. The Composition of the Unicameral Legislature—320 Members*

Currently, the California legislature is composed of 120 legislators—forty in the state senate and eighty in the assembly. I propose that we triple

THE NEW CALIFORNIA CONSTITUTION

ARTICLE II. THE LEGISLATIVE BRANCH

Section 3. Composition of the Legislature. The legislature shall consist of 320 representatives and such additional representatives as may be required by Section 7 of this Article. All representatives shall have equal status and equal voting rights in the legislature.

that number to 320.<sup>72</sup> While 320 may seem like a large number, it only seems large in relation to the present model. The current California legislature is actually relatively small when compared to the legislatures of other states. Thus, while California is the most populous state—with an estimated 37 million residents in 2009<sup>73</sup>—the combined membership in the California Senate and Assembly is smaller than the legislatures of thirty-four other states, including little New Hampshire, a state that boasts 424 representatives for its 1.3 million residents.<sup>74</sup> Not surprisingly, California's legislature has by far the largest constituent-to-representative ratio in the nation,<sup>75</sup> and in this sense, the California legislature can be described as the least-

72. The number, 320, is not magic, but it is certainly somewhere in the ballpark of a sensible and acceptable size. The essential point is that the legislature of California should be larger given the population of the state. But the choice of 320 was not completely random; it provides convenient multiples that make it easy to see the transition from the current forty-plus-eighty model. Also, 320 should not be seen as an absolute number since proportionality sometimes requires additional seats. *See infra* note 77 and accompanying text.

73. U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2009 (2009), available at <http://www.census.gov/popest/states/NST-ann-est.html>.

74. *Population and Size of Legislature*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=13527> (last visited Nov. 17, 2010).

75. *Legislative Districts*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=20662> (last visited Nov. 17, 2010).

democratic state legislature in the nation. More representatives and the resultant smaller ratios would be a positive step toward connecting the representatives with the electorate, which would seem to be an essential component of an effective democracy.<sup>76</sup>

### C. A Mixed-Member Electoral System

<p style="text-align: center;">THE NEW CALIFORNIA CONSTITUTION</p> <p style="text-align: center;">ARTICLE II. THE LEGISLATIVE BRANCH</p> <p>Section 4. Districts. The state shall be divided into 160 districts of equal population. Each district shall be entitled to one district representative.</p> <p>Section. 5. Regions. The state shall be divided into twenty regions of equal population. Each region shall be entitled to eight regional representatives.</p> <p>Section 6. The Election of Representatives. District representatives shall be elected through a single-member district plurality or majority electoral system. Regional representatives shall be elected through a proportional, open-party-list system.</p>
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Recall that an MMP electoral system relies on two electoral devices, one for the election of representatives of single-member districts, emphasizing a geographic connection to the representative, and one for the election representatives of larger MMDs, emphasizing party choice.

Under my proposal, half of the 320 legislators (160 legislators) would be elected in SMD electoral contests in relatively small, SMDs (“districts”). The other half would be elected through an open-party-list system in PR contests in larger MMDs (“regions”).<sup>77</sup>

As to the SMDs, each would have roughly the same population in order to conform to the one-person-one-vote principle. If we consider the current assembly model, with eighty districts, we can

76. Cf. Lijphart, *supra* note 69, at 12 (endorsing an increase from 435 to 650 members for the U.S. House of Representatives).

77. The New America Foundation has proposed a similar MMP electoral reform for California, with the regional elections being keyed to certain politically and geographically identified communities of interest. See MARK PAUL & MICAH WEINBERG, NEW AM. FOUND., REMAPPING A NATION WITHOUT STATES: PERSONALIZED FULL REPRESENTATION FOR CALIFORNIA’S 21ST CENTURY (2008), available at [http://www.newamerica.net/files/naf\\_nations\\_paper\\_v4.pdf](http://www.newamerica.net/files/naf_nations_paper_v4.pdf). I am in general agreement with this interesting and sophisticated proposal and in complete agreement with the Foundation’s arguments in favor of a unicameral, proportionally elected legislature. I have some concerns, however, both practical and philosophical, with the regional representation aspect of this proposal. The key difficulty, for me, is in finding a way to agree on what constitutes a geographically and culturally identifiable community of interest. Moreover, even if an initial agreement can be brokered, there would be an ongoing obligation to monitor the boundaries of the initially defined communities as our social and political culture morphs into different communities of interest. Hence, I prefer a population-driven system that necessarily incorporates that changing morphology without a need to identify those changes other than as population change.

see that the new model would double that number to 160. It follows that the resulting districts would halve the populations of the current districts (adjusting for any statewide population change) and thereby provide a smaller and more democratic constituent-to-representative ratio. For the moment, let us leave open the question of which SMD system we should use in the district elections.

As to the multi-member regions, each region would be the equivalent in population size to two current state senate districts, i.e., twice the size of a current state senate district (adjusting for any statewide population change). Thus, the new model would consist of twenty regions, and each of these regions would be eight times more populous than an SMD.<sup>78</sup> Accordingly, each region would elect eight representatives for a total of 160 multi-member representatives. These representatives would be elected through a party-list PR system. (It would also make sense for each region to be constructed of eight districts.)

Party-list PR is the most common PR system used for electing members of a large representative body. Under a party-list system, each political party submits a list of candidates for the electorate's consideration. On Election Day, voters vote for the party (list) of their choice. If the list is "closed," the party's ranking of its candidates controls; if the list is "open," voters retain the option of reranking the candidates. Typically, a party must achieve some minimum support in order to be awarded any representatives. The parties achieving that threshold are then awarded seats in the legislative branch in proportion to their shares of the vote received. The winning candidates are selected from the qualifying party's list in the order ranked by the party or by the voters.<sup>79</sup>

I propose that the representatives of the multi-member regions be chosen through an open-party-list system.<sup>80</sup> I favor the open list

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78. Using population as the measure, the current state senate districts are two times larger than the current Assembly districts. The new regions are two times larger than the current state senate districts, and, therefore, will be four times larger than the current assembly districts ( $2 \times 2$ ) and eight times larger than the new SMDs ( $2 \times 2 \times 2$ ), which are slated to be half the size of the current assembly districts. Thus, each region will consist of eight representatives in accord with the one-person-one-vote principle.

79. ELECTORAL SYSTEM DESIGN, *supra* note 5, at 60–71.

80. My proposal is somewhat oversimplified, as it does not include a formula for measuring proportionality. The choice of the appropriate formula is significant. See Arend Lijphart, *The Political Consequences of Electoral Law*, 84 AM. POL. SCI. REV. 481, 481–96 (1990). Quite obviously, before the proposal is finalized and implemented a proper measure must be adopted.



because it tempers party power and modestly increases voter power. Under this proposal, each party qualifying to be on the ballot would nominate a list of eight candidates for each of the twenty regions. On the same day that voters choose their district representatives, voters would also select their party of choice in the regional election; in addition, they would rank in order the candidates listed by that party. The ballots would then be tallied statewide to determine each party's proportional share of the whole, 5 percent being the minimum vote that would entitle a party to representation in the legislature.

#### *D. Distribution of Seats*

THE NEW CALIFORNIA CONSTITUTION

ARTICLE II. THE LEGISLATIVE BRANCH

Section 7. Distribution of Seats. A party's total representation in the legislature, combining district and regional representatives, shall be the equivalent of that party's total share of the statewide open-party-list vote. If a party receives more district seats than its proportion of the statewide open-party-list vote, that party shall retain those district seats but additional representation in the legislature will be awarded to other parties in order to achieve each party's proportionate share of the seats. A party receiving less than 5 percent of the statewide open-party-list vote shall not be entitled to any proportionate share of representation in the legislature unless that party has also won at least three district contests in the same election.

Given that the overall system is MMP, i.e., a combination of SMD and PR, in order to achieve system-wide proportionality, the number of seats won in the SMD contests must be subtracted from the potential number of seats that would otherwise be awarded in the PR contest. For example, let us say Parties A, B, C, and D receive 45 percent, 35 percent, 18 percent, and 2 percent of the statewide vote,

respectively. Party A would be entitled to 45 percent of the regional representatives minus the number of districts it won in the single-member contests. Parties B and C would have their allocations similarly calculated based on their respective percentages of regional votes minus their respective single-member victories. Party D would receive no allocation, because it would not have achieved the 5 percent minimum.<sup>81</sup> If a party wins more district contests than its proportional share of the system-wide vote, it would retain those district seats, but additional seats would be awarded to other parties

The debate over this choice is likely to be hyper-technical and I do not think that any particular formula should be "constitutionalized" as a relatively permanent fixture of the proposed system.

81. In some systems, the percentage shares of the system-wide vote are recalculated after subtracting the votes of the parties receiving less than the threshold minimum.

to achieve overall proportionality. The net result is that the qualifying parties should achieve overall representation in the state legislature that approximates their respective proportional share of the statewide vote in the regional contests.

*E. A System for Electing District Representatives*

Now we must decide which of the SMD electoral systems to adopt for the district elections. There are two ways to resolve this dilemma. First, we might wish to adopt the system with the fewest democratic downsides. To my way of thinking, that eliminates FPTP and both versions of TR since each of these systems has more democratic downsides than AV. AV is the obvious alternative; however, AV does run the risk of the “wrong winner” phenomenon, so it is far from perfect. One possible solution is to adopt AV with the caveat that if AV fails to elect the Condorcet winner (and there is such a winner), then the Condorcet winner would be elected in place of the AV winner—in other words, AV with a CP trump. With such an approach we would avoid the deep complexities of Condorcet methods triggered by the Condorcet paradox and, at the same time, significantly reduce the potential anomalies of AV. In short, our first approach could be to adopt something approaching the most democratic option. But, as noted previously, there is some debate as to whether the Condorcet winner ought to trump the AV winner. We would have to resolve that debate.

Second, we could simply adopt FPTP for the district elections. But why, the reader asks, choose the least democratic option? Because it does not matter. With the overlay of the PR-MMD system described above, the potential downside of an FPTP system is diluted by the system-wide proportionality that emerges from the open-party-list vote. Thus, the FPTP discouragement of third parties is erased by the imposition of system-wide proportionality. The potential spoiler effect in an FPTP contest becomes inconsequential if the gain of an FPTP seat is offset by the loss of a potential regional seat. Furthermore, the type of SMD system chosen should have no effect on PR’s ability to elect more minorities and women. In other words, the PR aspect of the MMP system dilutes the negative consequences of FPTP. And if it truly does not matter, a simple and familiar system may be the more persuasive option. More generally,

the best option would be to leave the choice between a plurality and majority system to the legislature.

#### IV. CONCLUSION

Clearly, adoption of this electoral reform proposal—or something akin to this proposal—will not cure all the ills that plague the governance of the state of California. It will, however, dissolve the hegemony of the two-party system and likely make the two dominant parties more flexible and more responsive to the electorate. This alone would be a major stride forward. Moreover, as noted above, this proposal is but one part of a larger project of constitutional revision. To succeed, all the parts must cohere. Nevertheless, reforming the electoral system may be one of the most critical parts of the larger project. The creation of a more representative legislative branch—or even the possibility of one—might provide the electorate the confidence it needs to abandon its distrust of government. Thus, with constitutional reformation and an overall heightened level of societal confidence, the state of California will begin to see positive improvements in the delivery of intelligent, just, and effective governance.