Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems

James A. Gardner

University at Buffalo School of Law

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MADISON'S HOPE: VIRTUE, SELF-INTEREST, AND THE DESIGN OF ELECTORAL SYSTEMS

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Professor of Law, Western New England College School of Law. B.A. 1980, Yale University; J.D. 1984, University of Chicago. My thanks to Dick Cole, Rick Hasen, Rick Pildes, and the participants in faculty colloquia at Florida State University College of Law and Western New England College School of Law for valuable comments and suggestions on earlier drafts. Thanks also to Dean Donald Dunn for providing financial support, and to Pat Newcombe of the Western New England College Law Library and Anne Blanford for research assistance.
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INTRODUCTION

In recent years, perhaps no institution of American governance has been so thoroughly and consistently excoriated by legal theorists as the familiar American system of winner-take-all elections. In the most common kind of winner-take-all system, multimember government bodies are elected by dividing the relevant jurisdiction into as many election districts as there are seats to be filled. Candidates for office compete separately in each district and, typically, the candidate with the highest vote total in each district is elected. In the last decade, legal theorists have condemned this method of election as "simple-minded," "crude," and "illegitimate." The winner-take-all system is said to "waste votes," lead to "majority monopolization" of political power, and cause the "underrepresentation" and consequent "social and economic subordination" of political minorities. According to its critics, the winner-take-all electoral system is worse than merely "unfair." The system grievously injures politics itself by undermining the electoral accountability of government officials, depressing levels of political competition, and discouraging voter mobilization. The winner-take-all system, according to its critics, thus subverts the very popular sovereignty it purports to serve.

Legal theorists are hardly alone in their condemnation of the winner-take-all electoral system. The great majority of political scientists seem to agree that it is a peculiarly bad system of democratic self-governance. Political scientists have argued, for example, that the winner-take-all electoral system unfairly denies representation to those who vote for losing candidates; causes politicians to adopt shifting and ill-defined positions on

3. Guinier, TYRANNY, supra note 1, at 79.
4. Id. at 121, 134-35.
8. Guinier, TYRANNY, supra note 1, at 79.
important political issues; installs a permanent monopoly of the two major political parties; results in a racially, ethnically, and ideologically homogeneous legislature; and ultimately raises unnecessarily the possibility of majoritarian factional tyranny. As one recent critic has summed things up, "An electoral system in a democracy is required to perform two functions—first, to ensure that the majority rules, and second to ensure that all significant minorities are represented. Plurality and majoritarian [winner-take-all] systems of election fail to achieve either of these two aims." The winner-take-all system, then, cannot accomplish the only goals an electoral system is ever called upon to accomplish; it is, on this view, quite literally good for nothing.

In spite of these criticisms, it seems clear that there is virtually no chance that Americans will soon abandon the winner-take-all system in favor of its chief rival and the overwhelming favorite of its critics, proportional representation (PR). Frequently hailed as the remedy for many of the American political system's ills, PR electoral systems aim to assure that candidates for multimember governmental bodies or, in some versions, the political parties fielding candidates, win seats in direct proportion to their support among the electorate. Despite a century-and-a-half of advocacy by political theorists in favor of PR, the winner-take-all electoral system enjoys an almost complete monopoly among American jurisdictions. It is presently used to elect Congress, every state legislature, and virtually every local

10. AMY, supra note 9, ch. 3.
11. Id. ch. 4; KATHLEEN L. BARBER, PROPORTIONAL REPRESENTATION AND ELECTION REFORM IN OHIO 34 (1995).
12. See AMY, supra note 9, chs. 5-6; BARBER, supra note 11, at 299-303.
13. For example, see BARBER, supra note 11, at 13 and ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 41 (1968).
15. See AMY, supra note 9, for an especially enthusiastic and wide-ranging endorsement of the benefits of Proportional Representation (PR). An earlier example of scholarly endorsement is GEORGE H. HALLETT, JR., PROPORTIONAL REPRESENTATION—THE KEY TO DEMOCRACY (1937).
16. See infra, Part I.B, for a fuller discussion of PR.
17. PR in its modern form was invented by Thomas Hare in the 1850s. See THOMAS HARE, TREATISE ON THE ELECTION OF REPRESENTATIVES PARLIAMENTARY AND MUNICIPAL (1859). John Stuart Mill, impressed by Hare's analysis, took up the issue and brought it forcefully to public attention. See John Stuart Mill, Considerations on Representative Government (1861), in ON LIBERTY AND OTHER ESSAYS (John Gray ed., Oxford University Press 1991). In Great Britain, an organized movement for electoral reform dedicated to instituting PR has existed since the latter part of the nineteenth century. See REPORT OF THE INDEPENDENT COMMISSION ON THE VOTING SYSTEM 6 (U.K. Stationery Office, October 1998) [hereinafter JENKINS COMMISSION REPORT]. In the United States, some branches of the Progressive Movement offered significant support for PR. See BARBER, supra note 11; HALLETT, supra note 15.
18. Winner-take-all districted elections were first required for Congress in 1842, see Apportionment Act of 1842, ch. 14, 5 Stat. 491 (1842), and have been used ever since, despite intermittent expirations of formal legal requirements. See LAURENCE F. SCHNECKEBEIER,
government. PR has never been used, and indeed has never even been seriously contemplated, in any but a handful of municipal jurisdictions. Even then, the experiment lasted for only a brief period early in the twentieth century. The prevailing American attitude toward PR was concisely summed up by President Ronald Reagan, who pronounced it “alien to the traditional political principles of our country.” Even more recently, President Clinton withdrew his 1993 nomination of Professor Lani Guinier to head the U.S. Justice Department’s Civil Rights Division when her support for proportional representation and semi-proportional systems, such as cumulative voting, provoked great controversy in the Senate. Yet one of the strangest aspects of the debate over electoral systems is that in spite of all the attacks it has suffered at the hands of PR advocates, the existing winner-take-all system rarely receives any kind of defense. Few seem to think it even needs one; apparently, the system is generally understood by all except its critics to be either so right or so natural as to require no defense.

How is it possible that an electoral system so thoroughly defective in its operation and pernicious in its results could enjoy public support so complete as to all but preclude the possibility of any serious public discussion of alternatives? Sometimes the fact that nothing much is said in support of a position means that nothing much can be said on its behalf. Some critics of the winner-take-all system have suggested as much. For example, some suggest that the winner-take-all system is defensible only on racist grounds as a means to prevent blacks and other minorities from achieving political influence. There is, to be sure, an ugly history,

Congressional Apportionment 132-35 (1941).
20. At its height, PR was used in nearly two dozen American cities during the first half of the twentieth century. Today it is used only in city council and school committee elections in Cambridge, Massachusetts, and in school board elections in New York City. See Amy, supra note 9, at 10-11.
22. Guinier describes these events in Lani Guinier, Lift Every Voice: Turning a Civil Rights Setback into a New Vision of Social Justice (1998). As John Hart Ely has pointedly observed: “As for proportional representation ... we know it must be pretty radical stuff if an expressed taste for it was enough to cause President Clinton to abandon his friend Lani Guinier after her name had been sent to the Senate for an assistant attorney generalship.” John Hart Ely, Gerrymanders: The Good, the Bad, and the Ugly, 50 Stan. L. Rev. 697, 610 (1998).
23. As Douglas Amy has observed, most Americans consider the winner-take-all, single-member-plurality system to be “the most common and natural way to elect officials. We assume that this system is the epitome of democracy and a model for the rest of the free world.” Amy, supra note 9, at 1.
24. One of the clearest examples of this is Karlan, Undoing, supra note 2, at 41 (asserting
particularly in the American South, of using winner-take-all systems such as at-large municipal elections as a way to suppress black political power. But winner-take-all systems are used everywhere, in completely white as well as in racially mixed jurisdictions, and have been employed continuously since colonial times, before any question of the political power of racial minorities could even have been contemplated.

Other critics suggest that Americans cling to the winner-take-all system out of a mindless refusal to abandon tradition. Yet this too seems implausible. On the federal level, Americans have amended the United States Constitution to change their political traditions more times than for any other purpose: they have altered the operation of the Electoral College, expanded suffrage on several occasions, established direct popular election of Senators, and changed the order of presidential succession. On the state level, where most of the power over electoral systems resides, voters have adopted constitutional changes to political processes even more frequently. Common reforms include provisions for referendum, initiative, recall, rotation in office, and the election of judicial and lower executive branch officials, all features of the package of Progressive-era reforms of which PR was sometimes a part. Moreover, it is difficult to understand how a naked tradition, unsupported by any plausible justification, could have become so thoroughly entrenched if it failed all along to respond to any genuine public sentiment or to fulfill any genuine public need.

There is another possibility. The ability of the winner-take-all system to withstand such unstinting criticism, and to do so without ever really being called upon to offer any substantial self-justification, suggests a different kind of problem, a problem of public discourse. The lack of a meaningful response to criticism of the winner-take-all system suggests strongly that such criticisms simply do not demand a response. An argument can only fail in this way if it does not hit its mark, and critics of the winner-take-all system can only fail to hit their mark if their arguments somehow fail to impugn, or perhaps even to address, the beliefs or practices that actually justify the widespread use and acceptance of the winner-take-all system. The debate, in

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26. This, at least, seems to be the insinuation made by those who dwell on the feudal origins of the winner-take-all system. See GUINIER, TYRANNY, supra note 1, at 127-29 (describing notions of dependence on existing political frameworks).

27. U.S. CONST. amends. XII, XV, XVII, XIX, XX, XXIV, XXVI.


29. For more on the Progressives, see infra Part III.B.
other words, is one-sided because there is no debate; proponents are arguing past one another.

My goal in this article is twofold. First, I aim to conduct a fresh examination of the historical and conceptual roots of the American system of winner-take-all elections to identify the best, or at least historically the most pertinent, justifications for that method of election. Second, having done so, I seek to reconstruct the contemporary debate over electoral systems and to explore its ramifications for the structure and design of American political institutions. My argument, in brief, is as follows.

Critics of the winner-take-all system converge on their position from several directions. These include support for proportional remedies to minority vote dilution under the Voting Rights Act,\(^{30}\) dislike for the Supreme Court’s recent equal protection jurisprudence of race-conscious election districting,\(^{31}\) and general support for proportional representation as a system of democratic self-governance. Although they almost never say so explicitly, advocates of these positions share a fundamental reliance on a particular conception of politics, often known as interest pluralism, in which politics is conceived as an arena in which individuals and groups compete against and bargain among one another for the purpose of satisfying to the greatest possible extent their own self-interest. It is on this set of premises that winner-take-all systems, with their suppression of minority political power, seem so unfair. Some enterprising political scientists have attempted to defend winner-take-all systems on the ground that they perform better than PR in maximizing long-term collective social interests. These attempts generally ring hollow, however, because they require defending winner-take-all systems on pluralist premises, premises according to which winner-take-all systems are patently unfair regardless of their ultimate efficiency.

I argue, in contrast, that winner-take-all electoral systems rest upon, and can be adequately defended, if at all, only upon an entirely different set of premises. Specifically, I argue that the concept of winner-take-all elections grew up alongside, and relies heavily upon, a very different and much older conception of politics, one that conceives of politics as an arena for identifying and then implementing the common good. Unlike the common good said to arise under interest pluralism from the aggregation of the self-interest of unrelated individuals and groups, the common good on this conception of politics is typically understood as objective, applicable to all members of society, and indivisible—that is why winners can and should take all. On this model, political activity principally represents an attempt to solve the epistemological problem of identifying the good of society. In some models, the common good is best discovered through the deliberation of

wise and virtuous representatives; in others, the people themselves are best qualified to identify the good of all.

This conceptual reconstruction sets the debate on a very different footing, for it now appears that a choice among electoral systems involves at some level a choice among conceptions of politics. The choice, moreover, is stark indeed: responsible, public-regarding politics or pluralism—virtue or self-interest. However, one of the principal efforts of the Framers of the U.S. Constitution was to figure out a way to avoid making just this choice. They wanted instead to design a system of democratic self-governance that would both encourage a politics of virtue to flourish, yet also guard against the worst excesses of a politics of self-interest should one materialize. I call this aspiration “Madison’s hope.” Unfortunately, the choice cannot be so easily avoided, at least when it comes to designing electoral institutions because, as I demonstrate below, those electoral systems best suited to permitting a politics of virtue to flourish tend to fail badly when the electorate behaves self-interestedly, and vice-versa. Consequently, choosing among electoral systems inevitably involves choosing between two unsatisfying alternatives: whether to give virtue a fair chance to succeed or whether to contain self-interest within the bounds of fairness—a choice, one might say, between a society’s hopes and fears.

The article is organized as follows. Part I describes the sustained attack on winner-take-all electoral systems and the intellectual traditions that have produced it. Part II analyzes the conceptual underpinnings of attacks on winner-take-all systems and the concomitant preference for proportionality, concluding that they rest on an underlying conception of politics as interest pluralism. Part III examines some recent efforts to defend winner-take-all systems from attack on pluralist grounds, and argues that the defenses are unavailing; on pluralist assumptions, proportionality is by far the fairest and most reasonable electoral system. Part III then goes on to propose that winner-take-all systems are far more effectively defended on an entirely different conception of politics, one that contemplates a politics of virtue, rather than self-interest, and that is aimed at identifying and self-consciously pursuing the common good. In so doing, Part III sets out the historical and conceptual development of the notion of a politics of virtue, including its association with historical justifications for majority rule. Part IV considers the feasibility of the Madisonian hope, concluding that it is ill-founded, at least when applied to electoral systems alone. By analyzing the political sociologies of the relevant conceptions of politics, Part IV demonstrates that the factual circumstances necessary for some conceptions of politics to succeed simultaneously impede the success of their rivals. Finally, Part V addresses some of the ramifications of these conclusions for the design and maintenance of political institutions in the coming century, including the feasibility of designing political institutions so as to achieve social goals, and the possibility of employing any conception of politics other than interest
group pluralism in a world that has experienced the historical and intellectual developments of the century just past.

I. THE ATTACK ON WINNER-TAKE-ALL ELECTORAL SYSTEMS

A. WINNER-TAKE-ALL ELECTORAL SYSTEMS

The dominant method of electing public officials in the United States has always been the winner-take-all system. American colonists inherited this system from Great Britain, where it has existed continuously in some form since medieval times. The most familiar and conceptually simple form of winner-take-all election occurs when the voters of a jurisdiction elect a single official to occupy an office with jurisdiction-wide power. Chief executives, such as the governor of a state or the mayor of a city, are typically elected in this manner. In such elections, every voter in the jurisdiction typically casts a single vote for one candidate, and the candidate with the highest vote total is elected. Election is thus by a plurality. In some cases, a candidate cannot be elected without obtaining a majority of the votes cast. In such jurisdictions, if no candidate obtains a majority on the first ballot, a runoff election is held between the top contenders. These elections are understood as winner-take-all because the winner, whether measured by plurality or majority vote, occupies the entire office and exercises all its powers; losing candidates obtain no share in the direct power of governance.

The winner-take-all system is also the dominant American system for electing officials of multimember governing bodies such as legislatures and city councils. For legislative elections, winner-take-all electoral systems come in two principal forms, one associated with the practice of single-member

33. See Morgan, supra note 32, at 40-48; Hanna Fenichel Pitkin, Representation 244-252 (1967).
34. The preeminent chief executive in the United States, the President, is not elected using a system of direct election; the President is elected by the Electoral College, whose members are chosen in such manner as the state legislatures direct. See U.S. Const. art. II, § 1, amend. XII.
35. The plurality vote is sometimes known, particularly in Britain and many of its former colonies, as "first-past-the-post."
37. While election to an office occupied by a single individual is inherently winner-take-all, Pam Karlan has correctly observed that the choice to create a "single-member office," on the other hand, is contingent—it is not necessarily the case that certain powers inherently must be exercised by a single individual rather than a multimember body. Karlan, Undong, supra note 2. The creation of a multimember body in lieu of a single official also creates the opportunity, though not the logical necessity, for relaxing the winner-take-all aspect of election to the office in question.
districting and the other associated with at-large elections. In a single-member districting scheme, the jurisdiction governed by the multimember body is typically divided into a number of election districts equal to the number of seats to be filled. Voters within each election district then select the candidate who will occupy the seat representing their district. Most often, officials from single-member districts are selected by plurality vote. Legislative elections from single-member districts are thus analogous to jurisdiction-wide election for chief executives: within the district, there is only one office to be filled, and the winner of the election takes all. In other words, he or she exercises all the power to which an occupant of a seat on the governing body is entitled. Again, candidates falling short of the highest vote total get nothing.

In an at-large election, voters throughout the jurisdiction collectively select all members of the governing body. Candidates typically compete for specific seats in the legislature or council, but compete for votes throughout the jurisdiction rather than in a single election district. Voters vote for one candidate for each of the designated seats, and candidates who obtain a plurality of votes for their seats are elected. For example, suppose a city council consists of five members, each elected at large. Seats on the council might be designated One through Five, and the political parties might nominate one candidate to run for Seat One, another for Seat Two, and so on. The candidates for Seat One then campaign against each other throughout the city, hoping to attract a plurality of city voters. They do not, however, compete against candidates running for the other seats on the council. Candidates for the other seats do likewise.

An at-large election can be viewed as winner-take-all in several ways. For instance, the at-large election of a five-member council is somewhat analogous to the independent election of five chief executives, each of whom exercises an equal share of the office's power. Alternatively, conducting such an election is also equivalent to conducting elections from five single-member election districts, except the districts are geographically coterminous instead of mutually exclusive. The key point in either case is that the losing candidate for any seat on the council obtains nothing and the winner exercises all the power that the seat commands. At-large elections are also winner-take-all in that the same majority of voters can completely control the outcome of the election. Thus, if sixty percent of city voters are Republicans and forty percent are Democrats, electing the city council at-large will likely result in the election of an all-Republican council no matter how many seats are to be filled; the same Republican majority will be able to control each seat.

B. The PR Alternative

For many years, there was no significant discussion within the Anglo-American tradition concerning alternatives to winner-take-all electoral systems. The question simply did not come up until the eighteenth century, when the rise of liberalism caused political theorists to begin to consider the relationship between majorities and minorities. Since then, theorists have devoted considerable energy to devising alternative election systems, especially in the last few decades, when the emergence of so many new nations has placed front and center the question of what form of electoral system a new polity ought to adopt. Today, the chief competitor to winner-take-all electoral systems, and the only one I shall take up here, is proportional representation.

PR systems are designed primarily to assure that seats in multimember governing bodies are awarded to candidates or political parties in proportion to the amount of support they receive from voters. A distinctive feature of winner-take-all majoritarianism is that the winners of election contests gain their seats regardless of whether they win every vote in the jurisdiction or just more than half. In the case of a plurality system, the seat may be awarded to a candidate who polls considerably less than half the votes. As a result, even winner-take-all systems that require winners to obtain an outright majority can allow a mere fifty-one percent of the electorate to control one hundred percent of the available seats. PR systems, in contrast, strive for a different result: candidates of parties that earn fifty-one percent of the votes should, in a well-designed PR electoral system, earn fifty-one percent of the seats. The remaining seats are distributed among the candidates of other parties in proportion to their vote totals.


41. For good overall accounts of PR, see generally AMY, supra note 9 (arguing for the abolition of the plurality system); MICHAEL DUMMETT, PRINCIPLES OF ELECTORAL REFORM (1997) (explaining the basis on which society should decide the type of electoral system it should use); HALLETT, supra note 15 (asserting the fundamental importance of PR); ROBERT A. NEWLAND, COMPARATIVE ELECTORAL SYSTEMS (1982) (comparing the principal electoral systems).

42. PR contrasts most starkly with at-large elections, which are completely insensitive to the distribution of electoral support for candidates. Although single-member districting is winner-take-all within any given election district, across a jurisdiction it has the potential to allow some degree of proportionality in the composition of the legislature when minorities are not distributed evenly throughout the jurisdiction. When minorities are geographically
To achieve proportionality in representation, PR elections must be held in multimember election districts—election districts that elect more than one representative to the legislature. These districts can be as large as the entire nation, as in the case of Israel, but they can also be much smaller; evidence suggests that the marginal increase in the proportionality of representation declines rapidly as the number of representatives to be elected from each district increases. Political scientists generally agree that the single-transferable-vote (STV) system of proportional representation—a complex system of vote quotas, multiple ballot counts, and vote transfers among candidates that was invented in the nineteenth century by Thomas Hare and popularized by its most famous supporter, John Stuart Mill—is the PR system that most accurately allocates seats in proportion to votes. In an STV election, voters from a hypothetical five-member election district would cast ballots on which they are permitted not only to vote for as many candidates as they wish, but also to rank those candidates in order of preference. Votes are then tabulated by initially counting first-place votes and then moving through the ballots roughly in order of descending preference until all available seats have been filled.

C. DEMANDS FOR PROPORTIONALITY

Over the years, demands for proportionality in electoral systems have been made primarily by political rather than legal theorists, usually in the course of arguing for the superiority of PR over winner-take-all systems as a method of general election. Although it has been argued in many different ways, the usual brief for PR is relatively simple: PR is fair. First and foremost, PR is said to be fair to political minorities insofar as it provides them with an opportunity to elect representatives of their choice. No one has made this

concentrated, they may constitute a plurality or majority in one or several election districts. This is the premise of the Voting Rights Act, which typically requires the creation of electoral subdivisions as a remedy for minority vote dilution, though only when minorities are geographically compact. Thornburg v. Gingles, 478 U.S. 30 (1986). See also Connor v. Finch, 431 U.S. 407, 415 (1977) (stating that in Fourteenth Amendment vote dilution cases, "this Court has concluded that single-member districts are to be preferred in court-ordered legislative reapportionment plans"). However, single-member districting is functionally no different from at-large elections when minorities are geographically dispersed throughout a jurisdiction. See generally Bruce Cain, The Reapportionment Puzzle (1984). In that situation, geographical election districts cannot be drawn in which the minority comprises a plurality or majority of voters.

44. Douglas Rae, The Political Consequences of Electoral Laws ch. 7 (1971).
45. See supra note 17 (discussing the origins of PR).
46. See Dummett, supra note 41, ch. 13; Newland, supra note 9, at 34, 35.
47. This language has been formalized in section two of the Voting Rights Act (VRA), which provides: "A violation [of this section] is established if, based on the totality of
point more eloquently than Mill, PR's most notable champion. Democracy, Mill writes, is supposed to be "government of the whole people by the whole people," yet under the winner-take-all system it consists of government of the whole by "a mere majority of the people, exclusively represented." The result, Mill claims, is "the complete disenfranchisement of minorities." The majority, he concedes, will necessarily outvote the minority and prevail, but "does it follow that the minority should have no representatives at all?"

Many others have since restated Mill's basic point in slightly different ways. Contemporary critics frequently accuse winner-take-all systems of altogether denying minorities representation. As the indefatigable British electoral reformer Enid Lakeman has argued, those who do not vote for the winner in a winner-take-all election can hardly "think of him as their MP [Member of Parliament]." Others argue that even if minorities are not entirely unrepresented, they are, at best, misrepresented in that they are forced to accept representatives they do not want. Some have put the point in even starker terms: votes cast by minorities for losing candidates, they argue, are literally wasted—such votes have just the same effect on the result as if they had been thrown away instead of being counted.

While PR is fair to minorities, it is also, according to its supporters, fair to majorities: it provides majorities with the measure of political control to which they are entitled consistent with the principle of majority rule, but no more. As Mill put it, "[i]n a really equal democracy, every or any section would be represented, not disproportionately, but proportionately."

Winner-take-all systems, in contrast, exaggerate the degree of representation to which majorities are entitled, resulting in "disproportional"
representation, a phenomenon that has also been likened to a kind of malapportionment. In traditional geographical malapportionment, for example, rural voters might have more representatives than urban voters. In a winner-take-all electoral system, it is majorities, regardless of location, that receive disproportionate representation in the legislature. Indeed, say its critics, only through the operation of some kind of winner-take-all electoral system can a bare majority obtain control over the entire apparatus of government, thus raising the specter of majority factional tyranny, a major concern of the Framers of the United States Constitution. By filling offices with candidates in proportion to their support throughout the electorate, PR, according to its supporters, is neutral in a way that winner-take-all systems are not: PR merely registers and reproduces the wishes of the electorate without distorting them in the process. PR's equation of seats with support thus "reflect[s], as exactly as possible, the social forces and political groups in the population." Winner-take-all systems have also been attacked by numerous legal theorists, usually on similar grounds. Attacks by legal critics, however, sometimes take on an added urgency because their focus often encompasses volatile issues of race. The main complaints against winner-take-all electoral systems are that they provide no representation for political minorities and, correspondingly, that they provide excessive and undeserved representation to majorities. In the peculiar dynamic of American politics, however, political and racial minorities frequently coincide, thereby lending racial overtones to what might otherwise have been purely political critiques. For example, Lani Guinier, a leading critic of winner-take-all electoral systems, has complained that the traditional American winner-take-all system "allows a racially homogeneous majority disproportionate representation at the expense of an historically oppressed racial minority."

57. DUMMETT, supra note 41, at 21.
58. DIXON, supra note 13, at 17, 437-38.
60. See DIXON, supra note 13, at 41. Dummett goes so far as to describe winner-take-all as a system of rotating "temporary dictatorship." DUMMETT, supra note 41, at 26.
61. See AMY, supra note 9, at 27; GIOVANNI SARTORI, DEMOCRATIC THEORY 107 (1965) [hereinafter SARTORI, DEMOCRATIC THEORY].
62. Dieter Nohlen, Two Incompatible Principles of Representation, in CHOOING AN ELECTORAL SYSTEM, supra note 48, at 87; see also AMY, supra note 9, at 27 (describing "[t]he notion that legislatures should reflect as accurately as possible the political desires of the public"); BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 212 (1997) (stating that PR reflects "the precise state of the balance of forces within the electorate"). Other benefits claimed for PR include producing more issue-oriented campaigns and principled politics, AMY, supra note 9, at 155-75, increasing voter turnout, id. at 140-42, and increasing the number of women and minorities elected, id. at 99-139. See also BARBER, supra note 11, at 307 (finding that PR facilitates the representation of minorities).
63. GUINIER, TYRANNY, supra note 1, at 82.
Legal critics tend to attack winner-take-all elections in two different, though closely related, contexts. First, legal theorists sometimes criticize the winner-take-all system in the course of expressing support for the use of race-conscious districting under the Voting Rights Act (VRA) to enhance the representation of racial minorities in multimember governing bodies. The Voting Rights Act was originally enacted to address the problem of racially discriminatory exclusion of blacks from the political process, a phenomenon often denominated "minority vote dilution." Since 1982, the VRA has prohibited the use of any "voting qualification or prerequisite to voting or standard, practice or procedure ... in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." For the most part, this has meant either breaking up large, multiracial jurisdictions into smaller election districts, or redrawing the lines of existing election districts, so as to create at least one election district that members of a racial or ethnic minority can control—a so-called "majority-minority" district. A sometimes unstated goal of this kind of subdistricting is to achieve a kind of rough proportionality in racial control over election districts within the relevant jurisdiction—to draw district lines, in other words, to provide minorities with control over a proportion of all election districts that corresponds to their proportion of the population.

In this context, legal theorists have praised the VRA in language that clearly echoes the language political theorists have used to praise PR. The VRA is said, for example, to aim at allowing blacks to gain political influence by providing them with "proportional legislative power." The VRA, according to its supporters, rejects a notion of politics as the means by which a majority may "arrogate to itself all governing power," thereby repudiating "majority monopolization." In so doing, the VRA protects minorities from the "perils of untrammeled majority factionalism" that can arise when winner-take-all electoral systems "reward [a majority faction] with superordinate representation." In the absence of the kind of legislative

67. This, at least, has been the Supreme Court's major complaint in recent cases about the Justice Department's management of redistricting under the VRA. See Miller v. Johnson, 515 U.S. 900, 927 (1995).
68. See Guinier, TYRANNY, supra note 1, at 72.
69. Id. at 79.
70. Karlan, Undoing, supra note 2, at 3.
71. Id. at 9.
72. Issacharoff, Polarized Voting, supra note 6, at 1862.
73. Id. at 1861.
corrective embodied in the VRA, proponents claim, racial minorities cast "wasted votes" and thus go unrepresented. Some critics, however, have cautioned that the VRA may create its own problems of unfair disproportionality by employing single-member districts as the preferred remedy for minority vote dilution. To designate in advance certain districts for political control by particular groups requires that district lines be drawn first around the designated group and then extended to include a population of "filler people," whose only role is to bring the district's population up to the constitutionally required level, and then to lose elections repeatedly. Single-member districting, on this view, thus merely replicates on a smaller scale the kind of problems that the VRA was intended to solve.

The second context in which legal theorists have criticized winner-take-all systems and praised electoral proportionality is in the course of criticizing the Supreme Court's recent constitutional jurisprudence of race-conscious districting. Until the early 1990s, the Court never intimated that the use of race-conscious subdistricting to remedy minority vote dilution could raise constitutional problems under the Equal Protection Clause. If anything, the Court's rulings suggested not only that minority vote dilution itself raised a serious constitutional problem in need of solution, but that the creation of majority-minority districts was the most natural remedy. In a series of cases beginning in 1993, however, the Court dramatically shifted direction. In Shaw v. Reno, Miller v. Johnson, and several subsequent cases, the Court held that the deliberate creation of majority-minority election districts

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74. Guinier, Tyranny, supra note 1, at 129.
76. The Equal Protection Clause doctrine of one-person-one-vote requires that election districts within a jurisdiction be roughly equipopulous. See e.g., Reynolds v. Sims, 377 U.S. 533, 584 (1964); Wesberry v. Sanders, 376 U.S. 1, 17 (1964); Karcher v. Daggett, 462 U.S. 725, 744 (1983).
violated the Equal Protection Clause when race was the “predominant factor” used to draw district lines.\(^8\) It makes no difference in the Court’s analysis that race-conscious districting is undertaken for the purpose of remedying minority vote dilution,\(^9\) nor even that it is undertaken pursuant to the VRA itself.\(^10\) The constitutional vice of deliberate race-conscious districting, the Court has ruled, is the “expressive harm” that results when the government, through its redistricting decisions, publicly affirms that race is and should be an overriding important factor in the official political life of the community.\(^11\)

Because the *Shaw* line of cases limits the use of race-conscious subdistricting, it limits the ability of government to use districting to achieve, other than inadvertently, any kind of rough racial proportionality in the composition of the legislature. While academic criticism of the *Shaw* cases has focused mostly on their doctrinal confusion and internal inconsistencies,\(^12\) the cases have also drawn the fire of those who support proportionality as a way of ending the political submersion of racial minorities. For example, as one critic has put it, the Court’s approach in the *Shaw* line of cases “prohibits black Americans from negotiating collectively

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82. *Miller*, 515 U.S. at 916.
83. The use of race-conscious districting appears to be permissible, however, if it is used as a remedy for demonstrated, past, intentional dilution of minority voting power. *Mobile v. Bolden*, 446 U.S. 55 (1980).
84. *Miller*, 515 U.S. at 921. In taking this position, the Court seems to have intimated that section two of the VRA may be unconstitutional, at least as it has been applied by the Justice Department. See James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L REV. 893, 933-41 (1997).
with white Americans," with the result that blacks "exercise no political influence." 87

II. PLURALISM AND PROPORTIONALITY

Is it really true that winner-take-all electoral systems, as their critics contend, "waste" votes, and that those who vote for the losing candidate in such systems are literally "unrepresented"? Or are these characterizations nothing more than pejorative descriptions of the normal operation of a majoritarian system? 88 It is certainly true that winner-take-all systems "exaggerate" majority representation compared to a baseline of proportionality, but perhaps that is their point. A system that delivers disproportionate electoral success to majorities is unfair only if proportionality is the correct baseline against which to measure the validity of electoral systems. Yet there is no a priori reason to accept such a definition of electoral fairness, and critics of winner-take-all systems offer no particular defense of their assumption.

Nevertheless, the critique of winner-take-all systems obviously has some resonance, a clear indication that its conclusions flow logically from some set of potentially acceptable premises. What, then, are the assumptions on which the proportionality-oriented critique of winner-take-all electoral systems makes sense? I argue that supporters of proportional systems of representation, including proportional remedies for minority vote dilution under the Voting Rights Act or the Equal Protection Clause, tend to embrace implicitly (and sometimes explicitly) a familiar conception of politics known as interest pluralism. It is only on the assumptions of interest


88. Brian Barry has this to say concerning the argument about wasted votes and lack of representation:

In recent years ... supporters of systems of proportional representation in Britain have succeeded in scoring something of a propaganda victory by pressing the idea that the vote for a candidate who comes in third (or lower) in a plurality system is "wasted" and the people who vote for the candidate are "effectively disenfranchised." But then why stop there? The only way of making sense of this argument is by postulating that anyone who voted for a candidate other than the actual winner—even the runner-up—was "effectively disenfranchised"; and it was not long before some academics stumbled on this amazing theoretical breakthrough. I do not think that anyone of ordinary intelligence would be found saying of an election for, say, the post of president of a club: "I didn't vote for the winning candidate. In other words my vote didn't help elect anybody. And that means I was effectively disenfranchised." It is a little alarming that such palpably fallacious reasoning should have the power to impose on people when the context is a parliamentary election.

pluralism that winner-take-all systems appear as ill-conceived and unfair as their critics contend.

**A. Interest Pluralism**

I shall have more to say about pluralism later, for present purposes, however, a brief sketch will suffice. By interest pluralism, I mean the notion that politics consists of a competitive struggle among the groups and individuals comprising society for control over governmental power. According to the theory of interest pluralism, groups and individuals seek such power for the purpose of using it to pursue their own self-interest. The concept of a socially diverse society comprised of multiple groups, each with some distinctive interest, is an old one in political theory. Its contemporary formulation, however, is of relatively recent vintage. The seeds of interest pluralism as a political theory were sown in the eighteenth century when Adam Smith's theory of economic markets provided a basis for legitimating the pursuit of self-interest. According to Smith, self-interested economic behavior benefits not merely the individuals who pursue it, but society as a whole because it leads to the efficient allocation of resources.

In the mid-nineteenth century, the founders of utilitarianism refined and formalized this idea and generalized it into a full-blown theory of politics. According to utilitarianism, a good society is one that achieves, in Bentham's famous phrase, "the greatest happiness of the greatest number." Consequently, the only proper goal of society is to maximize overall utility. Overall utility, in turn, is understood simply as the sum of the individual utilities of each member of society. Individuals, for their part, maximize their own utility simply by pursuing their personal self-interest however they are able. Utilitarianism provides, then, that political actions are best understood as attempts by individuals to maximize their own personal utility. This means, of course, that all public and political acts are by definition

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89. See infra Part IV.B.2.
91. Aristotle, for example, conceived of society as containing distinct classes, and identified certain kinds of government as ones in which one part of society ruled in its own self-interest. *Aristotle, Politics* bk. III, ch. vii. For example, Aristotle defined oligarchy as the rule of the noble or wealthy class in its own self-interest. *Ibid.* at bk. III, ch. viii.
95. *Ibid.* at 126 ("The interest of the community then is, what?—the sum of the interests of the several members who compose it.")
taken in pursuit of private self-interest. Although this leads to a political life of competitive struggle, the overall effect is good: the political process of bargaining and compromise through which citizens maximize their own individual utility also leads to the maximization of overall social utility and, consequently, to the good of the society in a genuinely ethical sense.

In addition to its assumptions concerning self-interested individual behavior, interest pluralism also entails a particular conception of legislative representation sometimes known, in Hanna Pitkin's terminology, as the "delegate" model of representation. Interest pluralism's goal of social utility maximization cannot be achieved when voters merely elect representatives to pursue their constituents' self-interest: legislators must also loyally pursue their constituents' self-interest in the course of bargaining in the legislature. To the extent they fail to do so, legislative bargaining will fail to adjust diverse social interests properly, thereby failing to maximize utility. Bentham, however, thought sufficient loyalty of representatives could be assured by linking representatives' self-interest to their effective pursuit of their constituents' self-interest through the mechanism of frequent elections.

The birth of modern, observational social science in the late nineteenth century provided new conceptual tools that, when applied to politics, appeared to provide empirical support for utilitarianism's speculative premises about the self-interested behavior of political actors. In a series of influential studies, political scientists argued on both empirical and theoretical grounds that the pursuit of self-interest by, and bargaining among groups and their representatives, was a ubiquitous and indispensable part of any feasible conception of democratic politics.

96. Bentham makes this crystal clear in his withering attack on the corruption of public service in the Britain of his day. See JEREMY BENTHAM, PLAN OF PARLIAMENTARY REFORM 2-15 (London, T.J. Wooler 1818) (hereinafter BENTHAM, PLAN OF PARLIAMENTARY REFORM). Other founders of utilitarianism took the same view. JAMES MILL argued quite directly that government officials will use power to pursue their private self-interest unless restrained. JAMES MILL, AN ESSAY ON GOVERNMENT 50 (Curtin V. Shields ed., Liberal Arts Press 1955) (1820). Though somewhat more moderate, John Stuart Mill made much the same point when he described the chief aim in the design of political systems as enabling each individual to "stand up for" his or her own interests, if not directly, then through chosen representatives beholden to their constituents. J.S. MILL, supra note 17, at 245.

97. PITKIN, supra note 33, at 119-21, 133-34.

98. See BENTHAM, PLAN OF PARLIAMENTARY REFORM, supra note 96, at 5-30 (discussing the control of self-interests and representation). See also JAMES MILL, supra note 96, at 69-70 (explaining that the less time one spends as a representative, the less he will pursue his self-interest); ROSS HARRISON, BENTHAM 207-10 (1983); Jeremy Waldron, Rights and Majorities: Rousseau Revisited, in NOMOS, supra note 39, 46-48 (discussing Bentham's theories); PITKIN, supra note 33, at 200-02 (stating how to make legislators follow the community's interests). The first modern expression of this position is often said to be Schumpeter's statement of the theory of competition for political leadership. See JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269-83 (3d ed. 1950).

assumption of rational utility-maximization through self-interested political behavior provides the standard premise of virtually every kind of political science analysis from the most empirical observational work to the most abstract and theoretical aspects of public choice theory.

**B. THE PLURALISTIC PREFERENCE FOR PROPORTIONALITY**

Proponents of electoral proportionality reveal their reliance on interest pluralism in their language, in their concepts, and, occasionally, in direct acknowledgments. For example, Lani Guinier has made no bones about the fact that her support for proportional remedies to minority vote dilution is based directly on a notion of "interest representation" in which the purpose of electoral systems is to produce in the legislature the "representation and satisfaction" of the interests of minority voters. On this view, the defect of winner-take-all electoral systems is that they "submerge[]" minority interests, thereby violating the right of every political minority "to have its interests satisfied a fair proportion of the time." Pam Karlan also criticizes winner-take-all electoral systems for their capacity to permit the white majority to "ignore[e] the interests of racial minorities," while Rick Pildes describes the VRA as designed to "define representation in terms of the political interests of specific groups."

When they are not describing the political process in terms of the clash of competing interests, supporters of proportionality often speak in terms of power. Thus, according to Guinier, winner-take-all systems award "all the power" to majorities, whereas semiproportional electoral systems such as cumulative voting would give blacks greater "political power," thereby ameliorating the "disproportionate power" that white majorities now wield under the present system. Karlan likewise criticizes winner-take-all...

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100. See generally James A. Gardner, Stop Me Before I Quantify Again: The Role of Political Science in the Study of Election Law, 92 LOW. L.A. L. REV. 1141 (1999); Mansbridge, supra note 99.

101. GUINIER, TYRANNY, supra note 1, at 94; see Gardiner, supra note 100, at 92-117.

102. GUINIER, TYRANNY, supra note 1, at 94.

103. Id. at 104.


106. GUINIER, TYRANNY, supra note 1, at 135.

107. Id. at 95.

108. Id. at 102.
electoral systems for their capacity to "unfairly minimize the political strength of distinct groups in the electorate."109 Political power, of course, is critically important in interest pluralism because it is the tool groups use to compete for the grand prize of interest pluralism: satisfaction of their private interests. Moreover, according to the utilitarian calculus of interest pluralism, all social interests should be represented in proportion to the degree in which individuals embrace them.110 Only then will each interest possess bargaining power commensurate with its magnitude, thereby enabling contending groups to strike a bargain that accurately maximizes overall utility.

This reliance on interest pluralism by supporters of proportionality is more than an artifact of their language—it is integral to the concepts they use to critique winner-take-all electoral systems. For example, as noted above, supporters of electoral proportionality claim both that votes cast for losers in winner-take-all systems are "wasted" or "thrown away,"111 and that the minority is in consequence "unrepresented."112 The concept of "filler people"—a minority who are included in a district only to round out the population and who cannot harbor any realistic expectation of electoral success113—refers to the same idea. Votes for losers, of course, are not literally thrown away; they are counted just like any other ballots, and are tabulated according to the same principle of simple addition. Similarly, those who vote for a losing candidate, including "filler people," are not literally unrepresented in the sense that the legislative seat from their district is unfilled; the seat is filled, though by someone whom they did not support. These concepts are explicable only if representatives entirely ignore the minorities in their districts—those constituents who voted for the representatives' vanquished opponents.

Interest pluralism assumes precisely such a dynamic. It holds that the sole job of elected representatives is to press the interests of their constituents in the legislature,114 yet the loyalty of representatives to their

110. As Bentham put it: "In order that the universal interest may be advanced, all particular interests must be comprehended and advanced . . . ." BENTHAM, PLAN OF PARLIAMENTARY REFORM, supra note 96, at 24. Moreover, the effective aggregation of these interests requires that each individual have a "share, of a certain degree of magnitude, in the choice of a person to form one in the body of the representatives of the people," and that this share be equal. Id. at 25. Bentham concluded from these premises that universal suffrage was necessary for accurate maximization of social utility. See id. at 24-25. J.S. Mill later argued that these conditions require PR as well. Mill, supra note 17, at 303-07.
111. Guinier, Tyranny, supra note 1, at 125, 134. See also Mill, supra note 17, at 303-07.
112. Guinier, Tyranny, supra note 1, at 105; Mill, supra note 17, at 302-03.
113. Aleinikoff & Issacharoff, supra note 75, at 601.
114. This conception of representation has been aptly referred to as the "transmission belt" theory. NANCY L. SCHWARTZ, THE BLUE GUITAR: POLITICAL REPRESENTATION AND COMMUNITY 25 (1988). According to Schwartz, in the Benthamite "delegate" version of the transmission belt
constituents can be assured only by means of electoral control. In a winner-take-all system, that power is held exclusively by the majority in the representative's district. On these assumptions, the minority might indeed be "unrepresented" if, by representation, one means solely the willingness to press within the legislature for satisfaction of a constituent's self-interest. The minority's votes are also on these assumptions "wasted" because those votes do not contribute to disciplining the jurisdiction's elected representative. Both of these critiques, it bears repeating, originated with John Stuart Mill, and it is no accident that PR's greatest supporter was also one of the founders of utilitarianism.

Other concepts employed by supporters of electoral proportionality also reveal their reliance on interest pluralism. They complain, for example, that winner-take-all systems exaggerate majority representation by rewarding the majority with a number of seats that exceeds its proportion of the electorate. Correspondingly, they assert, minority votes are "diluted"...
through proportionate under-representation. But why is this a problem? It is clear that the overrepresentation of majorities constitutes a problem in need of solution only if the proper balance of representation is proportionate. And on what set of assumptions is proportionality to be taken as the normatively correct outcome? Interest pluralism provides the answer. According to interest pluralism, the spoils of government can be divided fairly, and in a way that maximizes overall utility, only when each interest achieves representation in proportion to its strength. Unlike winner-take-all systems, PR does just that: it creates a legislature that reflects "the precise state of the balance of forces within the electorate."118 These forces, appropriately balanced within the assembly, are then in a position to negotiate a fair, utility-maximizing settlement."119 As Sam Issacharoff has forthrightly observed, the Voting Rights Act's embrace of electoral proportionality "rests on the foundations of a failed pluralism in the political process and the distortions of public policy that follow from that failure"120—distortions, that is, from the perspective of a successful pluralism that gives to each interest its proportionate due.

III. WINNER-TAKE-ALL AND THE POLITICS OF VIRTUE

We have seen, thus far, that winner-take-all electoral systems have been heavily criticized, and that such critiques rely predominantly on the assumptions of interest pluralism. At the same time, these critiques have apparently had no real impact upon the public perception and acceptance of winner-take-all electoral systems. There is no public clamor in the United States for proportional representation, not even among groups that might be thought to benefit from it. Two explanations for this disjunction suggest themselves: either the critique of winner-take-all systems fails on its own terms, or winner-take-all systems are justifiable, if at all, on some entirely different set of assumptions about politics. In section B below, I suggest what such an alternative justification might look like. To see why an alternative is necessary, though, we must first examine some of the standard defenses of winner-take-all electoral systems.

A. STANDARD DEFENSES OF WINNER-TAKE-ALL

Legal theorists by and large have not bothered to explore the possible justifications for winner-take-all electoral systems. Political scientists, in contrast, devote considerable attention to the study of electoral systems,

118. _Manin, suprano note 62, at 212.
119. As Richard Katz observes, strict proportionality is necessary only to what he calls "legislative democracy," RICHARD S. KATZ, DEMOCRACY AND ELECTIONS 128 (1997) [hereinafter KATZ, DEMOCRACY AND ELECTIONS], which he defines as a system for handling multiple alternatives through logrolling and trade offs, and which thus requires a multiparty system and proportionality so that groups can benefit fairly. Id. at 42-44.
120. Issacharoff, Polarized Voting, _suprano note 6, at 1890.
although the great majority of them favor PR and seem to find little to recommend in winner-take-all systems. Nevertheless, a small and sometimes vocal group of political scientists has attempted to mount a defense of winner-take-all systems. Much, though by no means all, of this work has been done to support opposition to electoral reform in Britain, where electoral reform societies that support PR have been active since the nineteenth century.  

Some of the most frequently made arguments on behalf of winner-take-all systems are merely attacks on PR rather than justifications for winner-take-all, and may be dismissed at once on the ground that they merely criticize PR for doing successfully precisely what it aims to do. For example, it is often said that PR creates ideological conflict within the legislature. Of course it does—that is its purpose. PR is designed to create a legislature that accurately reflects society's social divisions as a way of creating a forum in which those divisions can be resolved to general satisfaction. Another common criticism of PR is that it gives minorities too much power. Aside from the fact that critics rarely stop to explain how much power is "too much" and compared to what, if the criticism means simply that minorities are capable of exercising significant power under PR, the criticism is pointless. PR aims to give minorities power, at least compared to their lack of power under winner-take-all systems.

A third common criticism of PR condemns it on the ground that it forces legislative compromise. A somewhat more potent variant holds that PR is defective because of its process of post-election coalition formation, a process that prevents voters from knowing at the time of the election just what policies they are approving, or even what government they are electing. Yet here, too, critics attack PR for doing only what it seeks to do. The point of any principled kind of PR is to assemble in the legislature representatives of all of society's significant interests and then set them loose to negotiate, compromise, logroll, and otherwise buy each other off in a process that efficiently and, from the utilitarian perspective ethically, allocates society's resources and the satisfaction of private wants that such resources provide.

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121. See supra note 17 (discussing the origins of PR in Great Britain and the United States).
125. See Maurice Duverger, Which Is the Best Electoral System?, in CHOOSING AN ELECTORAL SYSTEM, supra note 40, at 31, 32; see also Peter Hain, PROPORTIONAL MISREPRESENTATION: THE CASE AGAINST PR IN BRITAIN 30-32, 45-46 (1986) (discussing, as an example, post-election coalition formation in the former West Germany, and summarizing the main points against PR).
Defenders of winner-take-all systems have, however, developed several stronger arguments that seek to justify winner-take-all rather than merely attack PR. Perhaps the most common argument advanced on behalf of winner-take-all systems is that they produce strong leadership and a concomitant capacity to govern. As Giovanni Sartori has observed, winner-take-all systems “do not seek a parliament that reflects the voting distributions; they seek a clear winner. Their intent is not only to elect a parliament but at the same time to elect . . . a government.” Winner-take-all systems thus over-reward electoral success for the express purpose of assuring majoritarian control over the government. The idea here is that such a government will be able to act decisively and pursuant to a single, coherent plan, unlike a PR government, which must constantly compromise to bring along its coalition partners. Nevertheless, as Lijphart and Grofman point out, “[t]o the partisans of the PR principle, strong government based on disproportional representation is illegitimate, just as dictatorial government, however effective and benevolent, would be unacceptable.”

The defenders of winner-take-all systems sometimes justify such systems on other grounds. For example, winner-take-all systems are often said to enhance democratic accountability. Their tendency to award seats disproportionately to the majority party makes them extremely sensitive to small changes in public opinion. As J.A. Chandler has explained:

> The leaders of a political party that can remain in power despite considerable loss of electoral support will clearly find less need to

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126. See Lijphart & Grofman, Choosing an Electoral System, supra note 40, at 3, 5; Quade, supra note 122, at 39; see also Schumpeter, supra note 98, at 272-273; Elaine Spitz, Majority Rule 26, 40 (1984).


128. PR supporters respond that majoritarian governments may also have to compromise. See Amy, supra note 9, ch. 8. Another, related argument made in defense of winner-take-all electoral systems is that they provide stability. According to what has come to be known as “Duverger’s Law,” winner-take-all electoral systems tend to produce two-party systems, whereas PR tends to produce multi-partyism. See generally Maurice Duverger, Political Parties: Their Organization and Activity in the Modern State (1954) (outlining electoral law and party methodology); William H. Riker, Duverger’s Law Revisited, in Electoral Laws and Their Political Consequences, supra note 19 (discussing the ambiguity in Duverger’s claim). Keeping the number of parties down to two makes it easier to produce stable one-party government. Lijphart & Grofman, Choosing an Electoral System, supra note 40, at 5; see also Katz, Theory of Parties, supra note 122.

129. Lijphart & Grofman, Choosing an Electoral System, supra note 40, at 6.

take account of popular opinion than the leaders of a party who
realize that only a relatively small reduction in their electoral
strength will remove them from office. One of the most criticized
consequences of the plurality system, the wide variation in votes
cast to seats won, therefore becomes a positive advantage for the
development of responsive governments. Within a plurality system
a relatively small loss of votes will result in a disproportionately
large loss of seats for the largest parliamentary parties and will be
likely to threaten their ability to form part of a government.\footnote{131}

Moreover, a governing party that does not respond effectively to
changes in public opinion will, on this view, be more vulnerable to
"expulsion" from office; winner-take-all systems thus provide voters with a
more effective "means of ousting" than does PR.\footnote{132} A related argument is that
governments formed under a winner-take-all system will be more moderate
than those formed under PR.\footnote{133} Because a winner-take-all system places such
a premium on majority support, it "encourages the competing parties to
adopt a majority-forming attitude. The parties incline to be moderate, to
seek conciliation."\footnote{134} This forces the parties "to coalesce before the balloting
occurs," a process that requires them to "synthesize the divergent interests
and opinions" of voters.\footnote{135} The result is a majority government of moderate
views.

Both of these arguments, however, are vulnerable to the objection
framed by Lijphart and Grofman: who cares? Winner-take-all systems may
provide accountability, but to whom? If accountability is purchased at the
price of excluding minorities from participating in the processes of
governance, the outcome is still unfair and the objection to winner-take-all
systems stands unrefuted. Similarly, it hardly matters from the point of view
of PR supporters that a majoritarian government adopts moderate positions
if the views of the minority are not fairly—that is to say, proportionately—
reflected in those positions. The truth seems to be, as Peter Taylor has
observed, that defenders of winner-take-all systems simply ignore PR’s
strongest claim—the fairness issue—and thus "the moral argument against
reform seems largely to have gone by default."\footnote{136}

The real reason why the standard arguments in favor of winner-take-all

\footnote{131. J.A. Chandler, \textit{The Plurality Vote: A Reappraisal}, 30 POL. STUD. 87, 92 (1982).}
\footnote{132. Pinto-Duschinsky, \textit{supra} note 130, at 10.}
\footnote{133. KATZ, \textit{Theory of Parties}, \textit{supra} note 122, at 122; Lardeyret, \textit{supra} note 123, at 33; Quade, \textit{supra} note 122, at 41; \textit{Jenkins Commission Report}, \textit{supra} note 17, at 5.}
\footnote{134. Quade, \textit{supra} note 122, at 41.}
\footnote{135. Lardeyret, \textit{supra} note 123, at 33. \textit{See also} KATZ, \textit{Theory of Parties}, \textit{supra} note 122, at 27.}
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fail to refute the proportionalist arguments from fairness is that these arguments attempt to meet proportionalists on their own ground. They defend winner-take-all systems, that is, on the instrumental ground that such systems produce good results: firm government, accountability, moderation, and so forth. There are no doubt non-instrumental grounds for desiring these benefits, but the defenders of winner-take-all seem to prefer them predominantly as instrumental goods. Firm government thus is good because it enables the society to achieve its goals efficiently. Moderation is good because it reduces conflict, which is inefficient. Accountability is good because it produces both firm government and moderation. The problem with this approach is that it proposes a certain view of what kind of political policies will best maximize overall social utility without subjecting those policies to the fair negotiation process that utilitarianism demands, a process of negotiation and trading among all significant social interests. If it is true, for example, that society as a whole indeed prefers a firm, decisive government to one that is paralyzed, the PR negotiation and coalition-building process will, according to its proponents, produce just such a government automatically. The reason PR countries sometimes do not have such a government, PR's advocates would argue, is precisely because of an underlying divergence of interests, one that cannot be made to disappear merely by appealing to some presumed cross-cutting interest in firmness. Favoring some interests at the expense of others will of course remove the logjam, but, on proportionalist premises, it will do so only by forcing on the dissenting minority an unfair and inefficient allocation of social resources.

On the assumptions of interest pluralism, then, there can be little question that winner-take-all electoral systems are distinctly inferior to proportional ones. If any justification for winner-take-all systems is to be found, it must be found on some conception of politics other than interest pluralism, one that views politics as predominantly something other than a forum for the clash and accommodation of competing interests.

B. Virtue and the Basis of Winner-Take-All

Interest pluralism, as I have indicated, is a relatively recent conception of politics. A far older—indeed, in western thought the original—conception of politics holds that its purpose is to identify and achieve the common good of society. Politics, on this view, is the forum in which truth emerges and is applied for the benefit of all. It is an arena in which actors are expected to behave virtuously, and where virtue is measured in part by the willingness to value the good of all ahead of private interests and to act accordingly. To speak of politics in this way is to use the term politics in its

137. See Sartori, Democratic Theory, supra note 61, at 107 ("[I]t is symptomatic that the very critics of proportional representation at a certain point accept the ground of discussion selected by their adversaries . . .").
original sense—as referring to the kind of life good citizens aspire to lead in their polis—and I shall from time to time use the term in this way, especially to contrast it with pluralism, a kind of life that the Greeks would have considered, again in its original sense, idiotic—that is, centered upon the personal or private. To avoid confusion, however, I shall also use the term politics of virtue to refer to the older conception of politics.

Winner-take-all electoral systems have been in use since the birth of modern democracy. They seem to have been adopted without any awareness of alternative methods of election, and indeed without any kind of reflection at all. In this section, I demonstrate that winner-take-all electoral systems were conceived and introduced into the American democratic process at a time when the idea of politics as a politics of virtue was unchallenged. As a result, at the time of their introduction into American democratic political life, winner-take-all electoral systems would have seemed not only entirely natural and unremarkable, but the only kind of electoral system even worth contemplating.

1. The Basic Inheritance

The generation that founded the United States and decided upon the initial structure of its political institutions inherited and embraced two basic ideas concerning the nature of politics: first, that the common good of society was objective and capable of discovery; and second, that politics was the means by which the objectively knowable common good was revealed to society's members. The precise way in which politics reveals the common good has been the subject of considerable debate throughout American history between, broadly speaking, two schools of thought: a republican school holding that the common good emerges from the deliberation of wise, virtuous, and largely independent elected representatives, and a populist school holding that the people know better than their representatives where the common good lies. Examination of this debate is deferred to the next subsection.

a. The Objectivity of the Common Good

The idea that society has a single, objective common good falls within a long tradition in western thought of what might be called, in Virginia Held's useful terminology, a "unitary" theory of the public interest. On this understanding, the common good is objective in that it "has an existence independent of private preferences" and thus stands for some body of timeless, substantive principles with which current policies must accord.

141. Richard E. Flathman, The Public Interest: An Essay Concerning the Normative
Such a common good is also unitary if "a valid judgment that a given measure, decision, or arrangement is in the public interest rules out the possibility that conflicting individual claims of interest... may also be valid."142

This conception of the common good goes back at least as far as Plato, and grows logically out of the platonic understanding of the world as a single, harmonious whole in which the good of one part is necessarily linked organically to the good of the entirety.143 The idea that certain propositions about the world and about morals are objectively either true or false, and that humans ought to conform their behavior to the true propositions, also has deep roots in the lengthy tradition of natural law running from Aristotle through Aquinas to the natural law writers of the Enlightenment.144 The content of the natural law may sometimes be difficult to discover, "but if this is truly ascertained, it will be in the interest of the community and in the common interest of all its members."145

By the eighteenth century, such ideas were thoroughly commonplace. They are evident in such diverse accounts as Rousseau’s insistenc that the general will “is always rightful and always tends to the public good,”146 and Edmund Burke’s description of Parliament as the deliberative assembly of a single nation, with a single common interest which it is the role of Commons to express.147 The objectivity of the common good, and the idea that humans possess the tools to find and implement it, even infiltrated Anglo-American legal institutions. Blackstone, for example, held that common law rules embody "the wisdom of the ages,"148 and should thus be treated as expressions of true principles on the ground that "no individual or even an entire generation can match the experience and wisdom accumulated over countless generations and reposed in the law."149

It should come as no great surprise, then, to find that the American founding generation broadly accepted the idea of an objective, and objectively knowable, common good. This notion comes through clearly in, for example, the language of the Declaration of Independence, which

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142. HELD, supra note 139, at 135.
143. Id. at 136-40. This idea persisted well into the Enlightenment. See DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY ch. 2 (1989).
145. HELD, supra note 139, at 141.
147. See DE GRAZIA, supra note 116, at 38, 41.
148. 1 WILLIAM BLACKSTONE, COMMENTARIES *42.
149. GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 64 (1986).
MADISON'S HOPE

declares certain "truths" to be "self-evident." These words, in Morton White's thorough analysis, mark Thomas Jefferson, the document's author, as a "moral rationalist"—one who holds that "we use our intuitive reason in perceiving self-evident truths of natural law." Indeed, the leading revolutionaries, according to White, "held that there are truths in ethics and politics which have all the certainty of mathematical axioms and which would be denied" only by those who have become debased.

The same ideas appeared just as prominently during the period when the Constitution was drafted and debated. As Joseph Bessette recently observed, "the entire case for replacing the Articles of Confederation with the Constitution of 1787 was a massive argument that there is a common interest that binds the parts of the union." Federalists and Anti-federalists may have disagreed on many things, but the objectivity of the common good was not one of them. The Federalists "were emphatic... in holding that there exists an objective, collective interest which, factoring out subjectivities, forms the true standard for representative rule." The truth, for Federalists, was "constant and universal and capable of being discovered by enlightened and reasonable men." The Anti-federalists, meanwhile, believed even more strongly "that any political society has a common good or ruling principle, higher than and inclusive of the good of its parts."

Madison's most famous argument in support of the Constitution, to cite another prominent example, is incomprehensible except on the assumption of an objective common good. In Federalist No. 10, Madison responds to critics of the proposed Constitution who complained about its proposal to

\[150. \text{THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).} \]
\[151. \text{MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 77 (1978).} \]
\[152. \text{Id. at 61.} \]
\[153. \text{Id. at 94, 95.} \]
\[154. \text{JOSEPH M. BESSERTE, THE MILD VOICE OF REASON 28 (1994); see also JAMES A. MORONE, THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT 41 (rev. ed. 1998) (asserting that the republicanism of the founding period involved "the subordination of individual interests to the common good," which contemplated "a distinct public interest with an objective existence of its own").} \]
\[156. \text{GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 362 (1992) [hereinafter WOOD, RADICALISM]. Wood, however, maintains that the Federalist certainty in universal truths was by the 1810s quickly and dramatically replaced by a more open-ended notion of truth as diverse and considerably more democratic, an episode that Wood calls "an epistemological crisis as severe as any in [American] history." Id.; see also Gordon S. Wood, THE DEMOCRATIZATION OF MIND IN THE AMERICAN REVOLUTION, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 109 (Robert H. Horwitz ed., University Press of Virginia, 3d ed. 1986) (making a similar argument). If Wood's point is that competing views of truth began to emerge as genuine competitors, then he is surely correct. However, if he means to say that the Federalist conception of truth as objective and unitary was completely replaced, he has grossly overstated his case, as the ensuing discussion in text of the Progressives makes clear.} \]
\[157. \text{McWilliams, supra note 155, at 21.} \]
create a single republic of continental scope. Madison defends the size of the proposed republic on the ground that a larger nation would be less susceptible to "majority faction," which he regards as the single greatest threat to liberty against which constitutional designers need to guard. In the course of his argument, Madison defines a faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." This critical definition shows two things. First, Madison obviously believed there is such a thing as the "aggregate interests of the community," or common good. Second, he believed that a majority should be deemed a faction if it acts in opposition to the common good, something that is impossible on pluralist or other relativist assumptions under which the beliefs of the majority define the common good. Consequently, for Madison, the common good was objective, and existed independent of the transient beliefs of any particular group of citizens, even a majority.

The notion of an objective common good persisted long after the founding to become a staple of American political thought. For example, the belief in an objective common good formed the centerpiece of the ideology of the highly influential Progressive reform movement of the early twentieth century. Progressives were deeply critical of what they considered to be the debasement and corruption of turn-of-the-century American politics. The main thrust of the movement was "to restore a type of economic individualism and political democracy that was widely believed to have existed earlier in America and to have been destroyed by the great corporation and the corrupt political machine," and in so doing to "bring back a kind of morality and civic purity that was also believed to have been

158. THE FEDERALIST No. 10 (James Madison).
159. Id. at 60-61 (Jacob E. Cooke ed., 1961).
160. Id. at 57.
161. Interestingly, one of the most important contemporary pluralist critiques of Madison implicitly acknowledges this point. In his Preface, Robert Dahl criticizes Madison's definition of majority faction on the ground that we can never know what would amount to such a faction because Madison never specifies the rights and interests of the citizenry in opposition to which such a faction would be aligned. Moreover, Dahl argues, the majority itself is by definition excluded from defining what constitutes a faction, because on Madison's assumptions of self-interested behavior, it would never so define itself. Similarly, a minority cannot do so since it would by hypothesis use that power tyrannically. DAHL, A PREFACE TO DEMOCRATIC THEORY, supra note 99, at 25-27. This argument is greatly overstated, but it nevertheless exemplifies vividly that Madison must have envisioned not only an objective common good, but one that was accessible only to some kind of elite that has both the knowledge and wisdom to discern it and the virtue to pursue it. See THE FEDERALIST No. 57, at 384 (James Madison) (Jacob E. Cooke ed., 1961) ("The aim of every political constitution is or ought to be first to obtain for rulers men, who possess most wisdom to discern, and most virtue to pursue the common good of the society . . . .").
Progressives thus tended to support a package of reforms designed to break what they saw as control over political institutions by special interests that manipulated the political system for their own advantage and contrary to the interests of society generally. Such reforms typically included the initiative and referendum, popular recall of elected officials, short terms of office, a professionalized civil service, and other measures designed to remove control over the political system from career politicians and to place that control either in the people directly, or in professional, and presumably apolitical, experts and managers.

A basic tenet of Progressive reform was that "there was a public interest which could be defined objectively and which, if implemented, would benefit all citizens equally."¹⁶⁴ This public interest, Progressives held, becomes known through the achievement of a public consensus.¹⁶⁵ Progressives had faith that such a consensus would inevitably coalesce: clearly echoing beliefs prevalent a century earlier during the founding period, Progressives expected that "in the formal process of election and decision making a consensus will emerge through the process of right reason and by the higher call to the common good."¹⁶⁶ So robust was the Progressive conception of the common good that Progressives frequently asserted that many issues, particularly those dealing with the administration of local government, were inherently apolitical¹⁶⁷—that is, admitted of only one best answer. This position led Progressives to support, with considerable success, the institution of nonpartisan political systems in many local jurisdictions throughout the United States.¹⁶⁸

Today, of course, the ideology and logic of the common good is not only a staple of political rhetoric, but is part of the mandatory vocabulary for any official or candidate. It is almost never permissible for a politician to support some measure on the ground that it will benefit some group at the expense of another. One must rather claim either that the supported

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¹⁶² Richard Hofstadter, The Age of Reform 5 (1955) [hereinafter Hofstadter, Age of Reform].

¹⁶³ See generally Hofstadter, Age of Reform, supra note 162; Richard S. Childs, Civic Victories: The Story of an Unfinished Revolution (1952); Benjamin Parke De Witt, The Progressive Movement (1915).


¹⁶⁸ See id.; Charles R. Adrian, Some General Characteristics of Nonpartisan Elections, 46 Am. Pol. Sci. Rev. 766 (1952); see also Lee, supra note 166, at 34-35 (discussing the role of nonpartisan politics in California).
measure is directly in the common interest, or that the measure, although in the immediate interest only of some particular group, is indirectly and in the long run in the interest of all. For example, a politician may successfully support dairy subsidies, not on the ground that they benefit dairy farmers at the expense of consumers, but on the ground that a strong dairy industry is in the interest of all Americans. The ideology of the objective common good has thus been a constant in American political life and thought.

b. Politics as a Politics of Virtue

In political thought, to postulate the existence of an objective common good tells only half the story, for it says nothing about how the common good can be known and realized. Such an idea becomes political only when it is linked to some conception of politics. In western political thought, the notion of an objective common good has frequently been associated with the idea that the main purpose of politics is first to identify the common good and then to take action to achieve it. This linkage occurred from the very beginning: Plato's 

Republic

is nothing less than an "attempt to establish the claim of truth to sovereignty." Although Plato derived from this equation a system of government by philosopher-king, other assumptions about knowledge, society, and political behavior can lead to the conclusion that other forms of government are better suited to identify and implement the common good. Such claims, when made on behalf of democracy, amount to an "epistemic" theory of democracy: one that postulates the existence of "right and wrong answers" to public questions, and holds that democracy is better equipped than other forms of government to get at and act upon the right answers. Whatever the form of government it is invoked to justify, however, the basic account of politics remains the same: it is a forum for perceiving and acting upon the common good. To find the common good, one must seek it. To do the common good, one must pursue it, even at the expense of one's own private interests. Politics, on this view, necessarily means a politics of virtue, one in which political actors are obliged to act, and do in fact act, virtuously.

Just as Americans inherited a conception of an objective common good, so they also inherited the companion idea of politics as a politics of virtue aimed at discerning and achieving society's common interests. To a considerable extent, this idea entered American political thought through liberalism and the understandings of popular sovereignty from which it emerged. In England, representative assemblies originated in the king's need to obtain agreement from all segments of the realm, an agreement

that at the time was seen as part of a pragmatic negotiation to obtain compliance with taxation and other laws. Such an assembly "had to be assembled. It had to be composed from the parts of the whole." As power gradually passed from the crown to Parliament, however, and legislators began to make policy for the whole society, "they had to think in different terms from the needs and desires of their localities; sharing regal authority, they had to think regally, to think for the nation rather than the neighborhood." The evolving idea that elected representatives had to consider and act upon the interests of all fit neatly with another idea that persisted well into the eighteenth century: "[t]he ancient ideal of an organic polity whose parts, operating independently within their assigned spheres, fitted together harmoniously." The combination of these ideas led by the eighteenth century to an understanding, widely accepted in Britain and America, of how public officials ought to behave: "the difference between rightful, virtuous rulers and unworthy parvenus was the ability to subordinate private interest to the common good." This understanding showed up clearly, for example, in the general distrust during that period of political parties, which were associated with the selfish pursuit of private interests:

Party rivalries signified illness within the body politic, malfunctions within the system, not because all interests were expected to harmonize with each other automatically but because right-minded men—men motivated not by private but by public interests—would naturally find ways of reconciling them.

This emphasis on virtuous political behavior, and its measurement in terms of an inclination to seek the common good rather than private interest, is inscribed at the deepest levels of liberal thought. Liberalism is sometimes taken to endorse a kind of atomistic individualism that justifies governmental institutions based on the pluralistic pursuit of self-interest, and as to liberalism's contractualist aspects there is surely some truth to this


172. Id. at 44.

173. Id. at 47.


176. BAILYN, supra note 174, at 36-37. See also RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840, at 9 (1969) [hereinafter HOFSTADTER, PARTY SYSTEM] (finding that the "root idea" of Anglo-American political thought about parties was that "parties are evil").

observation. However, it must not be forgotten that liberal thinkers simultaneously saw natural law as an ever-present constraint on what government—and the self-governing people from which that government derives its legitimacy—may rightfully do. This disjunction points to a tension in liberalism that has frequently occupied political theorists: how is it possible to achieve the kind of genuinely collective self-rule that liberalism authorizes, yet at the same time assure that such self-rule complies with natural law—that it is, in other words, substantively good?

Some theorists have found an answer in positivism, which dissolves the tension only by denying that collective self-rule has any intrinsic tendency toward justice.\(^{178}\) Liberal thinkers of the Enlightenment, however, resolved the tension differently: by assuming the inherent virtue of political actors. As Willmoore Kendall has remarked, much of what Locke says is intelligible only on the hypothesis that he believed that “the majority of any commonwealth can be trusted, not only to arrive at and fight for and impose its will, but to arrive at and fight for and impose a right will.”\(^{179}\) Locke reached this conclusion, Kendall adds, because he believed that the average person is “rational and just.”\(^{180}\) John Dunn, another Locke scholar, similarly observes that Locke saw “the nature of legitimate political authority as a structure of well-founded trust.”\(^{181}\) On this view, government itself thus “presupposes the presence of virtue—the presence of trustworthiness—in the society.”\(^{182}\)

There can be little question that this is how the American founding generation understood its liberal inheritance. An emphasis on virtue was, of course, a staple of Anti-federalist thought,\(^{183}\) but even Federalists, those allegedly “prototypical liberal pluralists,” expected “the majority of citizens, and, even more so, most rulers to be ‘virtuous’ most of the time.”\(^{184}\) The

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179. WILLMOORE KENDALL, JOHN LOCKE AND THE DOCTRINE OF MAJORITY-RULE 134 (1965) [hereinafter KENDALL, LOCKE].

180. Id. Nancy Schwartz agrees with this account. See SCHWARTZ, supra note 114, at 15-16.


revolutionary generation, according to Gordon Wood, "sought to construct a society and government[] based on virtue and disinterested public leadership and to set in motion a moral movement that would eventually be felt around the globe."\(^{185}\) To this end, they sought to create a government that "would foster rule by the informed and reasoned judgments of the citizenry,"\(^{186}\) a government that would be deliberative in the sense of aiming to achieve some public good rather than engaging in self-interested calculation.\(^{187}\) Such a government was intended to act morally, yet "self-love," wrote Jefferson, "is no part of morality."\(^{188}\) To keep the United States government on the right course, its institutions were framed, according to Madison, with the aim of "obtain[ing] for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society."\(^{189}\) The Framers thus sought to minimize the impact of self-interest on politics and "allow more public-spirited motives to hold sway."\(^{190}\) They held out, in sum, "the possibility of a virtuous politics."\(^{191}\)

This conception of politics has continued to exert a substantial influence on American political thought. Throughout the early nineteenth century, the dominant political ideal was one of wholeness based on an underlying social unity of interest. "Representation in the minds of most Americans of the pre-Civil War period," writes Alfred De Grazia, "was representation of the whole people, not of any part or of any minority."\(^{182}\) In his monumental study of the evolution of American conceptions of self-rule, Robert Wiebe reaches a similar conclusion: "19th century democracy

185. Wood, Radicalism, supra note 156, at 229.
186. Bessette, supra note 154, at 1.
187. See id. at 46, 48.
188. Letter from Thomas Jefferson to Thomas Law (June 13, 1814), in The Life and Selected Writings of Thomas Jefferson 636, 638 (Adrienne Koch & William Peden eds., 1972) [hereinafter Life and Writings]. For more on this aspect of Jefferson's thought, see David N. Mayer, The Constitutional Thought of Thomas Jefferson 73 (1994); Adrienne Koch, The Philosophy of Thomas Jefferson 40-43 (1943). Later in his life, Jefferson apparently moderated his view on this subject, coming to believe that self-love might nevertheless lead people to virtuous positions, and that such positions were none the worse for having been arrived at by this route. See Jean M. Yarbrough, American Virtues: Thomas Jefferson on the Character of a Free People 104-05 (1998); Wood, Radicalism, supra note 156, at 220.
189. The Federalist No. 57, at 384 (James Madison).
acknowledged no significant contradictions between individual self-interest and collective action." To Americans, Wiebe writes, elections "looked just like the People deciding," and by mid-century, "American" and "democracy" were synonymous; Americans "merged People and nation" through the mechanism of democracy.

These observations are borne out in the politics of the Jacksonian era. For Jackson, "the people" comprised all segments of the community, and they had a collective will that transcended fluctuating majorities and was based on a common interest transcending considerations of section and class. At the same time, Americans of the Jacksonian period carried forward the republican ideology of politics as an arena of virtue, an attitude which produced a disposition to see politics as a struggle between good and evil, expressed as the eternal warfare between liberty and power, virtue and corruption. It did not imply a tolerance for many and varied interests, each contending with the other for a place in the sun. Instead, ... republicans of that era... tended to regard their opponents as enemies of liberty itself, not as rival interests having equal claims to public favor.... [These] prevailing political attitudes tended to make compromise very difficult, if not impossible. Since each participant in a quarrel tended to view the interests of his constituents or himself as essential to the common good and those of his opponents as subversive of liberty itself, polemical controversies were frequent and vociferous.

The pursuit of private interest, in this formulation, was thus understood as a form of corruption, a disease of the body politic.

A strikingly similar view of politics was advanced much later in the nineteenth century and on into the twentieth by the Progressives. Like the Jacksonians, Progressive reformers sought to eliminate corruption from and restore purity to politics. Drawing on a Yankee-Protestant tradition of disinterested public participation in politics, which they sometimes contrasted with what they viewed as the hierarchical and dependent political behavior of recent European immigrants, Progressives advocated a form of

194. Id.
196. HARRY L. WATSON, LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA 47-48 (1990). See also HOFSTADTER, PARTY SYSTEM, supra note 176, at 8 (finding that the early Federalists and Republicans did not see themselves as “alternating parties in a two-party system”; when Republicans prevailed and Federalists withered away, this was seen as “evidence of the correctness of their views”).
197. HOFSTADTER, AGE OF REFORM, supra note 162, at 5.
198. Id. at 7-11.
politics in which virtue and the pursuit of the common good played preeminent roles. On the Progressive ideal, officials were “expected to make decisions on the basis of what they perceived to be good for the entire city, not just one geographic or social segment of it.” They would be, in Nancy Schwartz’s evocative formulation, “Kantian; the representative was to act as everyman, and could attend to the public interest by thinking in general categories about issues at hand.” Voters, in turn, bore “the responsibility... to educate themselves and vote for the best candidates strictly on the merits, not on the basis of party loyalty.” Citizens were thus obliged to work together to find the “right answer to a political problem,” an enterprise that Progressives believed could succeed because of their “belief in the underlying harmony of society.” The Progressives had faith in “the civic virtue... of the individual, his willingness not to pursue his interests but to transcend them.” To the extent that the people needed leadership to fulfill these duties, Progressives echoed the Jeffersonian imperative to do so by providing an appropriate education. In this way, the ultimate Progressive vision of social justice in the common good could be realized, a vision according to which, in the words of a leading Progressive reformer, “[t]he tendency to democracy is a tendency to altruism.... If democracy holds true to faith, true to its instinct, we may expect democracy to be just.”

On this view, then, politics is manifestly understood to be an arena in which private, selfish interests are set aside and in which all political actors work together to discern the common good and to take collective action to achieve it. Politics consequently becomes a forum for the forging not of compromise, but of collective unity; for the settling, not of conflicting individual claims to collective resources, but of the content of the singular

200. Schwartz, supra note 114, at 124.
201. Judd, supra note 164, at 94. See also Hofstadter, Age of Reform, supra note 162, at 259; Wiebe, Self-Rule, supra note 193, at 163-64.
204. Hofstadter, Age of Reform, supra note 162, at 260.
207. See Wiebe, Self-Rule, supra note 193, at 71-73, 82-83.
common good itself. The connection of this kind of thinking to a winner-take-all electoral system is, I hope, beginning to become clear. Before tracing those connections more explicitly, however, I want to explore this conception of politics a bit further by examining the details of an important fault line, one that divides proponents of a politics of virtue according to their views as to how politics actually functions to identify the common good. These details will become important when we turn in Part IV to the question of whether it is possible for an electoral system to permit a politics of virtue to flourish while simultaneously confining a self-interested, pluralistic politics within the bounds of fairness.

2. The Epistemological Problem

If society has some objective common good that it is the function of politics to identify, how precisely can a democratic political system lead society to discover it? Democratic political thought has generally answered this question in one of two different ways. One school of thought, which I shall call republican, holds that democratic societies discover the common good by electing wise and virtuous representatives, who then deliberate independently—that is, without significant regard to the beliefs of their constituents. Through this deliberative process, the representatives find the common good—or at least make the closest approach to it of which society is capable—and then use governmental power to achieve it. A second and generally more recent school of thought, which I shall call populist, holds that the main repository of wisdom and virtue in any society is the people themselves rather than their representatives. On this account, the people decide collectively upon the common good and then elect representatives whose principal responsibility is to implement the common good as the people have decreed it. Representatives thus have little independence, serving much more directly as agents whose function is to carry out a set of instructions from their principals.

a. Republicanism: Wise and Virtuous Representatives

Republicanism typically relies on what is sometimes called the “trustee” model of political representation. On this model, government officials are entrusted with the power to rule, but they are confined to using that power in behalf of its intended beneficiaries—the people. Representation, on this model, is not some kind of second-best substitute for direct democracy required by the inability of a large citizenry to meet in person; it is, rather, a different and superior form of government, a system the purpose of which


is "to select leadership, not to maximize democracy." Moreover, republicanism does not contemplate that representatives will take their seats in the assembly committed in advance to a concrete set of policies or even abstract beliefs. Because officials are selected precisely on the basis of their own personal wisdom and virtue rather than the wisdom and virtue of their constituents, representatives must exercise considerable autonomy of judgment, thus raising the distinct possibility that they will do things differently than their constituents might think right. The legislature, then, becomes a deliberating body, "a place where individuals form their wills through discussion," and it is clear that "discussion can produce agreement among participants with divergent opinions at the outset only if they are in a position to change their minds during the course of the exchange"—if they are not, that is, bound to some externally determined position.

Once again, this model of politics has ancient roots: "Immemorial practice and an enormous weight of political theory accepted that the character and quality of a people depended on the good influence of their government and also taught that this required attention to the virtue of the rulers, assumed to be a prince or some sort of aristocracy." Although ancient thinkers such as Aristotle did not rule out the possibility that preeminent virtue could be found in any segment of society, medieval thought distinguished clearly between social quantity and social quality (maior pars and sanior pars) and tended to locate the latter in a ruling aristocracy. By the Enlightenment, however, this concept was replaced by the idea of what Jefferson, echoing contemporary political terminology, called a "natural aristocracy"—one based not on birth but on merit. The

210. SARTORI, DEMOCRATIC THEORY, supra note 61, at 108.
211. MANIN, supra note 62, at 203-05; HOFSTADTER, PARTY SYSTEM, supra note 176, at 47-48.
212. MANIN, supra note 62, at 205-06.
213. Id. at 203-06.
214. KETCHAM, supra note 92, at 78.
215. In his discussion of which kinds of constitutions are best suited to various political communities, Aristotle advances a kind of geometric formula that identifies the portions of the community that predominate in "quantity" and the portions that predominate in "quality," and weighs them against one another to decide where power should lie. In applying this formula to various examples, he proceeds immediately to the difficult cases: the ones in which "quality may belong to one of the parts which compose a state, and quantity to another." ARISTOTLE, supra note 91, bk. IV, ch. xii, at 1296b17. His first example is the realistic one in which the low-born exceed the high-born in quantity, but not in quality. Nevertheless, it is clear from his formula that nothing requires quantity to be weighed against quality, and where the two coincide in a single class that class, whatever it may be, should rule. Id. He also specifically recognizes a type of constitution, "polity," in which "the masses govern the state with a view to the common interest." Id. at bk. III, ch. vii, 1279a32.
216. KATZ, DEMOCRACY AND ELECTIONS, supra note 119, at 18-21, 29-30.
The concept of a natural aristocracy did not do away with the idea that some are better suited than others to rule, but merely democratized it: members of a natural aristocracy of wisdom and virtue might, at least in theory, be found in any social class or economic condition.\(^\text{218}\)

The idea of a natural aristocracy entitled to be elevated to the reins of government fit well with long-established social customs of hierarchy, patronage and dependence.\(^\text{219}\) England, wrote Walter Bagehot, was “a deferential country” in which members of the lower classes “did not really form their own opinions . . . [but] were in fact guided in their judgment by the better educated classes.”\(^\text{220}\) While this deference had traditionally been exercised in favor of “rank and wealth,”\(^\text{221}\) it required no great shift of attitude or behavior to redirect the habit of deference toward the republican value of merit. The result, indeed, was a substantial gain in status for the ordinary person, for behavior that had previously been understood as the due of social and hereditary privilege was reconceptualized in a way that credited ordinary citizens with an exceedingly important, though certainly limited, kind of skill and judgment. Montesquieu put it thusly:

> The people are extremely well qualified for choosing those whom they are to intrust with part of their authority. They have only to be determined by things to which they cannot be strangers, and by facts that are obvious to sense. They can tell when a person has fought many battles, and been crowned with success; they are, therefore, capable of electing a general. They can tell when a judge is assiduous in his office, gives general satisfaction, and has never been charged with bribery: this is sufficient for choosing a praetor. They are struck with the magnificence or riches of a fellow-citizen; no more is requisite for electing an edile [executive]. These are facts of which they can have better information in a public forum than a monarch in his palace. But are they capable of conducting an intricate affair, of seizing and improving the opportunity and critical moment of action? No; this surpasses their abilities.\(^\text{222}\)

\(^{218}\) HARRY L. WATSON, LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA 5-6 (1990). On republican assumptions, however, the possibility of finding members of the natural aristocracy in the lower social orders was mostly theoretical because the kind of virtue that concerned republicanism tended to require a kind of leisure and economic independence that could be found mostly among the relatively well off. WOOD, RADICALISM, supra note 156, at 106-08.

\(^{219}\) WOOD, RADICALISM, supra note 156, chs. 1-5.


\(^{221}\) Id. at 7; see also Beeman, supra note 175, at 401 (finding that deference in eighteenth-century America was given to “property, education, lineage”).

Thus, in the eighteenth century, the citizen "was entrusted with the responsibility of identifying and evaluating his superiors," those with a legitimate claim to leadership.223

So conceived, the republican model contemplates an extremely clear division of political labor.224 The job of the people is to use their judgment regarding individual qualities and character to select the wisest and most virtuous representatives. The job of those selected, in turn, is to use their gifts of intellect and character to identify and implement the common good. To do this job properly, however, representatives must be independent; they must be free to follow their judgment wherever it leads them. This is a view of representation that accords well with traditional British notions of Parliament as "a place for deliberating and reasoning on the great affairs of state," and one that is correspondingly hostile to the concept of instructions from constituents and to "organized pressure politics."225

Much of the American constitutional structure of political institutions reflects the assumptions of a republican epistemology of morals. In the original scheme, the Senate and the President were elected indirectly, utilizing mechanisms designed to produce the election of the wisest and most virtuous officials.226 The Electoral College, in particular, was structured so as to make the choice of President depend upon the detached deliberation of wise and virtuous electors rather than on popular judgments about the merits of particular candidates or policies.227 Madison expressly defended the large size of electoral districts under the proposed Constitution on the ground that such elections were more likely to result in the selection of virtuous candidates than would be the case in small election districts. Because the ratio of constituents to legislators would be greater in a large republic, said Madison, the number of "fit characters" from whom voters could choose would be proportionately larger the larger the election district.228 Moreover, candidates would need to persuade a larger number of

Dupont de Nemours dated Apr. 24, 1816, in which Jefferson claims that the people are competent as judges of fact and choose representatives based on their knowledge of human character).

223. Beeman, supra note 175, at 407.
224. See MANIN, supra note 62, at 94.
225. On the division of political labor see ERNEST BARKER, REFLECTIONS ON GOVERNMENT 38-47 (1942); JOHN DUNN, INTERPRETING POLITICAL RESPONSIBILITY: ESSAYS 1981-1989, at 24, 40-41 (1990). The republican division of labor, to succeed, must be based on considerable mutual trust among society’s members. See generally TRUST AND GOVERNANCE (Valerie Braithwaite & Margaret Levi eds., 1998); KENDALL, LOCKE, supra note 179; Willmoore Kendall, The Two Majorities, 4 MIDWEST J. POL. SCI. 317 (1960).
227. THE FEDERALIST No. 57 (James Madison); see also BESSETTE, supra note 154, at 19.
228. THE FEDERALIST No. 68 (Alexander Hamilton).
229. THE FEDERALIST No. 10, at 63 (James Madison).
people to get elected, making it more likely that voters would pick “men who possess the most attractive merit, and the most diffusive and established characters.”

The founding generation, then, did not assume that “the job of members of the legislature was to transform electoral sentiments into legislation.” Far from it: the purpose of elections was to select leaders, not to involve the public in affairs of government. On the republican model, government should be staffed by members of a natural aristocracy of merit, and the role of the people was to “recognize these sages, put them in office, and follow their capable directions.”

b. Populism: A Wise and Virtuous People

Republican ideology, it goes without saying, was soon overtaken in American political thought by a rather different conception of how democratic politics identifies and implements the common good. Under the influence of an emphatically leveling notion of equality, Americans, in Gordon Wood’s words, “came to believe that no one in a basic down-to-earth and day-in-and-day-out manner was really better than anyone else . . . Good republicans had to believe in the common sense of the common people.”

When combined with a well-established American skepticism of government, this belief in intrinsic equality soon led to an idea even further removed from republican concepts of a natural aristocracy: the idea that the people were actually superior to their representatives. Consequently, as Elaine Spitz observes, “a belief in the general populace as the repository of natural civic virtue became commonplace,” a belief that was put into practice by the rapid expansion of suffrage and, somewhat later, by the introduction in the states of numerous devices of direct democracy.

Once again, the idea that the people are superior—wiser or more virtuous—than their governmental servants has ancient roots. Aristotle put the case for the people in these terms:

There is this to be said for the Many. Each of them by himself may not be of a good quality; but when they all come together it is possible that they may surpass—collectively and as a body, although

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235. Morone, supra note 154, at 5 (defining “the populist ideal” as the notion that “[t]he people are wiser than their governors”).
not individually—the quality of the few best . . . [W]hen there are
many [who contribute to the process of deliberation], each can
bring his share of goodness and moral prudence; and when all
meet together the people may thus become something in the
nature of a single person, who—as he has many feet, many hands,
and many senses—may also have many qualities of character and
intelligence.237

Even Machiavelli, conventionally understood to hold the people in low
regard, frankly acknowledged their capacity for acute judgment:

I claim that the populace is more prudent, more stable, and of
sounder judgement than the prince. Not without good reason is
the voice of the populace likened to that of God; for public
opinion is remarkably accurate in its prognostications, so much so
that it seems as if the populace by some hidden power discerned
the evil and the good that was to befall it. With regard to its
judgement, when two speakers of equal skill are heard advocating
different alternatives, very rarely does one find the populace failing
to adopt the better view or incapable of appreciating the truth of
what it hears.238

These pragmatic justifications were later supplemented by a powerful
epistemological account, provided by the common sense philosophers of the
Scottish Enlightenment, of the abilities of the ordinary human mind.
According to this account, all normal individuals have a kind of innate sense
of morality that, left to itself, orients them with considerable accuracy toward

237. ARISTOTLE, supra note 91, bk. III, ch. XI, at 1281a-b.
238. NICCOLO MACHIAVELLI, THE DISCOURSES I:58, at 255 (Bernard Crick ed., Leslie J.
Dei,” the voice of the people is the voice of God. This saying is extremely difficult to track down.
The earliest known direct attribution appears to be its use by Alcuin, an eighth century English
monk and adviser to Charlemagne. Yet Alcuin wrote to dispute the validity
of the maxim. Apparently then well-known, in the course of arguing that “only those who enjoyed special grace
were allowed to voice the Vox Dei, namely, prelates, kings or pseudoprophets on whom God
Himself had conferred such a right.” SOPHIA MENACHE, THE VOX DEI: COMMUNICATION IN THE
MIDDLE AGES 3 (1990). The Latin may suggest a Roman origin, though the phrase does not
appear to be from Cicero, who speaks of the good of the people as the highest good, N. W.
WOOD, CICERO’S SOCIAL AND POLITICAL THOUGHT 128-40 (1988), but draws no specific link
between the people’s wishes and God’s. Perhaps the expression owes more to the Christian
notion of the sensus fidelium, the idea that “[t]he body of the faithful as a whole, anointed as
they are by the Holy One [see 1 John 2:20, 27] cannot err in matters of belief. Thanks to a
supernatural sense of the faith which characterizes the People as a whole, it manifests this
unerring quality when . . . it shows universal agreement in matters of faith and morals.”
RICHARD P. McBRiEN, CATHOLICISM 54 (1994) (quoting Dogmatic Constitution on the Church,
§ 12). The Dogmatic Constitution on the Church can be found at 1 VATICAN COUNCIL II 363
(rev. ed. 1988). The references to John are: “But you have been anointed by the Holy One, and
all of you have knowledge,” and “the anointing that you received from him abides in you, and
so you do not need anyone to teach you.” 1 JOHN 2:20, 27 (NEW OXFORD ANNOTATED).
right and wrong. In the context of a general Enlightenment resistance to monarchical and aristocratic claims to moral superiority, and to a consequent entitlement to the reins of power, common sense philosophy provided a convenient basis for justifying republican forms of government.

Common sense philosophy made a distinct impression on many of the American founding generation. Jefferson, for example, struggled to reconcile his sympathy for the common sense view of universal moral aptitude with what he apparently regarded as obvious, everyday evidence of the inability of at least some portion of the populace. In a frequently quoted letter, Jefferson made the case as strongly as any American of his generation for the universal competence of the people:

[Man] was endowed with a sense of right and wrong . . . . This sense is as much a part of his nature as the sense of hearing, seeing, feeling . . . . The moral sense . . . is given to all human beings in a stronger or weaker degree . . . . It may be strengthened by exercise . . . . This sense is submitted indeed in some degree to the guidance of reason; but it is a small stock which is required for this . . . . State a moral case to a ploughman and a professor. The former will decide it as well, and often better than the latter, because he has not been led astray by artificial rules.

Yet at the same time, as we have seen, Jefferson professed a belief in the propriety of rule by a natural aristocracy distinguished by virtue and intelligence. In what might well be called a characteristically American way of reconciling these two positions, Jefferson allowed himself to be guided by a certain optimism about basic human nature and a belief in the possibility of human progress, beliefs that allowed him ultimately to maintain that virtue does not flow down from virtuous leaders, but up from a virtuous populace. Any disjunction between the theory of universal popular virtue and the reality of popular ignorance or venality was to be addressed, in Jefferson’s view, not by concluding that the people were incapable of good and just self-rule, but by providing for all citizens an education appropriate to the role that democracy demands of them.

If Jefferson’s personal struggle to reconcile republicanism and

240. See generally Morton White, supra note 151; Garry Wills, Inventing America: Jefferson’s Declaration of Independence (1978).
241. Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), in 12 The Papers of Thomas Jefferson 14 (Julian P. Boyd ed., 1955). On Jefferson’s debt to moral sense philosophy, see Koch, supra note 188, ch. 3; Yarbrough, supra note 188, ch. 2; Morton White, supra note 151, chs. 2-3.
242. Koch, supra note 188, at 116-18; White, supra note 151, at 137.
243. See Yarbrough, supra note 188, at 103.
244. See Cronin, supra note 232, at 40.
populism typified the transitional beliefs of the founding generation, that struggle was by all accounts definitively resolved within a generation in favor of a populistic belief in the competence, the virtue, and, ultimately, the superiority of the common people. As pre-revolutionary social hierarchies weakened, so did traditional attitudes of deference toward social and economic elites. In a strange twist on the platonic account of the relationship between truth and power, decentralization of power apparently led to a belief in the decentralization of wisdom as well. In Gordon Wood's perhaps overly exuberant account:

The result of all these assaults on elite opinion and celebrations of common ordinary judgment was a dispersion of authority and ultimately a diffusion of truth itself to a degree the world had never before seen. With every ordinary person being told that his ideas and tastes, on everything from medicine to art and government, were as good as, if not better than, those of "connoisseurs" and "speculative men" who had college degrees, it is not surprising that truth and knowledge became elusive and difficult to pin down. Knowledge and truth, it was argued, now indeed had to become more fluid and changeable, more timely and current. Americans of the early Republic experienced an epistemological crisis as severe as any in their history. [They were c]onfident of their ability to determine all by themselves the truth or validity of any idea or thing presented to them .... [Under the influence of this] democratization of truth ... [m]ost ordinary people were no longer willing to defer to the knowledge and judgments of those who had once been their superiors .... [T]hey had eyes and ears, and they knew what was true for them better than some "commanding genius" or "learned sage" did.24

In Wood's view, not only had "the nature of truth and the ways to discover it ... become public issues,"247 but the criterion for determining truth was no longer the opinion of an enlightened elite but "the opinion of the whole people"—in the terminology of the nineteenth century, "public opinion."248

245. See generally Wood, RADICALISM, supra note 156, chs. 13-19; WIEBE, SELF-RULE, supra note 193, ch. 1.
246. WOOD, RADICALISM, supra note 156, at 361-62.
247. Id. at 362.
248. Id. at 363. Cf. Walter Lippmann, PUBLIC OPINION (1922) (noting the subjective nature of public opinion). Wood goes on to argue, somewhat extravagantly, that early nineteenth-century Americans developed a self-conscious theory of truth analogous to the utilitarian theory of morals in which truth is merely the aggregation of individual views. See Gordon S. Wood, The Democratization of Mind in the American Revolution, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 102, 125 (Robert H. Horwitz ed., 1977). Aside from the historicist implausibility of the possibility that utilitarian ideas could have been extended to truth before they were
Whatever the strength of Wood’s account of the founding and the period immediately following, it is clear that by the Jacksonian period “a strident egalitarianism had become the staple of American political rhetoric.” Politicians of this era professed “an appreciation of the common man, and a desire to serve his needs and aspirations.” This faith in the common person rested on a belief in the purity of the popular will and on the people’s responsiveness to rational argument, qualities that Jacksonians, following Jefferson, often attributed to the independence and self-sufficiency of what they took to be the typical American yeoman.

Jacksonians thus claimed, loudly and repeatedly, that the people were “good, trustworthy, and capable of self-rule.”

There is, to be sure, some tension between the rhetoric of the Jacksonian democratic faith and the techniques of mass democratic politics that Jacksonian Democrats developed, techniques that tended to treat the voter as “a simple fellow more responsive to hokum than to straight talk about issues.” Moreover, even those whose faith in the people was sincere found that faith severely tested by the 1840 election of William Henry Harrison, an event that Jacksonians saw as a grievous popular error. Nevertheless, at least in their public rhetoric, Jacksonians typically claimed that any problems in the operation of democratic self-rule were not caused by the people, who remained virtuous and reasonable, but by politicians or government officials who had become corrupted and who had in consequence betrayed the people’s true interests.

This formulation—a virtuous and competent citizenry whose will had been obstructed either by corrupt individuals or unsuitable governmental structures and institutions—continued to dominate American public political thought through the nineteenth century and on into the twentieth. While populists like William Jennings Bryan proclaimed in Jacksonian fashion their faith in the common people, it was the Progressives who

articulated and applied to utility, Wood’s position seems directly contradicted by the much more orthodox views of the Jacksonians and Progressives set out in the ensuing paragraphs of the text.

249. Watson, supra note 196, at 5.
251. See Meyers, supra note 195, at 19-21 (describing Jackson’s belief of the political superiority of the common man as compared to the aristocracy).
254. See Arthur M. Schlesinger, Jr., The Age of Jackson 401-02 (1945).
255. See id. at 402-04 (discussing John C. Calhoun’s thoughts on powerful economic interests and the government).
256. Bryan claimed that:

the people were competent "to sit in judgment on every question which has arisen or which will arise, no matter how long our government will endure," and... that
developed a full-blown theory of popular virtue and capacity for self-rule, along with a package of institutional reforms designed to put these beliefs into action by turning over substantial direct political power to the people themselves at the expense of their representatives. At the center of the Progressive democratic ideology lay the conviction that the average contemporary American citizen is fully competent to exercise extremely close oversight and control over the apparatus of government. According to Benjamin Parke De Witt, an early historian of the Progressive movement:

With the telephone, the telegraph, the railroad, the newspaper, and the magazine, with the spread of education and the increase in the intelligence of the average voter, there is every reason why the people should exert more and more influence on government rather than less and less. There is every reason why a majority of the people, expressing their opinions in an open, legal way should control the acts of presidents, judges, and legislators rather than that they should allow corporations and banking interests to control them in a secret and illegal way. To make the federal government more democratic by eliminating the impediments to popular rule is not to make it less representative; it is merely to change the persons represented.27

Significantly, by characterizing popular competence as a modern phenomenon brought about by modern education and technology, the Progressives were able to appropriate the founding generation's republican beliefs in an objective common good and a politics of virtue, yet at the same time repudiate republican institutions of governance that, as Madison frankly admitted, were designed to effect "the total exclusion of the people in their collective capacity" from the reins of government.28 If leading Progressives believed in "the intelligence, the self-restraint, the morality, the breadth of view of the average man, the emergent New Citizen,"29 they also believed that these qualities imposed upon citizens an obligation to improve society through their active participation in politics.30

the great political questions were in the final analysis moral questions concerning which the intuitions of the people were as good as almost any degree of experience.

HOFSTADTER, AGE OF REFORM, supra note 162, at 260.
257. DE WITT, supra note 163, at 143. In his own, somewhat quirky account of progressivism, William Allen White attributed increases in popular leisure time and education to technological innovations—specifically, "steam." WHITE, supra note 206, at 4-5.
258. THE FEDERALIST No. 63, at 428 (James Madison) (emphasis deleted). The Progressives were openly critical of the Framers on this point, often describing them and the Constitution in ways that could not be more different from the kind of pious reverence characteristic of today's originalist discourse. See WHITE, supra note 206, at 3, 34, 38.
259. HOFSTADTER, AGE OF REFORM, supra note 162, at 257.
260. See DE WITT, supra note 163, at 190 ("The theory of democracy upon which the entire progressive movement is based is that every normal citizen who is mentally and morally fit not
Unlike earlier admirers of the public, who nevertheless remained suspicious of democracy and feared popular power, Progressives put their beliefs into practice by a carefully coordinated and extremely successful campaign for political reform. Among their widely adopted innovations are such now-familiar mechanisms of direct democracy as the initiative, referendum, direct primary, and recall election. They also sought to tighten popular control over government through extension of the franchise to women, popular election of Senators, improved voter registration systems, corrupt practices acts, and the short ballot. In introducing these innovations, Progressives took a view of the function of representation that could not have been more different from its republican predecessor: far from exercising independence based on their wisdom and virtue, government officials, on the Progressive view, "served as little more than highly intelligent coordinators who responded to all manner of rational public demands, integrated them, and arranged for their fulfillment." Clearly, behind such a conception of politics lies an extremely robust conception of popular competence, wisdom, and virtue.

The notion that the people are competent and virtuous, and that the common good is best identified by them, and implemented according to their instructions, raises the question of precisely how the people are to decide among themselves where the common good lies. Historically, the most common answer to this question has been that a majority shall decide. Because of the intimate connections between the populist conception of a politics of virtue and the notion of majority rule, I turn now to a brief examination of some of the historically most important justifications for majority rule.

only has the right, but is also under a duty to participate in the solution of political problems.".). 
Cf. Wiebe, Order, supra note 165, at 160-61:

Above [government officials] stood the public man, a unique and indispensable leader. Although learned enough to comprehend the details of a modern, specialized government, he was much more than an expert among experts. His vision encompassed the entire nation, his impartiality freed him from all prejudices, and his detached wisdom enabled him to devise an equitable and progressive policy for the whole society . . . . As the nation's leader, the public man would be an educator-extraordinary. He bore the greatest responsibility for raising mass intelligence to the level of true public opinion . . . . [After a period of civic training,] the electorate would come to participate directly in certain aspects of government through the initiative, referendum, and recall. The proper use of such mechanisms, however, depended upon the prior existence of that rational public.

261. See De Witt, supra note 163, chs. 10-11.
262. See id.
263. Wiebe, Order, supra note 165, at 162. See also De Grazia, supra note 116, at 185 (linking a belief in direct democracy with support for PR, and linking both with a delegate conception of representation).
c. Justifications for Majority Rule

In his first inaugural address, Thomas Jefferson declared that “absolute acquiescence in the decisions of the majority” is “the vital principle of republics” and one of the “essential principles of our government.” In later years, Jefferson maintained that “the will of the society enounced by the majority of a single vote, as sacred as if unanimous, is the first of all lessons in importance.” In taking this position, Jefferson stood firmly on tradition, to be sure—but did he stand on anything more? Is majority rule justifiable on normative grounds as well? We have seen that the founding generation believed both that the common good is objective and that the purpose of politics is to discover it. It would seem to follow from these premises that absolute acquiescence is owed not to political decisions made by a majority, but to political decisions that accurately discern and pursue the common good. Majority decisions might be entitled to obedience, but only if they are substantively right.

Historically, the notion that some group of decision makers—whether the people or their representatives—are wise and virtuous has long been linked with the idea that the majority of the group is more likely to be right than the minority. According to Willmoore Kendall, “[t]he proposition that there is resident in the majority a certain virtue which, outweighing all the claims of expertise or intellectual superiority, gives it the right to make final decisions affecting the welfare of the state, was more or less a commonplace in the utterances of the democratic statesmen of the ancient world.” Later, influenced by the Roman principle that the will of the majority is the will of the collectivity, medieval church usage concerning majority rule tended to conflate superiority of numbers (maior pars) with superiority of wisdom (sanior pars).

By the time of the Enlightenment, some natural law theorists seemed to try to avoid defending majority rule on these grounds, preferring to justify it on some kind of logic inherent in the natural world. Grotius, for example, wrote that it must be the wish of any association to have some way of
“conducting business.” "[I]t is manifestly unfair," he argued "that the majority should be ruled by the minority. Therefore, naturally, the majority has the same right as the entire body." In a famous passage, Locke also appealed to a kind of natural logic:

when any number of men have . . . made a community, with a power to act as one body, [i]t is only by the will and determination of the majority; for . . . it being necessary to that which is one body to move one way, it is necessary the body should move that way whither the greater force carries it, which is the consent of the majority; or else it is impossible it should act or continue one body . . ; and so every one is bound by [his or her] consent to be concluded by the majority.

Because these passages seem to appeal to natural, and thus non-normative principles, they appear to justify majority rule as a pragmatic requirement of collective life without regard to the content of the majority's decisions. Yet, as I have already indicated, such passages must be read in light of the many other constraints that natural law theories place on political decision making of any kind. As Jefferson put it, "though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable."

Peter Laslett resolves this tension by attributing to Locke a doctrine of what Laslett calls "natural political virtue," according to which people are naturally disposed to treat each other well and to attempt to do what is right. This doctrine, Laslett argues, "goes some way to justify in ethical terms Locke's rather perfunctory defence of majority rule in mechanical terms. For a majority, which is simply a random sample of those who voted, will under this doctrine tend to act with some responsibility towards those in

272. Perhaps the modern equivalent of this approach is Kenneth May's well-known demonstration that only majority rule can simultaneously satisfy four seemingly reasonable conditions: uniqueness, anonymity, neutrality, and monotonicity. See Kenneth O. May, A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision, 20 ECONOMETRICA 680 (1952). Downs similarly claimed that majority rule was a consequence of a preference for equality over other values. Anthony Downs, In Defense of Majority Voting, 69 J. POL. ECON. 192 (1961).
273. See supra notes 179-82 and accompanying text.
274. Jefferson, First Inaugural, supra note 264, at 322. See also Letter from Thomas Jefferson to Thomas Seymour (Feb. 7, 1807), in 5 THE WRITINGS OF THOMAS JEFFERSON 43 (H. Washington ed., 1869) (discussing majority's "rightful will").
275. PETER LASLETT, INTRODUCTION TO JOHN LOCKE, TWO TREATISES OF GOVERNMENT 122-23 (Peter Laslett ed., Mentor 1960).
Kendall goes further. Locke did not believe, he claims, that "it is the fact of majority support which makes right in politics," for Locke could not have committed himself to this kind of moral relativism. The proposition that the majority always wills what is right need not, however, involve a commitment to relativism. It may rest equally on "a judgment regarding the quantitative relation between the wise and the just, on the one hand, and the foolish and the unjust on the other hand." Such a view would be consistent with the belief that "there are moral standards which do not in any sense depend for their validity upon acceptance by majorities" as well as with the belief that "the majority of each political society both accept and know how to apply these [objective moral] standards."

There is probably no more perceptive account of liberalism's ethical claims for majority rule than that of the sociologist Georg Simmel. Majority rule, according to Simmel, is merely one manifestation of the more general problem of "reconciling the individual's unity and totality ... with his social role .... It is an attempt at saving the unity and totality of society from disruption by the autonomy of its parts. Every conflict among the members of a collectivity makes the continuance of this collectivity dubious." In its most basic aspect, a society might resort to majority rule "from the fact that the many are more powerful than the few"; voting is then nothing more than a peaceful substitute for resort to force, a way of convincing the minority that resistance would be impossible. In this situation, "two parties confront one another like two independent groups, between which the decision is made by power relations."

In more sophisticated forms, however, "this enforced physical subordination is sublimated into an ethical form," namely "the principle that the minority ought to follow the majority."

This principle, evidently does not only involve the suggestion that the minority should cooperate with the majority for practical reasons: it should also accept the will of the majority; it should recognize that the majority wants what is right. Unanimity is not a fact but a moral claim. The action taken against the will of the

276. Id. at 123.
277. Kendall, Locke, supra note 179, at 133; see also Willmore Kendall, Prolegomena to Any Future Work on Majority Rule, 12 J. Pol. 694, 699 (1950) (arguing that the majority principle, properly understood, does not legitimate majority will without restriction, but rather that "the will of the majority shall be accepted as the closest possible approximation to the will of the community within limits set by certain other rules whose violation would prevent that free arraying at majorities which is taken for granted by the majority principle itself.
279. Id. at 241.
280. Id. at 242.
281. Id.
minority is legitimated by a unity of the will, which is produced retroactively. . . . [In this view,] the majority appears as the natural representative of the totality. It shares in the significance of its unity, which transcends the mere sum of the component individuals . . . .

The voice of the majority now no longer is the voice of the greater power within the group, but is the sign that the homogeneous will of the group has decided in favor of this side . . . . The requirement of unanimity initially derived entirely from an individualistic basis. [This is replaced with] the principle of an objective group unity, with its own, homogeneous will . . . [which is] based on a common interest . . . [and] exists irrespective of any contrasts among individual wills contained in these groups . . . . Since the group will is one, it must act in a certain, homogeneous fashion. [But this conflicts with the facts. The contradiction is resolved by assuming] that the majority knows or represents this will better than the minority . . . . [N]ow, the minority is, in principle, not excluded but included; and the majority acts, not in the name of its own greater power, but in the name of the ideal unity and totality. It is only to the latter, speaking through the voice of the majority, that the minority subordinates itself.

Rousseau certainly seems to be getting at just such a notion with his

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282. *Id.* at 242-43. Simmel goes on to identify with stunning precision the feeling that members of a democratic minority may experience upon defeat under a regime of majority rule. The minority, he writes,

must subordinate itself . . . . And it must subordinate itself, not only in the simple sense in which ordinarily convictions and efforts are negated and made ineffectual by opposing forces, but in the more subtle and crafty sense that the loser, because he is part of the group, must positively participate in the action which was decided against his will and conviction. What is more, the uniform character of the eventual decision which contains no trace of his dissent, makes him, too, responsible for it. In this way, outvoting . . . becomes the most poignant expression of the dualism between the autonomous life of the individual and the life of society, a dualism which is often harmonized in experience, but which, in principle, is irreconcilable.

*Id.* at 249. There is a striking similarity between Simmel's account and accounts by some VRA activists of the feelings of black Americans who conceive of themselves as permanent political losers. See Guinier, *Tyranny*, supra note 1, at 76-7; Quiet Revolution, supra note 25, at 16; see also Clifford Geertz, *The Interpretation of Cultures* 317 (1973):

For a state to do more than administer privilege and defend itself against its own population, its acts must seem continuous with the selves of those whose state it pretends it is, its citizens—to be, in some stepped-up, amplified sense, *their* acts. This is not a mere question of consensus. A man does not have to agree with his government's acts to see himself as embodied in them any more than he has to approve of his own acts to acknowledge that he has, alas, himself performed them. It is a question of immediacy, of experiencing what the state "does" as proceeding naturally from a familiar and intelligible "we."
coordinate claims that “the general will is always rightful,” and that “the counting of the votes yields a declaration of the general will.”283 Voting, Rousseau explains, is not an attempt to canvass public opinion, but rather to solve a much more specific epistemological problem—the identification of the general will. This is a task that a majority is more likely to perform correctly than a minority,284 and those who vote with the minority have not been overpowered, but have simply erred: “When, therefore, the opinion contrary to my own prevails, this proves only that I have made a mistake, and that what I believed to be the general will was not so.”285 In this way, as Simmel suggests, majority rule is justified on the ground that the majority is better able than the minority to perceive the unitary common good.286

Because Americans inherited the principle of majority rule, and because its underlying assumptions so closely track other leading assumptions about politics, American political actors have rarely felt a need to articulate justifications for majority rule of any sophistication. Nevertheless, it is clear that support for majority rule has often been associated with the populist conception of politics described earlier.287 Andrew Jackson, for example, frequently referred to the importance of majority rule.288 Populists held that “[t]he way to discover the general will, which is the objectively correct common interest of the incorporated citizens, is to compute it by consulting the citizens.”289 Progressives claimed that their institutional reforms would “give to a majority of the people . . . an easy, direct, and certain control over their government.”290

A few Progressives attempted to work out more detailed explanations as to why the majority is better able than the minority to discern the public interest. Much of the Progressive reform agenda was achieved in state

283. Rousseau, supra note 146, at 83, 153.
284. See Beitz, supra note 136, at 67 (describing the differences between the ability of the majority and minority to ascertain the general will).
285. Id. at 153.
286. It is possible, of course, to take this position too far, even on its own terms. For example, the Stalinist theorist Andrei Vyshisky used this reasoning to justify the complete suppression of dissent. See Elias Berg, Democracy and the Majority Principle: A Study in Twelve Contemporary Political Theories 5-10 (1965). Nothing in Rousseau’s reasoning, however, suggests that a minority can justifiably be silenced. Rousseau was concerned merely with the minority’s compliance, not its existence.
287. “Populistic democracy’s bets . . . are on the notion that a political system can be adjudged good or bad according as authoritative decisions within it emanate from a certain ‘source’. . . . from, concretely, the majority of a voting population made up of political equals, and not some minority . . . .” Willmoore Kendall & George W. Carey, The “Intensity” Problem and Democratic Theory, 62 AM. POL. SCI. REV. 5, 10 (1968).
288. See 3 Robert V. Remini, Andrew Jackson and the Course of American Democracy, 1833-1845, at xiv (1984); Dixon, supra note 13, at 42-44.
290. DeWitt, supra note 163, at 196.
constitutional conventions, where Progressives urged that state constitutions be amended to include their package of direct democratic devices and anti-corruption measures. In his study of state constitutional conventions of the Progressive era, John Dinan has usefully collected some of the more sophisticated arguments and debates. During the 1907-1908 Michigan constitutional convention, for instance, one delegate defended the populist version of majority rule in these terms:

"[T]here is not a chance nor an opportunity for error or private interests to creep in where a matter is proposed by the electors of the state in a collective capacity, that there is in any small or appointed body from the people. We must remember this[:] that truth is a unit, and that when a great aggregation of people pass upon a matter proposed and agree upon the exact words of that subject matter as it may be proposed in the amendment in that proposal, that there are from eighty to a hundred thousand qualified electors of the state in the very beginning who have agreed upon the principle of that proposal. That where there is that multitude of individuals who must agree, that there must be eliminated from that process of agreement, the errors of each individual and the private interests of each individual."

Writing in The Atlantic Monthly in 1912, Jonathan Bourne of Oregon made a similar public defense of the reliability of Progressive mass majoritarian democracy. When the people act collectively, Bourne argued, many different and selfish interests are set in motion, but "[n]o one selfish interest is powerful enough to overcome all the others; they must wear each other away until general welfare, according to the views of the majority acting, is substituted for the individual selfish interest."2

3. Winner-Take-All: Electoral System for a Politics of Virtue

It is time now to pull together the threads of the argument thus far. My contention is this: just as PR is the electoral system best suited to a conception of politics as interest pluralism, so winner-take-all electoral systems are perfectly suited to achieve the goals of politics understood as a politics of virtue. If the common good is objective and unitary; if the purpose of politics is to identify and implement this common good; if the people have either the ability to identify the best and wisest representatives, or the virtue and wisdom to discern the common good directly; and if a

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292. Id. (quoting Jonathan Bourne, Jr., Initiative, Referendum, and Recall, ATLANTIC MONTHLY 109, 122, 123 (Jan. 1912)).
majority of the people know these things better than any minority; then a winner-take-all electoral system must be the electoral system of choice. On these assumptions, the very features of winner-take-all systems that contemporary proportionalists most frequently criticize—its insensitivity to minority views, its exaggeration of majority strength, its lack of proportionality in representation—appear as strengths rather than weaknesses. They are features of an electoral system that has no purpose other than to place the full, undivided power of the state in the service of the good.\footnote{See LIJPHART, DEMOCRACIES, supra note 43, at 207 (arguing that it is possible "to derive all of the characteristics of the majoritarian model logically from the principle of concentrating as much political power as possible in the hands of the majority"). Cf. Quade, supra note 122, at 37 (arguing that the purpose of "democratic statecraft" is "to synthesize society's parts, unify and defend its people, [and] identify and pursue the common good," and that the real test of democratic politics is "the test of excellence in state action").}

As we saw earlier, proportionalists since Mill have claimed that winner-take-all electoral systems leave the minority entirely unrepresented, their votes wasted as though discarded. But if politics is understood as a politics of virtue, this is no vice. If the purpose of politics is to permit a majority to identify the common good, then a formal political decision shows only that those in the minority are simply wrong on the merits: what they want has been authoritatively (though not permanently) determined to be not in the best interest of the entire community. Once such a decision has been made, it would be both counterproductive and unethical to give the minority any significant strength in the councils of government, for the only way in which they could be expected to use that power would be to perpetuate their error by obstructing governmental achievement of the common good. The same reasoning answers the proportionalist objection that a winner-take-all system exaggerates the majority's strength by over-rewarding electoral success with disproportionate representation. Of course it does. The very purpose of such a system is to assure as far as possible that the majority controls the levers of power, control that ethically it and no one else must exercise for the simple reason that the majority, by hypothesis, knows better than any other group or individual where the common good lies.

Similarly, the complaint that the minority lacks its own representatives under a winner-take-all system\footnote{See Voting Rights Act § 2, 42 U.S.C. § 1973b (1994) ("A violation of subsection (a) . . . is established if . . . it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens protected by subsection (a) . . . in that its members have less opportunity than other members . . . to elect representatives of their choice . . . ."); LAKEMAN, supra note 9, at 165 (stressing the importance of proportional representation regardless of any disadvantages of the multimember constituencies).} has no bite, for no group in such a system has its "own" representative to press its interests, or needs one. A winner-take-all system is designed to be responsive, but not to the interests of any
particular constituency—it is designed to be responsive to the common good. On a republican model, where the common good is determined in Burkean fashion by the independent deliberations of the representatives, it is clear that no one needs or is entitled to his or her "own" representative. But even on the populist model, where the common good is determined by a majority of voters, the government acts in accordance with the majority’s determination not out of some desire to be "responsive" to the majority’s wishes, but out of a desire to implement the common good which the majority happens to have identified.

This kind of reasoning has rarely come to the surface in American political thought, apparently because almost no one has thought it necessary to lay out justifications for winner-take-all electoral systems. Although the connections between a politics of virtue and winner-take-all political structures thus typically lie deep beneath the surface, they have occasionally bubbled up into plainer view, most notably in the thought of the Progressives. One of the most common items in the Progressive bundle of reforms was the at-large municipal election, the most robustly winner-take-all of electoral systems. As we have seen, Progressive ideology conceived of politics as a politics of virtue. Progressives thus crafted their reform proposals in the belief that the measures they advocated would, more successfully than existing institutions, bring about a reign of the common good in public life.

How could at-large elections accomplish this goal? Here, Progressives were frank. In the Progressive view, local politics had become corrupted by the selfish pursuit of private interest. One of the main culprits, they believed, was the ward system of politics, a system in which local bosses could gain and then easily maintain control over small segments of municipal society by engaging in a wasteful and corrupt politics of spoils. At-large elections, Progressives argued, would break machine control over municipal politics by eliminating the "neighborhood base of the machine." Politicians would have to appeal to a large electorate rather than to one neighborhood or ethnic group. All members of such a legislative body would be statesmen, representing all the citizens as best they could. Gone


297. JUDD, supra note 164, at 95-96.

298. Id. at 95.
would be the politics of trade-off and compromise among legislators representing their own particular areas. "Special interest" politics would give way to "public interest" politics. 299

Moreover, Progressive reformers most often packaged at-large elections together with nonpartisanship. 300 Nonpartisanship, now used in a majority of local American jurisdictions, 301 is premised on the belief that most issues of local governance are inherently apolitical—that they admit of only one correct answer. 302 Clearly, Progressives thought that at-large, winner-take-all elections were the kind of elections most likely to produce objectively correct answers to political questions.

The proportionalist argument that poses the greatest problems for winner-take-all systems, even on the assumptions most favorable to them, is the argument that such systems, in the American context, transform racial minorities into permanent political minorities which are then deprived of all direct influence over government actions. Nevertheless, on the assumptions of a politics of virtue, the most direct answer 303 is perfectly clear, if perhaps not entirely palatable: the only reason why a racial minority might become a chronic political minority under a winner-take-all electoral system is because its members chronically take political positions that are wrong on the merits, and thus do not capture the common good of the entire society, a common good best identified by the majority. Blacks, Hispanics, and other racial or ethnic minorities, the argument goes, are thus in no different position than many other groups—communists, socialists, neo-Nazis, Christian

299. Id. In addition, Cain argues in his book, The Reapportionment Puzzle, that the Progressives in essence anticipated what today would be called the "median preference theory of representation": they believed that if districts are large and heterogeneous, representatives will have to respond to the median position of all voters, which will prevent them from becoming too parochial in outlook. BRUCE CAIN, THE REAPPORTIONMENT PUZZLE 65 (1984). See supra note 117 (citing writers who discuss the extent of influence of voters who do not directly support the candidate elected by the majority).


301. Cassel, supra note 300, at 226.

302. SAMUEL HABER, EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA, 1890-1920, at 102-03 (1964); HOFSTADTER, AGE OF REFORM, supra note 162, at 101, 116; WEAVER, supra note 167, at 20.

303. There are numerous indirect ways to blunt the force of this criticism. It is often argued, for example, that voting is far from the only way, and perhaps not even the most effective way, to influence government behavior. See generally Kathryn Abrams, "Raising Politicians Up": Minority Political Participation and Section 2 of the Voting Rights Act, 63 N.Y.U. L. REV. 449 (1988); CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS (1993). Another argument is that racial minorities exercise influence more effectively by influencing representatives as minorities in numerous districts than by directly electing favored representatives as majorities in a small number of majority-minority districts. See generally DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS (1997). I put these arguments to one side here in order to confront the basic claim.
fundamentalists—who are members of a permanent political minority because American society deems their political views wrong.\footnote{304}

This approach is precisely what so infuriates VRA supporters and some other proportionalists about the Supreme Court's decisions in the Shaw line of cases. Whatever difficulties these cases present—and political naivete, internal incoherence, and impracticality may well be among them\footnote{305}—it must surely be conceded that the Court is attempting in the Shaw cases to appeal to a unitary conception of the common good and to a politics that transcends the race-based pursuit of private interest.\footnote{306} As Richard Thompson Ford has observed, "[t]he Court's position in the colorblind districting cases is a classic example of strong integrationism. The Court repeatedly claims to aspire to a society in which race will not matter."\footnote{307} The Court's decisions, Ford continues, thus constitute "a tacit nation-building effort" conducted in the name of a particular conception of American citizenship.\footnote{308} It is only from this vantage point that the harms identified by the Court in the Shaw cases make sense, harms that might be understood to include impeding the achievement of a united multiracial society, for example, or undermining "constitutional aspirations [for] a government in which elected representatives owe a constitutionally-rooted obligation to work for the entire community."\footnote{309}

The Court's critics, of course, tend to respond that the political

\footnote{304. This kind of reasoning has recently begun to show up in cases alleging minority vote dilution under the Voting Rights Act. For example, in Uno v. City of Holyoke, 72 F.3d 973 (1st Cir. 1995), the court departed from the thrust of most prior rulings by holding that a showing of bloc voting by a white majority, under the third prong of Thornburg v. Gingles, 478 U.S. 30 (1986), was insufficient by itself to support a claim of minority vote dilution. Instead, minority plaintiffs would have to show that "other factors, apart from racial bias" did not cause the majority bloc voting. Uno, 72 F.3d at 980. Thus, a Voting Rights Act claim could be defeated if the defendants introduced, and the plaintiffs failed successfully to refute, evidence "that whites voted as a bloc for reasons wholly unrelated to racial animus." Defeat, the court said, "does not prove a lack of electoral opportunity but a lack of whatever else it takes to be successful in politics (say, failure to support popular programmatic initiatives, or failure to reflect the majority's ideological viewpoints)."

305. See supra note 86 (citing sources that discuss the Shaw line of cases).

306. In this regard, Samuel Issacharoff reads Justice O'Connor's swing opinions in the Shaw cases as evincing a fear that minority groups' "claims of historical injustice [will serve] as a screen for interest group demands of the present." Samuel Issacharoff, The Constitutional Contours of Race and Politics, 1995 Sup. Ct. Rev. 45, 47. See also id. at 53 (arguing that the "overriding theme" of the 1995 Term, in which Miller was decided, was that "the federal government is as capable of succumbing to racial interest group politics as any other organ of government").


308. Id. at 1436. See also Anne Phillips, The Politics of Presence 124 (1995) (urging that the politics of presence "always invokes some notion of proportionality between constituent groups," meaning "it already presumes a heterogeneous society—and this presumption can be precisely what some people will want to contest").

subordination of blacks and other racial minorities has nothing to do with the merits of their political positions and everything to do with race.\textsuperscript{510} They consequently understand the Court's rulings to pit a normative vision of colorblindness against an empirical reality of racial discrimination.\textsuperscript{511} As Pamela Karlan and Daryl Levinson exasperatedly complain, the Court's notion of an expressive or special representational harm is an "essentially irrebuttable normative theory, rather than an empirical prediction."\textsuperscript{512} If only the Court would stick to the facts, they seem to claim, its position would be exposed as insupportable. This argument, however, is disingenuous. Facts do not simply exist, waiting to be discovered and deployed to refute normative theories. Rather, facts gain their power only in virtue of some underlying norm that makes them relevant. The problem, of course, is that the Court's critics are not merely confronting a norm with facts—they are confronting one norm with another norm, a norm under which the empirical reality of racial discrimination in politics makes a great deal more difference than it does under the Court's norm of colorblindness.

On the Court's analysis, curtailing race-conscious districting will help racial minorities (and everyone else) because race-conscious districting itself harms the common good. Supporters of race-conscious districting argue in response that race-conscious districting will in fact help minorities (and everyone else) by increasing minority representation in government, which will increase minority political influence, which will in turn help to achieve the common good. But how does increasing the political influence of racial minorities help achieve the common good? For the most part, VRA supporters are thrown back at this point on some sort of interest pluralism.\textsuperscript{310}

310. Guinier and Karlan have taken this position particularly strongly. See \textit{Guinier, Tyranny}, supra note 1, at 3, 9, 34, 37, 60, 70, 103; Karlan, \textit{Undoing}, supra note 2, at 41; Karlan, \textit{The Rights to Vote}, supra note 104, at 1740. This is in some ways a strange position for Guinier to take, since she also conceives the VRA as a vehicle by which blacks are to achieve the "transformative social agenda" of the original civil rights movement. \textit{Guinier, Tyranny}, supra note 1, at 44-48, 69. The latter idea, of course, opens Guinier's analysis of American racial politics to the possibility that some or even most white voters reject black candidates not because of their race but because of their substantive positions.


312. Karlan & Levinson, supra note 311, at 1211-12.

313. One important exception to this trend is the move toward a multiculturalism-driven notion of ideological differentiation, which I call "view pluralism," and its close cousin deliberative democracy. See \textit{Phillips, supra} note 308, at 145 (1995), stating:

[The policies of presence] always refers to] a notion that different groups have different kinds of interests, and that, failing more equitable distribution of political office between different groups, there is little basis for believing that public policy will be equitable between all .... The project of equal or proportionate presence moves in close but uneasy association with the project of deliberative democracy ... [in that both address] who is present in political debate.
What is primarily unjust about the current situation, they maintain, is that the perpetual exclusion of racial minorities from political office prevents these groups from getting their due—their fair share of political benefits. Giving racial minorities political influence in rough proportion to their numbers thus conduces to the common good by creating a fair and equitable politics of self-interest. The Court, then, has played its cards well. It cannot persuasively defend a winner-take-all system in terms of that system’s ability to promote a fair politics of self-interest. To attempt to do so would be to meet VRA proportionalists on their own playing field. Instead, the Court has come out against proportionality and in favor of winner-take-all by identifying and relying upon a unitary common good that proportionality itself, according to the Court, undermines.

This, at least, is how things look on the surface. What makes the whole debate much more complex and unsatisfying, if I may be permitted a moment of cynicism, is that neither side seems to be completely honest in staking out its positions. At times, it seems that VRA proportionalists are less interested in achieving proportionate political influence for blacks than they are in achieving some set of substantive political objectives that, they apparently believe, black elected officials would help to promote—Lani Guinier’s “transformative agenda of the civil rights movement,” for example. It is hard to escape the suspicion, meanwhile, that at least some members of the Court sometimes seem more interested in assuring the political dominance of the (white) majority than they do in pursuing genuine principles of colorblindness. This has led to a truly breathtaking irony in which one side promotes PR, a pluralist electoral system, as a way to attain substantive justice; while the other side promotes winner-take-all, a system designed to achieve substantive justice, for reasons of private interest.

The depressing reality may well be, as Peter Hain has observed, that support for or opposition to particular electoral systems is often opportunistic and driven by considerations of ideological or party interest.  

IV. THE IMPOSSIBILITY OF MADISON’S HOPE

To this point, I have shown that proportional and winner-take-all electoral systems rest on entirely different conceptions of politics. PR is premised on a conception of politics as interest pluralism, a politics in which the good emerges from free and fair bargaining among political actors pursuing their own private self-interest. Winner-take-all electoral systems, on the other hand, assume a politics in the classical sense, one in which political

314. GUINIER, TYRANNY, supra note 1, at 44-48, 69. See also PHILLIPS, supra note 308, at 100 (“[T]hose pursuing the goal of minority political presence have always perceived it in relation to the policy changes that will follow from this.”).

315. HAIN, supra note 125, ch. 5; see WEAVER, supra note 167, at 143. For a recent example of a study that adopts this point of view, see Carles Boix, Setting the Rules of the Game: The Choice of Electoral Systems in Advanced Democracies, 93 AM. POL. SCI. REV. 609 (1999).
actors behave virtuously in an impartial search for a unitary common good. The choice of an electoral system, then, appears to involve a choice of something more than a method for casting and counting votes—it involves a choice among competing conceptions of politics.

Any democratic society must, of course, choose an electoral system. So which will it be? PR or winner-take-all? Politics or pluralism? Virtue or self-interest? One obvious problem here is that neither choice seems, to the contemporary mind, particularly appetizing. To build a political system on interest pluralism seems like a complete capitulation at the outset to the worst of human impulses. Moreover, interest pluralism's conception of the public interest relies on a highly implausible bit of alchemy in which a ceaseless stream of individual acts of selfishness is magically converted to the greatest good of all. How convenient. On the other hand, politics in the classical sense also seems like a deficient, or at least incomplete, conception of political life. To build a political system that depends for its successful operation upon the virtue and selflessness of political actors in a modern mass democracy seems unrealistic, if not dangerously utopian. But it is not merely the unpalatability of the choices themselves that makes this problem unsettling; it is also the possibility that we may have to choose at all. Surely human social life encompasses both virtue and vice, selflessness and selfishness, the pursuit of the common good, and the pursuit of private goods. Must we really, in designing the institutions of democratic self-governance, commit ourselves to expect, and hence to rely upon, only one of these two qualities?

But perhaps no such choice is necessary. Perhaps there are some institutions of governance that can function effectively regardless of whether the citizenry behaves well or badly. If it is possible to build an automobile engine that runs on gasoline but can also use propane when that is the only fuel available, perhaps there is some way to structure a system of democratic self-governance that can be propelled by either virtue or vice, or by some realistic combination of the two. This is an attractive solution to an ugly dilemma, and the path has been clearly blazed in American constitutional thought. The founding generation wanted to devise just such institutions so as to avoid precisely the choice I have identified between a politics of virtue and a politics of self-interest. They believed that the best kind of government would be based on virtue and would seek the common good, yet feared that such a politics might be overwhelmed by a factional politics of self-interest. Consequently, in framing the Constitution, they sought to develop a governmental structure that would simultaneously encourage virtue to

316. The evident lack of political virtue in post-revolutionary America and the disillusionment it caused revolutionary leaders probably had a significant influence on the Framers' decision to construct a new constitution that did not depend heavily on a virtuous public. MICHAEL SANDEL, DEMOCRACY'S DISCONTENT 127-29 (1996).
flourish and take full advantage of it whenever it appeared; yet would also be well-prepared to confront and confine self-interested political behavior to prevent it from causing serious damage to the nation. The promise of avoiding difficult moral choices through clever institutional design I shall call "Madison's hope."

Section A of this Part shows how Madison thought his hope could be realized. Section B shows that Madison's hope is unattainable at the level of electoral systems: no electoral system both permits a politics of virtue to flourish without impediment and confines self-interested political behavior within the bounds of fairness. Both leading contenders, PR and winner-take-all, perform only one of these functions well while stumbling badly on the other. To be clear, I make no claim here that Madison's hope is unattainable under any circumstances. I argue only that it cannot be fulfilled through the design of electoral systems alone. Whether Madison's hope is realizable through some combination of democratic institutions is beyond the scope of my analysis.

A. MADISON'S HOPE

Those who think of Madison as a pluralist typically rely on the mistaken inference that because Madison thought "faction"—the pursuit of self-interest rather than the common good—was inevitable, he must also have thought that political virtue was unattainable. In fact, Madison makes it quite clear that he preferred, and indeed fervently hoped for, a politics of virtue, and he explicitly defended several aspects of the constitutional design on the ground that they would help to usher such a politics into existence. At the same time, the Framers knew that they could not count on a politics of virtue to be sustained indefinitely or without interruption—"enlightened statesmen will not always be at the helm," in Madison's words—and they thus expected factional behavior to appear. To prevent factions from doing significant harm, they also tried to build into the constitutional structure devices that would contain factions and inhibit their ability to seize the reins

317. See The Federalist No. 10, at 57 (James Madison) ("By a faction I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.")

318. The most notable proponent of this misreading is surely Dahl, who makes this mistake in the very first "hypothesis" he attributes to Madison: "If unrestrained by external checks, any given individual or group of individuals will tyrannize over others." Dahl, A Preface to Democratic Theory, supra note 99, at 6. It is true, of course, that Madison held that the accumulation of all powers in the same hands is the equivalent of tyranny, The Federalist No. 47, at 324 (James Madison), a proposition that relies on an implicit assumption of human venality. It does not follow, however, that Madison believed that all political actors will behave self-interestedly all the time. His statement implies only that those with absolute power will yield to the temptations of self-interest on enough occasions to characterize their rule as tyrannical.

319. The Federalist No. 10, at 60 (James Madison).
of power. Although at times the Framers sought to accomplish this goal through a combination of distinct devices working in tandem, in some cases they intended a single institution to advance both goals at once.

The centerpiece of the constitutional plan, and surely its most elegant stratagem, is the creation of a large republic. Madison lays out his defense of this constitutional innovation in Federalist No. 10. He begins from the assumption that factional behavior is inevitable in politics, and that attempting to prevent it would require intolerable restraints on liberty. Unless Madison intended to defend the freedom to act contrary to the common good, a dubious proposition, what presumably makes such restraints on liberty intolerable is that they would inhibit the behavior of those who seek the common good as well as those who do not. Such restraints on liberty might also limit the public-regarding behavior of those who might act factionally on other occasions. The picture that Madison paints, then, is from the outset one not of a politics characterized by the constant, universal pursuit of self-interest, but of a politics consisting of some mix of the pursuit of the common good and the pursuit of self-interest. The problem, as Madison frames it, is to distill from such a politics whatever virtue it is capable of producing, while at the same time prevent self-interested behavior from bearing fruit. The large republic, Madison claims, can perform both these functions.

The distinguishing feature of a republic, Madison notes, is “the delegation of the [g]overnment . . . to a small number of citizens elected by the rest.” The effect of this process, he argues, is to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice pronounced by the representatives of the

320. Among the devices the Framers intended to reduce the potency of majority factions are federalism, separation of powers, and judicial review.
321. The Federalist No. 10, at 77-79 (James Madison).
322. Kendall argues that the Framers were strongly committed to popular control over government; they were concerned about majority factions, but not majority rule itself. This caused them to distinguish between “a popular majority as such and a popular majority determined to commit an injustice.” Willmoore Kendall, The Two Majorities, 4 Midwest J. of Pol. Sci. 317, 334 (Nov. 1960). See also supra Part III.B.1.b.
323. The Federalist No. 10, at 78 (James Madison).
324. The Federalist No. 57, at 350 (James Madison) (“The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.”)
325. The Federalist No. 10, at 82 (James Madison).
people, will be more consonant to the public good, than if pronounced by the people themselves. 526

The first line of defense against a politics of self-interest, then, is the use of an electoral mechanism which, when utilized by the citizenry in the proper spirit, will install in office the wisest and most virtuous representatives, who will then diligently pursue the common good. On the other hand, Madison immediately acknowledges, "the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may by intrigue, by corruption or by other means, first obtain the suffrages, and then betray the interests of the people." 527 What then?

The second line of defense, in Madison's view, is to make the republic as large as possible. This works in two ways. First, because an effective legislature can only be so large no matter what the size of the republic, the number of people each legislator represents increases more rapidly than the number of legislators as the size of the republic increases. This means that a large republic will have larger election districts than a small one. If we may assume, Madison suggests, that "the proportion of fit characters be not less in the large than in the small Republic"—if, that is to say, wise and virtuous individuals are distributed evenly throughout the population—then each voter in a large republic will have a greater choice of good candidates, thereby leading to "a greater probability of a fit choice." 528 Second, the large size of election districts in a large republic means that any successful candidate must attract the support of more voters than would be the case in a small republic with smaller election districts. This works to the benefit of the better quality candidates, Madison argues, because

it will be more difficult for unworthy candidates to practise with success the vicious arts by which election are too often carried; and the suffrages of the people being more free, will be more likely to center on men who possess the most attractive merit and the most diffusive and established characters. 529

Finally, large election districts also impede the ability of factions to coalesce and to elect venal candidates because each election district is likely to be large enough to contain "a greater variety of parties and interests" than would a small election district, thereby reducing the likelihood that a faction will form a majority within any district. Furthermore, the sheer size of such a district makes it "more difficult for all who feel [a factious motive] to discover their own strength and to act in unison." 530 Thus, in Madison's view,
the creation of a large republic can be expected to yield three advantages: it will result in "the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and schemes of injustice"; it will impede the ability of any minority faction "to outnumber and oppress the rest"; and it will raise "obstacles to the concert and accomplishment of the secret wishes of an unjust and interested majority," should one appear.591 Creating a large republic, then, spares us the need to trust our fate entirely either to political virtue or vice. We need not wait passively for virtue to appear, yet neither need we give up on virtue altogether and hunker down, our only goal to survive, with our liberties reasonably intact, the inevitable outbreaks of self-interest. Instead of choosing one or the other, we choose both, equipping ourselves adequately for each occasion.

Having decided that representatives to the national legislature should be elected, the Framers left no further constitutional instructions concerning the methods to be employed in conducting these elections. This omission leaves the state and national governments substantial latitude in the creation of subconstitutional democratic institutions. On the other hand, it seems clear that the Framers hoped the electoral systems of a large American republic would work simultaneously to encourage a politics of virtue and to contain a politics of self-interest. Today, confronted as we are by significant challenges to the structure and operation of electoral systems at every level of government, might we take guidance from Madison's hope by striving to choose electoral systems that perform both these functions at once? Doing so would not only be in keeping with the original constitutional plan, but might also spare us the pain of having to choose between competing conceptions of politics.

We have seen that proportional electoral systems presuppose a politics of interest pluralism and winner-take-all systems presuppose a politics of virtue. But it need not follow that either system functions well exclusively when politics is conducted in the way that it presumes. PR is designed to allow the free and fair play of self-interested pluralism, but perhaps it is capable of doing so without significantly impairing the ability of public-regarding political actors to pursue and implement some conception of a unitary common good. Conversely, a winner-take-all system should work best when political actors behave disinterestedly, but perhaps it can also function well when the pursuit of self-interest dominates the political process. If either of these scenarios proves out, then choosing an electoral system need not involve committing ourselves to one kind of politics or the other. In the next section, I address this possibility by examining the performance of PR and winner-take-all electoral systems under different political conditions.

331. Id. at 64.
To claim that some particular institution of self-governance has the ability to bring about in practice—to institutionalize—some philosophically desirable conception of the common good is necessarily to make some significant empirical assumptions about the way in which politics will actually proceed when conducted in the proposed institutional setting. An electoral system, that is to say, operates on a particular set of sociological facts about the way political decision making occurs and how political actors behave—what motivates them, how they interact, what means they are able and willing to pursue to achieve their goals, how they exert political influence on one another, and so on. As Melissa Williams has perspicuously observed, a "theory of [political] institutions can be seen as standing between a particular political sociology and a particular view of the common good." The political sociology, in other words, explains how particular institutions are capable of realizing some conception of the common good. To assess the ability of some electoral system to achieve the common good under different sets of conditions, then, requires first identifying the specific sociological facts upon which each electoral system is thought to operate.

My analysis proceeds as follows. Earlier I identified in American political thought two principal conceptions of politics, a politics of virtue and a politics of self-interest, which are captured in the more specific political models of republicanism, populism, and interest pluralism. For each of these models, I first recapitulate briefly its associated political sociology—the specifics, that is to say, about how, on its own assumptions, each model contemplates that politics will achieve the common good. For each model, I then "run" its political sociology—its hypotheses about political behavior—"through" a winner-take-all and a PR electoral system. This yields conclusions about which electoral system is best able to achieve the common good on each of the models of politics. Finally, I analyze what would happen under each electoral system if the assumptions contained in its best-case political sociology were violated—if, for example, under an electoral system that contemplates political virtue, political actors behaved self-interestedly, and vice-versa. This analysis yields some conclusions about the versatility of each electoral system, by which I mean its ability to achieve the common good even when its primary assumptions about political behavior break down. This analysis shows, alas, that neither PR nor winner-take-all electoral systems perform well enough under nonoptimal conditions to relieve us of the painful moral difficulty of choosing which conceptions of politics to favor in the construction of democratic political institutions.

1. Electoral Systems and the Politics of Virtue

a. Republicanism

Republican Political Sociology. As set out in greater detail earlier, Republicanism contemplates an objective and unitary common good. The purpose of politics is to discover and implement this common good. The content of the common good is discovered and implemented, on the republican model, through the legislative deliberations of elected representatives who are preeminently wise and virtuous. To perform this function adequately, representatives must be independent: they must be free to pursue the common good wherever their deliberations lead them. The people, on this model, have the competence to identify and the virtue to select the best possible representatives. They do not, however, have the ability on their own to determine collectively the content of the common good. Popular competence ends with the selection of the representatives. Popular competence and virtue, as the republican model understands them, generally refer to the competence and virtue of a majority. Although republicanism gives the people credit for a certain kind of perspicacity, it does not assume the equality of all opinions, even those concerning the character and intelligence of candidates for political office. Thus, decisions about whom to install in office are for the greatest number.

The Best Electoral System for Republicanism. On the assumptions of republicanism, it seems clear that the common good can best be realized by adopting a robustly winner-take-all electoral system. Most of the work toward achieving the common good in a republican system is done by the representatives through their post-election deliberations, so the critical function of elections in a republican system is to give these deliberations the best possible chance to succeed by identifying and installing in office the absolutely wisest and most virtuous candidates.

Because it is so closely tied to majoritarianism, republicanism presumes that a larger number of people is better at identifying the best candidates than a smaller number of people. It follows that the best electoral system for republicanism is one that will maximize the number of people who make decisions about the merits of each candidate. This can be accomplished in at least three ways. First, a republican electoral system would allow the largest numbers of voters to put their heads together to identify the best candidates. Second, because a majority of the largest possible voter grouping is most likely correctly to identify the best candidates, the electoral system would allow the majorities so constituted to make as many choices as possible. Third, to maximize the voters' ability to select candidates who are in fact the best, the electoral system should permit the voters to make their choices from the best possible pool of candidates. If we assume that the likelihood of

333. This paragraph is condensed from the fuller discussion set out in supra Part III.B.
electing the truly best candidates increases with the number of candidates from which voters are permitted to choose, this will probably mean taking steps to offer voters the largest possible pool of candidates.

These conditions are, without question, best satisfied by a winner-take-all electoral system. Indeed, they are best satisfied not merely by a system that is winner-take-all, but by one that also conducts elections at-large, over the widest possible area. A large election district takes in a correspondingly large electorate that, by hypothesis, will be more competent than the electorates of smaller districts. Because the majority of such a district will, again by hypothesis, be best able to identify outstanding candidates, the power of that majority should be maximized, something that an at-large election using a place system is well-suited to accomplish. Finally, as Madison argued, the large size of such a district increases the likelihood that it will contain, and that the voters will therefore elect, the best possible candidates. Indeed, the logic of republicanism is in some tension with the use of any electoral subdividing at all; its logic drives powerfully to the conclusion that all elections should presumptively be held jurisdiction-wide.334


The very fact of geographic districting, the constitutional validity of which the Court does not question, carries with it an acceptance of the idea of legislative representation of regional needs and interests. Yet if geographical residence is irrelevant, as the Court suggests ... I do not understand why the Court's constitutional rule does not require the abolition of districts and the holding of all elections at large.

Obviously, as a polity we have decided, at both the constitutional and legislative levels, to deviate from the use of maximally large election districts. For example, the Constitution provides that Senators and Representatives are elected statewide rather than nationwide, and various federal laws, beginning with the Apportionment Act of 1842, ch. 14, 5 Stat. 491 (1842), have further required that elections for Representatives be held from election districts rather than at-large within each state. See Laurence F. Schlecker, Congressional Apportionment 132-35 (1941). It does not necessarily follow, however, that these decisions reflect a retreat from the assumptions of republicanism. They may reflect only a judgment that countervailing considerations of significant weight require some compromise, perhaps only a small one, regarding the ability of the electoral system to install the absolutely best candidates. Clearly, the independent values of federalism and state sovereignty, to say nothing of political realities, played a critical role in the Framers' decision to have representatives elected state by state.

Issacharoff and Pildes argue that the adoption of the Apportionment Act in 1842 reflects a national commitment to enhanced proportionality of representation. See Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 Stan. L. Rev. 643, 677 (1998) (claiming that the "principal aim" of the Apportionment Act was "to increase political competition and encourage more diverse representation"). In my view, greater emphasis ought to be placed on the complexities of the sectional politics of slavery that consumed Congress during that period. To be sure, many members of Congress were sincerely interested in the operation of republican government and the political relationship between majorities and minorities. Compare, for example, the remarks of Representative Halsted, chair of the House committee that introduced the legislation, 11 Cong. Globe 465 (May 10, 1842) (arguing that districting was needed "to secure equality in political rights" and "a full
For purposes of comparison, we may consider what would happen if, instead of using a winner-take-all system on a politics consistent with republican assumptions, we used PR instead. How well would PR produce the common good as republicanism conceives it? The answer is: not as well. PR elections use large, multimember election districts, so in this respect PR is at least no worse than at-large elections. However, under PR, a majority cannot control the disposition of all the seats to be filled from the district. Instead, candidates preferred by minorities are elected in proportion to their popular support. What would be the practical effect of such a change? Even under PR, a single, cohesive, popular majority could still fill a majority of legislative seats. Since, by hypothesis, the minority is not as capable as the majority of identifying the wisest and most virtuous candidates, the result would be a legislature a majority of whose members were extremely able, and a minority of whom were less able. Depending upon the deficiencies of the popular minorities that elected them, these lesser candidates might range from only slightly lower in ability than candidates that the majority would have selected, all the way down to incompetent and venal. Nevertheless, in these circumstances, the legislature would still contain a majority of the most able candidates who, in the best case, would have the expression of popular opinion”), and Senator Miller, id. at 568 (June 2, 1842) (decrying "the monopoly of representation in a State" and claiming that the districted system "was the only possible way of feeling the pulse of popular will"), with those of Senator Bagby (arguing in favor of at-large congressional elections on the ground that "the people of each State are, collectively, interested in the relation which that State bears to the General Government; and it was only by the general-ticket system they could obtain their proper representation"). Id. at 571 (June 3, 1842). Yet the debates also reveal, never very far from the surface, a concern for the politics of slavery. In brief, Southern states wanted apportionment to preserve their legislative power in Congress. In the South, political opinion was united in favor of slavery, and pro-slavery forces could count on the support of every member of each state's congressional delegation. In the North, in contrast, political opinion on slavery was divided. If congressional elections in northern states were held at-large, there was a chance that anti-slavery forces could gain a voting majority, enabling them to elect state delegations that were solidly anti-slavery. Southern politicians believed that if northern elections were, on the contrary, held by district, it was likely that a good number of northern legislators would not support measures to end slavery. Thus, apportionment would preserve a pro-slavery majority in Congress. Occasionally, such sentiments were expressed quite directly, as by Representative William CostJohnson:

He was very free to confess that, representing as he did a peculiar institution of the country, he should prefer to see the single district system. He believed that the southern interests would be better advanced by that system, because, on all questions touching it, the Representatives of the South would, as a matter of course, stand together in protection of their own rights guaranteed them by the Constitution, and there would always be differences of opinion in the North and West, and those to unite with the South in the vindication of its rights.

Id. at 463 (May 2, 1842). Similarly, Rep. Garrett Davis argued that "the peculiar principles of the South, and every interest it cherished, were to be protected by the district system." Id. at 448 (Apr. 27, 1842). Others alluded to "sectional interests," see id. at 469-70 (May 3, 1842) (remarks of Rep. Ferris), or disparaged the legislation as "a movement of . . . one section against another." Id. at 568 (June 2, 1842) (remarks of Sen. Woodbury).
power to control the legislature for the purpose of bringing about the common good as they determine it.

While it is possible to imagine such a legislature performing reasonably well, there are good reasons to think that, on a republican political sociology, it would not typically do so. Republicanism contemplates that truth and the common good will be identified through the deliberations of the representatives. This depends upon two considerations: the degree of wisdom and virtue that each representative brings to the legislature, and the quality of the legislative deliberations themselves. A legislature assembled through PR is likely to be inferior in both categories. First, those legislators elected by popular minorities are unlikely to bring to the legislature the same degree of competence as would legislators elected by the majority, reducing the overall pool of delegate resources available to the legislature as a whole. Second, less able legislators will be unable to contribute as much to the legislature's deliberations as their more able counterparts, reducing the quality and utility of discussion. Indeed, they might seriously impede it by taking up limited time pursuing fruitless topics or avenues. On republican assumptions, it is unquestionably better for all seats to be filled by the best possible representatives, rather than merely some, even if amounting to a majority. The Continental Congress had Jefferson and Adams and Franklin; the Constitutional Convention had Madison and Hamilton and Washington and Wilson. Surely a system best suited to including all these luminaries is to be preferred to a system that might include merely some of them, or which would replace them with incompetents.

Furthermore, except on the most absolutist conceptions of a unitary common good, even the wisest and most virtuous representatives will often disagree, at least at the outset of discussion. If this were not the case, deliberation would be unnecessary. Some, moreover, no matter how wise, may from time to time be wrong; others, no matter how virtuous, may from time to time waver in their commitment to the common good. The best antidote to these kinds of problems, on republican assumptions, is to assure a legislature stocked to the brim with the best possible people, those most capable of filling in any gaps left by the occasional faltering colleague. A legislature assembled through PR, however, introduces the possibility that a wrong-headed majority coalition might form from two smaller groups, one consisting of generally able and good representatives, elected by the majority, who have fallen short of their best, and the other consisting of a group of stupid or venal representatives, elected by the (by definition incorrect) minority. In this situation, the legislature's ability to identify and act upon the common good is put in serious jeopardy.

Similar problems arise if there is no single, cohesive, popular majority

335. See Berg's account of the Stalinist theorist Andrei Y. Vyshinsky in BERG, supra note 286, ch. 1.
capable of coming to agreement on the identity of enough of the very best
candidates to install a majority of the legislature. If the largest voter
grouping amounts to only a plurality of the people, then PR systems, unlike
winner-take-all systems, will guarantee that the legislature is not controlled by
a majority of the absolutely wisest and most virtuous candidates. Since
republicanism typically draws no distinction between the wisdom of the
greatest number when it is a majority or merely a plurality, PR has the
capacity seriously to undermine the achievement of the common good on a
republican political sociology. It is of course true that much in this analysis
depends upon the assumption that a majority is more competent than any
minority and that a plurality is more competent than any smaller minority,
yet this is simply part of the republican hypothesis. If we set it aside, then
nobody's opinion about who will make the best representative is any better
than anyone else's, and republicanism collapses into interest pluralism.

Winner-take-all on the Counterassumptions. Winner-take-all electoral
systems, then, can be expected to perform at least somewhat better, and very
likely substantially better, than PR electoral systems on the assumptions of
republicanism. Suppose now that we are designing democratic institutions
and have high hopes for a politics of virtue. We consequently install a
robustly winner-take-all electoral system for the purpose of reaping as fully as
possible the benefits of political virtue. But what happens if our hopes for a
politics of virtue are not realized? Suppose that the electorate begins to
behave self-interestedly. Voters begin voting for candidates not on the basis
of their wisdom and virtue, but on the basis of their willingness to pursue
their constituents' private interests, at the expense of the common good, if
necessary. Representatives no longer seek the common good but instead
press measures designed to provide private advantage to themselves or their
constituents. What happens now in a legislature assembled utilizing a
winner-take-all electoral system?

The result, unfortunately, is that when a winner-take-all electoral system
confronts self-interested political behavior, it quickly collapses into a highly
leveraged and unfair power grab by the majority—all the more so if the
system is at-large, and all the more again if it operates over an extensive
territory. Winner-take-all systems are designed to place control over the
entire apparatus of government into the hands of a majority or plurality;
that is their point—that is how, on republican assumptions, they reap the
benefits of political virtue. Such a system deliberately magnifies the power of
the majority because it assumes that the majority knows, and intends to act
upon, what is good. A majority or plurality bent on pursuing its own private
interest rather than the common good—a faction, in Madison's
terminology—can, however, under these same conditions, without difficulty
seize control over governmental policy to serve its own selfish purposes.

When such a group gains control over the powers of government, the
common good is the first casualty. On republican assumptions, the common
good is something different from the private good of any group, even a majority, and the pursuit of self-interest by a ruling majority is thus by definition not the pursuit of the common good. But even under the assumptions of interest pluralism itself, an ethical system in which self-interested behavior is to be praised rather than condemned, the winner-take-all electoral apparatus thwarts the achievement of the common good as interest pluralism conceives it. Interest pluralism is a utilitarian system in which the common good is achieved through maximization of overall social utility. By allowing a majority full control over the institutions of government policy making, however, winner-take-all systems do not institute the conditions necessary for the maximization of social utility. That would require negotiation and trading among all significant social groups. Winner-take-all systems, by giving all power to a majority, exclude the minority from the councils of government and thus dispense altogether with the process of compromise and negotiation between and among majorities and minorities that the utilitarian calculus demands.\footnote{336. Issacharoff & Pildes, \textit{supra} note 334.}

This is, of course, exactly the kind of complaint that proportionalists so frequently make about winner-take-all electoral systems. As we saw in section I.C, proportionalists object to the way in which winner-take-all systems exaggerate majority strength and deprive minorities of the kind of legislative presence that would allow them to exert some influence on legislative outcomes. For proportionalists, when winners take \textit{all} they are taking something to which they are not entitled; they are engaging in a cheap and unprincipled grab for power. I hope to have shown here that what makes this kind of result a power grab is not the winner-take-all electoral structure itself, but rather a breakdown of its most critical assumption: instead of behaving virtuously and in pursuit of the common good, political actors are behaving badly by exploiting the electoral structure for the purpose of pursuing their own private interests.

\textit{b. Populism}

\textit{Populist Political Sociology.} Let us now apply the same analysis to a populist conception of the politics of virtue to see if things come out any differently.\footnote{337. This paragraph is condensed from the fuller discussion set out in Part III.B.2.b \textit{infra}.} Like republicanism, populism contemplates an objective and unitary common good and holds that the purpose of politics is to discover and implement it. However, on the populist view, the people—usually understood to mean a majority or plurality of the people—know better than their elected representatives where the common good lies. The people thus possess a substantial degree of competence; they are usually able, for example, to evaluate the merits of competing policy alternatives and to identify the alternative that most conduces to the common good. By
hypothesis, then, the main function of representatives is merely to press in the legislature the policies that the people have determined to be in the public interest. If representatives do not display this kind of loyalty—if they exercise independence and are permitted to debate freely and to change their views—then the system comes to resemble much more closely the republican model.

*The Best Electoral System for Populism.* For much the same reasons as held true for republicanism, winner-take-all electoral systems are the systems best adapted to achieve the common good on the populist sociology of politics. In a populist system, elections give the people the opportunity collectively to identify the common good directly rather than merely the individuals who will subsequently determine it through independent deliberation. Like republicanism, populism assumes that the expected quality of the popular decision increases with the number of decision makers. Consequently, as with its republican counterpart, a populist politics of virtue is best conducted utilizing an electoral system that maximizes the number of people consulted and then gives to a majority of that group the broadest possible degree of influence. A winner-take-all system, particularly an at-large system conducted across large jurisdictions, fits the bill admirably.

Once again, PR has the potential to undermine the political system's ability to achieve the common good as populism understands it. Under PR, small minorities would have the opportunity to determine for themselves where the common good lies and to elect representatives committed to pressing corresponding positions. Yet, on populist assumptions, these minorities and the representatives they elect are likely to be wrong about the content of the common good. Any electoral system that would deliberately introduce into the legislature representatives committed to the advancement of incorrect positions can only make it harder for the political process to achieve the common good.

In some situations, the presence of these wrong-headed representatives may make little difference to legislative outcomes. For example, if in a PR election a popular majority is sufficiently large, its representatives may so dominate the legislature as to have no need for the votes of representatives committed to positions dictated by the minority. The smaller the majority, however, the more often the votes of minority representatives might be needed, and if the largest segment of the electorate amounts only to a plurality then these additional votes become absolutely necessary. To attract these votes, representatives of the majority or plurality might find themselves called upon to engage in some form of compromising or vote trading with representatives of the various minorities. Yet it is axiomatic on populist assumptions that the majority possesses the truth, and the truth is not something to be compromised or traded away in exchange for other considerations. PR would thus force representatives to adopt an attitude toward the common good that is inconsistent with the premises of a politics
of virtue.

*Populism on the Counterassumptions.* If political actors should behave self-interestedly instead of virtuously, a winner-take-all system adopted on the assumptions of a populist sociology of politics would suffer from precisely the same defects as one adopted on the assumptions of republicanism: it would degenerate into a leveraged power grab by a popular majority bent on advancing its own self-interest at the expense of the common good. A winner-take-all system is designed to hand as much power as possible to a majority on the assumption that such power will be put to good and proper use. A popular majority or plurality that does not behave consistent with these assumptions would have free rein to use the power of government for selfish purposes. Again, the pursuit of self-interest is by definition contrary to the populist conception of the common good, and the exaggerated minimization of minority influence at the same time prevents the electoral system from operating under conditions necessary to a fair and principled interest pluralism.

In sum, winner-take-all electoral systems do a far better job than PR of achieving the common good when politics is conducted as a politics of virtue. Conversely, winner-take-all electoral systems do an extremely poor job of achieving the common good—on any conception of the common good, political or pluralist—when politics is characterized by the pursuit of self-interest. A winner-take-all electoral system, then, is not a particularly versatile system; it works well only on one kind of political sociology and does not work well on others.

2. Electoral Systems and the Politics of Self-Interest

*The Political Sociology of Interest Pluralism.* I turn now to the competing conception of politics: politics as the pursuit of self-interest, as captured in the model of interest pluralism. According to interest pluralism, the common good is achieved through the maximization of social utility. This notion of the common good is in a sense objective, but it is not a common good that can be reliably perceived either through *ex ante* contemplation or by principled deliberation and reflection. Rather, the common good in a system of interest pluralism can reliably be determined only by the political system in action. Politics, on this model, achieves the common good automatically when political actors engage in the mutual pursuit of self-interest through a process of negotiation, compromise, and logrolling. Consequently, the only way to get a fair share of the spoils, and thus to

338. This paragraph is condensed from the fuller discussion set out in *supra* Part II.A.

339. It is possible to conceive of a different kind of pluralism—call it *raw pluralism*—consisting of a pure power struggle with no utilitarian payoff, a true Hobbesian system in which all war against all. Because such a system depends entirely on strength and domination, and thus holds no ethical interest, I shall not pursue it here.

340. *Pitkin, supra note 33, at 200-05.*
attempt to maximize one's own utility (thereby contributing to the maximization of overall utility) is to have one's interests represented directly in the legislature.\textsuperscript{51} This means that representatives must be loyal to constituents by attempting at every opportunity to advance their interests. Representatives will do this out of political self-interest: because they seek reelection, representatives will attempt to please voters, and voters will respond either by rewarding representatives with additional terms or by punishing them by turning them out of office.

The Best Electoral System for Interest Pluralism. On the assumptions of interest pluralism, the common good can best be realized by adopting a PR electoral system. As with republicanism, most of the work toward achieving the common good in a system of interest pluralism occurs after the election, within the legislature. In this case, however, the common good is hammered out not in the disinterested deliberation of public-regarding representatives, but in the give and take of legislative compromise, negotiation, and logrolling, processes in which all legislators faithfully seek to advance the private interests of their constituents. It follows that the most important function of elections in a system of interest pluralism is to create the conditions in the legislature most conducive to the accurate achievement of maximal social utility.

On interest pluralist assumptions, the legislative process is likely to maximize utility only when two conditions are fulfilled. First, the full panoply of society's private interests must be represented and vigorously advanced within the legislature.\textsuperscript{52} This condition is necessary to prevent represented groups from unfairly distributing to unrepresented groups a disproportionately low share of social benefits or saddling them with a disproportionately large share of social costs, either of which would lower overall utility. Second, social interests must be represented in rough proportion to their social strength, which means generally that each interest must be represented by a number of legislators proportional to the number of voters who hold the interest. This condition is necessary to provide each interest with an appropriate amount of legislative bargaining strength. Utilitarianism holds that utility is maximized when resources are allocated to those who are willing to pay the most for them. In the legislative setting, the currency is votes. Premises of democratic equality, however, require that all legislative votes count the same, both within the legislature and in terms of the number of individuals represented by each vote.\textsuperscript{53} Consequently, the most feasible way to translate the willingness to pay of represented interests

\textsuperscript{51} This was certainly Mill's view. See Mill, supra note 17, at 244-45, 303-07; see also Gardner, supra note 84, at 948-51. Mill's position, however, rests on some assumptions that may be questionable. Id. at 951-56.

\textsuperscript{52} See supra note 110 (discussing Bentham's views on interest pluralism).

\textsuperscript{53} Or at least this is so according to some of the major philosophical models of political fairness. See Charles R. Beitz, Political Equality: An Essay in Democratic Theory (1989).
into legislative resources with which to bargain is to provide for proportionality in the representation of interests.

These conditions are obviously best satisfied by some kind of proportional electoral system, and the more accurately votes are translated into legislative strength, the better. Unlike other electoral systems, PR is designed specifically to provide legislative representation to all significant groups of voters.\(^{344}\) It also contains mechanisms to adjust each group's legislative strength proportionately to its popular support. Some PR systems, such as the single-transferable vote, contain complex devices that make them extremely sensitive to small changes in proportional support for candidates.\(^{345}\) Thus, PR is well-suited to install a legislature that will be in a good position to engage in the kind of bargaining that interest pluralism contemplates.

For purposes of comparison, we may ask what would happen on the political sociology of interest pluralism if we used a winner-take-all electoral system instead of PR. As we have already seen, winner-take-all systems are highly unlikely to achieve the common good when political actors behave self-interestedly. Instead of producing the conditions for a fair and, on interest pluralism's assumptions, principled form of pluralistic bargaining, winner-take-all systems reward majorities or pluralities with complete control over the apparatus of power. In so doing, winner-take-all systems make it unnecessary for majorities to negotiate with minorities. Free from the need to bargain and make trade-offs, majorities are free to institute policies that maximize their own utility, but do not necessarily maximize the utility of society as a whole. This problem would most likely manifest itself in a shifting onto minorities of the external costs of political policies, but could also show up in outright plunder, that is, in forcible wealth transfers from the minority to the majority. Members of majority groups might benefit greatly from policies adopted by majority action, but minorities might well suffer losses of a magnitude that make the chosen policies inefficient from a society-wide perspective. In sum, PR electoral systems are clearly better suited than winner-take-all systems to achieve the common good on the assumptions of interest pluralism.

**Interest Pluralism on the Counterassumptions.** Now let us consider what would happen under a PR electoral system if the assumptions of interest

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344. If the number of legislators is to be less than the number of voters, obviously not every interest group will be able to muster the votes to elect a candidate. Thus, every PR system contemplates some threshold vote total necessary to elect a candidate. The exclusion of small—read "fringe" or "extremist"—groups inevitably introduces some degree of error into the process by which politics maximizes social utility. However, this error can be adequately justified on utilitarian premises because the exclusion of smaller groups reduces transaction costs by allowing society to keep its legislature at a manageable size. Presumably, this gain in transaction costs roughly offsets any errors resulting from the exclusion of groups that are too small to meet the threshold requirement for election.

345. See DUMMETT, supra note 41, at 127-35.
pluralism are violated and voters begin to behave virtuously rather than self-interestedly. Instead of voting for the candidate whom they think will most accurately advance their own private interests, suppose voters make sincere and diligent efforts to cast votes on the basis of where they think the common good lies. In these circumstances, the meaning of a candidate's election is no longer clear. Some candidates might be elected to pursue their constituents' private interests; others to advance policies that promote the good of all; still others to use their best judgment independently for the common good; and others yet for some variety of conflicting and incompatible purposes. Ordinarily, we might be inclined to think that the presence of virtue in politics—in any amount—is good. As Jeremy Waldron has observed, however, things are not that simple:

This sounds as though it ought to make things better, since it mitigates the centrifugal force of egoism in politics, but in fact it makes things worse for the Benthamite theory of democracy. So long as each voter decides on the basis of his own interest, some chance exists that a majority decision might correspond roughly to the aggregate happiness of society. But if large numbers are voting on the basis of what they think the aggregate happiness demands [i.e., on the basis of a belief about the common good], then the whole thing falls apart. If some are voting that way and some are voting selfishly, adding those votes to one another is like adding chalk and cheese. And if all are voting selflessly, on the basis of their personal perceptions of the general welfare, then we have no aggregative reason for thinking that the majority decision tells us anything new at all. Aggregation over individual votes makes some sort of sense from the utilitarian point of view if votes represent individual preferences. But it makes no sense at all from that point of view if votes represent utilitarian opinions.  

In other words, for interest pluralism to work properly, all must behave selfishly. A politics of virtue subverts pluralism's ability accurately to adjust social benefits and burdens. A legislature assembled in this manner can be expected to achieve the common good, on any set of assumptions, only inadvertently or randomly. Moreover, as we have already seen, PR is counterproductive even if all behave virtuously because it elevates to the legislature mistakes made by popular minorities about the common good or the qualifications of candidates. On the assumptions of republicanism or populism, this result has a significant potential to undermine achievement of the common good. PR electoral systems, then, are not particularly versatile: they work exceedingly well on a pluralistic politics of self-interest,

but they work badly when political actors pursue a politics of virtue.

3. Summary

The preceding analysis shows that Madison’s hope cannot be fulfilled through the subconstitutional structuring of electoral systems. Winner-take-all electoral systems perform admirably when it comes to nurturing political virtue and allowing society to reap its benefits as fully as possible. In the presence of a politics of self-interest, however, any winner-take-all system is at grave risk of breaking down into a mechanism by which a self-interested majority or plurality can seize the levers of power for the purpose of advancing its own private interests at the expense of the common good. Conversely, PR is extremely well-suited to handle a politics of self-interest. By reproducing in the legislature a balance of legislative interests that accurately reflects their distribution in society, PR creates the conditions for a pluralism that will produce fair and utility-maximizing outcomes. When political actors do not behave self-interestedly, however—when they behave virtuously and make sincere efforts to use the political system to achieve the common rather than their own private good—PR’s ability to produce a fair pluralism is severely undermined.

Neither system, then, is capable of doing what Madison hoped democratic institutions would do: allow a politics of virtue to flourish and contain and control a politics of self-interest. This means that in choosing an electoral system we cannot escape the necessity of choosing among conceptions of politics, or at least of choosing which conception of politics will be favored by institutional circumstances. To choose an electoral system is thus to put a thumb on the political scales. An electoral system is not merely a passive receptacle for political behavior; it does not simply take political behavior as it comes and convert it impartially into some version of the common good. Instead, the electoral system plays an important role in

347. Some political scientists who study electoral systems have acknowledged a similar point. No electoral system is impartial, they argue, in the sense that it is merely a system that takes and mechanically aggregates the electorate’s preferences. What constitutes a “preference” that ought to be aggregated, for example, is highly contestable and any choice in this respect is typically referable to some underlying conception of what democratic politics ought to be about. See William H. Riker, Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice 235 (1982) (observing that there are many ways to amalgamate preferences; that they do not produce the same outcomes on the same set of preferences; and that there is no one clearly superior method; each makes a claim to superiority based on different features of fairness or efficiency and embodies “different ethical principles”; as a result, “there is no fundamental reason of prudence or morality for preferring the amalgamation produced by one method to the amalgamation produced by another”); Katz, Democracy and Elections, supra note 119, at 279 (rejecting the possibility of deciding which electoral system is most democratic and arguing instead that there is no single answer because it depends on the “values to be encouraged” and “the political and social environment in which one is working”). As Riker later observed in another context, “[m]uch of the motivation for the invention of new electoral systems is a belief that a new method of
constituting society's politics. A society that chooses PR will have little hope of successfully producing a politics of virtue; a society that chooses winner-take-all will have no good electoral defense against the concerted and energetic pursuit of self-interest. Which do we prefer: to yield to our hopes by making possible a politics of virtue; or to yield to our fears by consigning ourselves to a politics of self-interest that is, if not virtuous, at least fair? Designers of democratic institutions ought to have a clear idea of which alternative they favor, and should choose an electoral system accordingly.

V. CONCLUSIONS: POLITICAL INSTITUTIONS IN THE 21ST CENTURY

The impossibility of fulfilling Madison's hope through the design of electoral systems has several implications for any further consideration of political structures and institutions. First, it may simply be that the accomplishment of Madison's hope requires a broader, more systemic approach in which the design of an electoral system is conceived as merely one component of an integrated institutional design. Under such an approach the promotion of political virtue might be allocated to the electoral system, for example, while the containment of political self-interest within the bounds of fairness might be assigned to some other institution. If the electoral system can perform only one of these functions, deciding which role it ought to perform might then depend on the availability and capabilities of other institutions.

On this view, one argument for adopting a winner-take-all electoral system might be that many constitutional institutions—bicameralism, federalism, separation of powers, judicial review, and so on—are already well-placed to thwart governmental action effectively. Given the adequacy of these institutions at preventing any kind of political action, whether public-regarding or self-interested, from bearing fruit, what might be needed to balance the system is some institution that increases the chances for a politics of virtue successfully to emerge. If so, a winner-take-all electoral system might then be a sensible choice. Indeed, it is difficult to discern in the Constitution, or even among subconstitutional political institutions, other institutions that have much of a capacity to nurture political virtue.548
Here, though, we might be justified in asking whether it is really within the power of any institution to encourage political virtue at all. Institutions may create the conditions in which political virtue may flourish when it appears, but it must appear—it must be generated by citizens. As Judge Hand wrote in a related context, "a society so riven that the spirit of moderation is gone, no court can save; [and] a society where that spirit flourishes, no court need save." This view, if it is correct, points toward a different allocation of social functions. If institutions cannot create virtue but are capable, at least in some circumstances, of reining in the excesses of a politics of self-interest, perhaps we should devote our institutions uniformly to constraining self-interest and allocate the encouragement of virtue to other areas of life such as education, either within the private realm of the family, or in the semi-public one of schooling. This conclusion, however, cannot stand because it rests on a false distinction between public institutions and personal education. In fact, as political theorists since Aristotle have observed, institutions educate. While some of a citizen's education may be imparted directly through teaching and other forms of direct instruction, much of it, as John Dewey has persuasively argued, is not:

[T]he development within the young of the attitudes and dispositions necessary to the continuous and progressive life of a society cannot take place by direct conveyance of beliefs, emotions, and knowledge. It takes place through the intermediary of the environment. The environment consists of the sum total of conditions which are concerned in the execution of the activity characteristic of a living being. The social environment consists of all the activities of fellow beings that are bound up in the carrying on of the activities of any one of its members. It is truly educative in

popular wishes, aim primarily only to survive and will do whatever is necessary to assure their own survival. See Peter Mair, Party System Change: Approaches and Interpretations ch. 5 (1997). Recent developments in systems theory suggest a basis for understanding political parties as "autopoietic" (self-sustaining) institutions. Some of these developments are described in Jurgen Habermas, Between Facts and Norms 46-49 (1996). See also James A. Gardner, Can Party Politics Be Virtuous?, 100 Colum. L. Rev. 667 (2000) (arguing on structural grounds that a virtuous party politics is possible, but unlikely).

349. Learned Hand, The Contribution of an Independent Judiciary to Civilization (1942), in The Spirit of Liberty 155, 164 (3d ed., 1960). Justice Jackson similarly observed that the formal separation of constitutional powers cannot "keep power in the hands of Congress if it is not wise and timely in meeting its problems[;] ... only Congress itself can prevent power from slipping through its fingers." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring). An even more extreme position was taken by the political scientist E.E. Schattschneider, who argued that political parties can and do routinely subvert even the best-considered legal norms. E.E. Schattschneider, Party Government 12 (1942).

350. Aristotle argued, for example, that one of the most important jobs of the legislator is "to ensure that his citizens become good men. He must therefore know what institutions will produce this result." Aristotle, supra note 91, bk. VII, ch. xiv, at 1333b32.
its effect in the degree in which an individual shares or participates in some conjoint activity. By doing his share in the associated activity, the individual appropriates the purpose which actuates it, becomes familiar with its methods and subject matters, acquires needed skill, and is saturated with its emotional spirit. By living a certain kind of life, then, members of society become educated to the society’s values and beliefs.

This analysis requires us to ask what kind of education might be provided by institutions designed to accommodate pluralism, and more specifically whether such an education might work at cross-purposes with and thus undermine, societal efforts to inculcate virtue at home and in school. Surely there are good grounds for thinking that this would be the case. Pluralistic institutions such as PR are designed in the expectation that political actors will pursue their private self-interest, and indeed can be utilized successfully only by actors behaving in just that way. Such institutions thereby provide not only a structural incentive for the pursuit of self-interest, but also an object social lesson which teaches that the pursuit of self-interest is publicly expected, socially appropriate, and politically effective. In these circumstances, it is difficult to see how pluralistic political institutions could avoid undermining other efforts, at home or in school, to teach the young that they ought to live public and political lives of virtue. Institutions designed in the expectation of a politics of self-interest, then, may well contribute to the fulfillment of those very expectations.

If these considerations counsel against a complete capitulation to interest pluralism in the design of political institutions, they must be weighed against a very different and potentially overwhelming countervailing consideration: the possibility that institutions designed to cultivate political virtue are simply inappropriate for the times in which we live. Those political institutions best suited to harvest public virtue—institutions like majoritarianism, single-member districting, and winner-take-all electoral systems—appeared during the Enlightenment at a time when a belief in an objective and objectively knowable common good was part of the standard intellectual equipment of the age. Since then, several

351. JOHN DEWEY, DEMOCRACY AND EDUCATION 26 (1916).
352. Nancy Schwartz makes the complementary argument that winner-take-all, single-member district systems “best promote[] citizenship.” SCHWARTZ, supra note 114, at 125. Schwartz argues that political representation “is a process in which a people makes a choice about how it will be recognized politically, and hence becomes self-conscious about who they are collectively.” To be constitutive, she argues, representation “must be rooted in local constituencies” of place rather than interest. Single-member districts utilizing winner-take-all elections, Schwartz maintains, “best encourage the development of political individuality, the civic status of being a citizen who retains his or her own particular loyalties yet acknowledges membership in the whole. By having set boundaries to a district one defines a relevant constituency not just by one aspect of its life at a moment in time but rather by the totality of its political life over the years.” Id. at 129.
important, interrelated developments have undermined, and perhaps wholly
discredited, the assumptions upon which those institutions originally were
founded.

In the political realm, the assumptions of eighteenth-century
republicanism soon yielded to a widespread belief in democratic equality.
Americans, to be sure, have never quite ceased to believe in political virtue
and the common good. Nevertheless, perhaps as early as the 1790s, but
certainly by the Jacksonian period, Americans came to accept equally the
notion that individuals and groups have distinct interests, and that the
pursuit of those interests is an entirely respectable object of political activity.
Indeed, the belief that different classes have different interests, when
combined with a general rejection of virtual representation, led Americans
eventually to conclude that leaders could not know the interests of all classes
or transcend the interests of their own, an idea which in turn evolved into
calls for extension of the franchise.

The extension of the franchise to previously excluded groups of white
males only eroded further the plausibility of the republican concept of a
politics of virtue by including within the polity voters who, by republican
standards, were incompetent to pursue political virtue themselves, and
who in all likelihood declined to practice an appropriately republican self-
abnegation in their personal or political lives. The declining competence of
the citizenry as America moved toward mass democracy in turn facilitated
rejection of the model of a virtuous politics. At the same time, mass
democracy embraced the utilitarian article of faith that no one knows better
whether his shoe pinches than the man who wears it. Consequently, the
citizens of this new mass democracy came to understand themselves to be
eminently competent—in discerning their own self-interest.

353. See Wood, Radicalism, supra note 156, at 255-67 (discussing the erosion of
disinterested political participation).
354. See Wiebe, Self-Rule, supra note 193, at 79. Harry Watson places this transition
somewhat later in the nineteenth century. Watson, supra note 196, at 48.
355. When British authorities invoked virtual representation to justify the
disenfranchisement of the American colonists, it "met at once with flat and universal rejection,
ultimately with derision." Baily, supra note 174, at 167. See id. at 167-68, 173-74; see also John
Phillip Reid, The Concept of Representation in the Age of the American Revolution 59-60 (1989)
(explaining American Whig arguments against virtual representation); Pitkin, supra note 33, at 173-75
(supporting a distinction between the interests of the aristocracy and the people).
357. For example, most states eliminated property requirements for voting, requirements
originally justified by the belief that members of the economically dependent classes lacked the
independence and will to participate properly in political affairs. See Robert J. Steinfeld, Property
358. See Peter Bachrach, The Theory of Democratic Elitism: A Critique 26-35 (1967);
Wiebe, Self-Rule, supra note 193, at chs. 7-9.
359. See Pitkin, supra note 33, at 198.
This change in competencies further reinforced the tendency to see politics in pluralist terms: as a forum for the pursuit and accommodation of competing interests.

Parallel developments in the philosophical realm reinforced the impact of these political developments on republican beliefs. During the nineteenth century, skepticism toward the Enlightenment concept of objective truth appeared everywhere, from Bentham's dismissal of natural law as "nonsense on stilts" to Nietzsche's antifoundationalism. Today, of course, postmodernism utterly denies the existence of objective truths and deems political judgments concerning truth and the common good to result from the application of political power to social life.

Finally, two of the most dreadful historical episodes of the twentieth century—World War II and the Gulag—furnished the world with the starkest possible examples of what can go wrong when individuals armed with rigid ideologies, and the sheer power to impose them on others, pursue their conception of truth and the common good to its logical end. In his anti-platonic polemic The Open Society, Karl Popper laid the blame for these atrocities directly at the feet of a kind of "naive monism" to which the belief in objective truth can lend itself. Democracies, Popper argued, are no more entitled than tyrannies to claim that the outcome of their political processes identifies the common good simply in virtue of the fact that the decision is made by the people rather than a despot, and he warned against "Utopian engineering" in any form, whether democratic or not.

These developments raise an important question: is it possible for a society that has experienced Jacksonian egalitarianism, the growth of interest politics, universal suffrage, mass modern democracy, postmodern philosophical skepticism, Nazism, and the Gulag to retain any significant and contextually plausible belief in an objective common good? Is it possible for politics in such a society to be conducted in any way other than the universal pursuit of self-interest? Perhaps not. And if the beliefs underlying a politics of virtue cannot be sustained, what is left to sustain political institutions that are best justified by those beliefs? Perhaps, then, we ought simply to discard winner-take-all and at-large electoral systems as quaint relics of the Enlightenment.

And yet, it seems somehow premature to dismiss entirely the idea that virtue—or some twenty-first-century reinvention of the idea of virtue—might

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360. JEREMY BENTHAM, ANARCHICAL FALLACIES 489, 501 (1824).
361. See, for example, among many possible works, FRIEDRICH NIEZSCHIE, THE GENEOLOGY OF MORALS (1887).
362. See MAN LING LEE, supra note 169, at 5 (giving an overview of postmodern thought regarding truth).
363. Id. at 125.
364. Id. at 157.
play some meaningful role in political life, one that opposes the unmediated political pursuit of self-interest. The proliferation of countertheories such as civic republicanism, communitarianism, and discourse theory testify to the longing for a politics that is more meaningful and more rewarding than the politics interest pluralism promises to deliver and institutionalize. Certainly, the task for political theory in the coming years is to restore virtue and the common good to places of prominence without founding them upon discredited conceptions of objective and objectively knowable truth.