

COMMENT

One Person, No Vote: Staggered Elections, Redistricting, and Disenfranchisement

Every ten years, California redraws the maps for its State Senate districts in order to restore compliance with the constitutional “one person, one vote” requirement.¹ Because state senatorial districts hold staggered elections, redistricting allows some Californians to cast two votes for a state senator within a four-year election cycle: once in their old senatorial district, and once again, just two years later, in their new senatorial district. Meanwhile others do not vote for a state senator at any point within the same four-year timeframe. Redistricting therefore creates the exact harm it intends to prevent: in service of the ideal of “one person, one vote,” California gives some voters two votes and others no vote at all. During the current cycle, an estimated 3.97 million Californians will be temporarily disenfranchised on account of redistricting;² another 3.9 million will be double-enfranchised.³

The problem arises from the intersection of the ten-year redistricting cycle with California’s system of staggered State Senate elections. Every two years, half of California’s state senators stand for election, with odd-numbered districts holding elections in presidential-election years and even-numbered districts holding elections in midterm-election years. When redistricting moves a voter from an odd district to an even district, that voter is placed in democratic limbo: her old senator’s term ends in 2012, but her new district does not hold elections until 2014. Thus for two years, that voter is not

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1. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).
 2. *Vandermost v. Bowen*, No. S198387, 2012 WL 246627, at *31 (Cal. Jan. 27, 2012).
 3. Jim Miller & Brian Joseph, *Redistricting: New Lines Leave Some Voters Without a Senator*, PRESS-ENTERPRISE, Dec. 17, 2011, <http://www.pe.com/local-news/politics/jim-miller-headlines/20111217-redistricting-new-lines-leave-some-voters-without-a-senator.ece>.

represented by a senator for whom she had an opportunity to cast a ballot, a status euphemistically termed “deferral.” A voter moved from an even to an odd district faces the opposite scenario: she can vote in her new district in 2012, even though her old senator, whom she elected in 2010, will continue serving through 2014. These “accelerated” voters thus cast ballots in races for two State Senate seats, while most Californians only cast ballots for one senator, and deferred voters cast ballots for none.

This problem is not unique to California: twenty-eight states elect one or both houses of their legislature by staggered terms.⁴ Each of these states must balance legislative continuity and state constitutional requirements with democratic participation and federal equal protection principles in reconciling staggered elections with decennial redistricting. This Comment identifies the methods various states use to resolve this problem, and it argues that California and states employing unmodified staggered elections ought to adopt a system of truncated terms, whereby all State Senate districts hold elections in the first election year following redistricting. Such a system would better fulfill constitutional and democratic norms of equal participation and would be more consistent with the policy preferences of California voters.

Part I describes California’s system, variants in other states, and the resulting inequality among voters. After Part II explores Florida’s alternative system of truncated terms, Part III argues that a Florida-style system is preferable to California’s because it is more consistent with constitutional and democratic norms. Part IV examines the counterargument that continued staggering serves the state’s interest in institutional continuity and concludes that other democratic values must take precedence.

I. HOLDOVERS, ACCELERATED TERMS, AND DEFERRED VOTERS: THE CALIFORNIA SYSTEM

The California Constitution, adopted in 1879, requires that elections for State Senate be staggered, with half of all senatorial districts holding elections every two years.⁵ In 1964, the Supreme Court ruled in *Reynolds v. Sims* that states must ensure that legislative districts are roughly equal in population in

4. The following states stagger the terms of their legislatures’ upper chambers only: Alaska, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Missouri, Montana, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. North Dakota staggers terms in both houses; Nebraska’s unicameral legislature is staggered. See *infra* Appendix.

5. CAL. CONST. art. IV, § 2, subsec. a.

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order to comply with the Equal Protection Clause.⁶ To comply with *Reynolds*, California adopted a system of decennial redistricting; however, it has not amended its constitution's system of staggered elections to alleviate the resulting problem of deferred and accelerated voters described above. The California Supreme Court endorsed this convoluted system in its 1973 decision in *Legislature v. Reinecke*, reasoning that “[t]o obviate the inequality [between voters] would substantially interfere with the orderly operation of the four-year staggered terms system after every reapportionment.”⁷ Thus, the intersection of the nineteenth-century state constitution and the twentieth-century redistricting mandate has generated a democratic dilemma: every ten years voters may elect one, two, or zero state senators owing solely to the vagaries of the redistricting process.

Californians reformed the state's redistricting process in the Voters First Act of 2008, which established an independent redistricting commission and required that new district lines be drawn without regard to the incumbent's place of residence.⁸ Having separated many voters from their legacy districts, the first Citizens Redistricting Commission considered the issue of deferral and acceleration only *after* the district boundaries were drawn.⁹ In the current electoral cycle, the Commission worked to minimize the number of deferred (odd-to-even) voters by determining which districts had the greatest proportion of formerly-odd voters and assigning those districts odd numbers.¹⁰ For those voters still deferred, this is little consolation: for the next two years, they must be represented by a state senator they had no voice in electing, for reasons completely outside of their control.

6. 377 U.S. 533.

7. 516 P.2d 6, 12 (Cal. 1973).

8. CAL. CONST. art. XXI, § 2, subsec. e.

9. *Citizens Redistricting Commission's Narrative on Preliminary Final District Maps*, CAL. CITIZENS REDISTRICTING COMMISSION (July 29, 2011), http://wedrawthelines.ca.gov/downloads/meeting_handouts_072011/handouts_20110729_narrative.pdf; see also *In re Full Commission Business Meeting: Hearing Before the Cal. Citizens Redistricting Comm'n* 132-88 (Cal. July 21, 2011), available at http://wedrawthelines.ca.gov/downloads/transcripts/201107/transcripts_20110721_sacto.pdf.

10. *Citizens Redistricting Commission's Narrative on Preliminary Final District Maps*, *supra* note 9. This numbering plan itself is also potentially vulnerable to legal challenge, since it is unclear whether it complies with the Voters First Act's requirement that districts be “numbered consecutively commencing at the northern boundary of the State and ending at the southern boundary.” CAL. CONST. art. XXI, § 2, subsec. f. The Commission's plan results in many discrepancies from north-south continuous numbering: *e.g.*, district six is north of district five and district twenty-five is north of district twenty-two. *Maps: Final Certified Senate Districts*, CAL. CITIZENS REDISTRICTING COMM'N (Aug. 15, 2011), <http://wedrawthelines.ca.gov/maps-final-draft-senate-districts.html>.

California is not alone in its non-solution. Similarly, Oregon,¹¹ Tennessee,¹² Kentucky,¹³ Indiana,¹⁴ Missouri,¹⁵ Nevada,¹⁶ Oklahoma,¹⁷ Utah,¹⁸ Washington,¹⁹ West Virginia,²⁰ and Wisconsin²¹ do not modify their existing staggered-election system to account for the impact of decennial redistricting. Non-modification is the rule in any state without an explicit constitutional provision or state court decision changing the system of elections, since without explicit legislative, judicial, or constitutional authorization to do otherwise, the ordinary system of staggered elections required by statute or state constitution continues to operate.²²

Other states reassign legislators whose terms continue past redistricting (termed “holdover” legislators) to represent new districts. Nebraska,²³ Montana,²⁴ Oklahoma,²⁵ Pennsylvania,²⁶ and Ohio²⁷ reassign holdover legislators

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11. Republican Party of Oregon v. Keisling, 959 F.2d 144, 145-46 (9th Cir. 1992).
 12. Mader v. Crowell, 498 F. Supp. 226, 231 (M.D. Tenn. 1980).
 13. Anggelis v. Land, 371 S.W.2d 857, 858-59 (Ky. 1963); *see also* 1982 Ky. Op. Att’y Gen. 2-18 (Jan. 11, 1982). However, Kentucky’s status has recently been thrown into question by litigation pending at the time of writing. *See infra* note 28.
 14. IND. CONST. art. IV, § 3.
 15. MO. CONST. art. III, § 11.
 16. NEV. CONST. art. XVII, § 9; State *ex rel.* Herr v. Laxalt, 441 P.2d 687, 691 (Nev. 1968).
 17. OKLA. STAT. ANN. tit. 14, § 80.35.1 (2012).
 18. UTAH CODE ANN. § 36-1-102 (LexisNexis 2011).
 19. Prince v. Kramer, No. CIV. NO. 9668, 1972 WL 123242 (W.D. Wash. Apr. 21, 1972).
 20. W. VA. CONST. art. VI, § 3.
 21. WIS. CONST. art. IV, § 5.
 22. Whether Wyoming will maintain its staggered-election system will be decided by the state’s legislature. In response to a request for an advisory opinion, the state attorney general concluded in late 2011 that, in redistricting, the legislature could chose to either allow all sitting state senators to complete their current terms, following the ordinary system of staggered elections (resulting in deferral), or truncate their terms, at the legislature’s discretion. Letter from Gregory A. Phillips, Att’y Gen. of Wyo., to Sen. Cale Case & Rep. Peter S. Illoyay, Formal Op. No. 2011-003, 2011 WL 5304071 (Oct. 10, 2011). At the time of writing, legislation was pending that would generate deferral and acceleration. H.B. 0032, 61st Leg., Gen. Sess. (Wyo. 2012).
 23. NEB. CONST. art. III, § 7; *see* Carpenter v. State, 139 N.W.2d 541, 546 (Neb. 1966) (holding that the two-year holdover period, being “reasonable, uniform, and impartial,” is not an “unconstitutional hindrance or impediment to the right of a qualified voter to exercise the elective franchise” because of the “practical impossibility to redistrict without this effect”); *see also* Pick v. Nelson, 528 N.W.2d 309 (Neb. 1995).
 24. MONT. CONST. art. V, § 3; Wheat v. Brown, 85 P.3d 765, 771 (Mont. 2004); *see also* Letter from Mike Greely, Att’y Gen. of Mont., to Sen. Stan Stephens, Op. No. 2, 40 Mont. Op. Att’y Gen. 7 (Jan. 21, 1983).

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to represent a newly drawn district (generally, the new district with the largest proportion of constituents from that legislator's old district or the new district where the legislator resides). States without holdover reassignment leave holdover legislators in their existing numbered seats, often even temporarily waiving in-district residency requirements to allow legislators to represent districts they no longer live in.²⁸ Despite their variations, these California-style systems still defer voters; many voters in these states see the terms of the legislators they elected elapse and then must wait two years before electing a new legislator.²⁹ The numbers of voters affected are often uncounted, but can be large: for example, in Pennsylvania 1.3 million voters were deferred

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25. OKLA. STAT. ANN. tit., 14 § 80.35.1 (West 2012).
 26. Pennsylvania assigns holdover senators based on where the senators live, such that each senator is assigned to represent the newly drawn district that includes his or her residence. 25 PA. CONS. STAT. ANN. § 2209 (West 2007); *see also* Donatelli v. Mitchell, 2 F.3d 508, 516 (3d Cir. 1993). Under the Pennsylvania Constitution, “[a]ny district which does not include the residence from which a member of the Senate was elected whether or not scheduled for election at the next general election shall elect a Senator at such election.” PA. CONST. art. II, § 17, subsec. f.
 27. In Ohio, holdover senators represent, by constitutional mandate, the new district with the largest population overlap with the old district that elected him or her. However, if under this rule multiple senators would represent the same district, “the persons responsible for apportionment . . . shall designate which senator shall represent the district and shall designate which district the other senator or senators shall represent for the balance of their term or terms.” OHIO CONST. art. XI, § 12.
 28. *E.g.*, OR. CONST. art. IV, § 8, subsec. 7, para. b (“Following the applicable deadline for making a final apportionment . . . until the expiration of the term of office of the person, a person may be an inhabitant of any district.”); *Anggelis v. Land*, 371 S.W.2d 857, 859 (Ky. 1963) (acknowledging that in the interim “the persons who are represented by the Senator from the Twelfth District are no longer the ones who elected him”); 42A CAL. JUR. 3d *Legislature* § 7 (2008) (“A duly elected legislator who was qualified for office at the time of his or her election is not deprived of office by a readjustment of districts resulting in the legislator ceasing to be a resident of the district from which he or she was elected.”); *see also* *People ex rel. Jennings v. Markham*, 31 P. 102 (Cal. 1892); Letter from Steven L. Beshear, Att’y Gen. of Ky., to Vic Hellard, Jr., Dir., Legislative Res. Comm’n, 1982 Ky. Op. Att’y Gen. 2-18 (Jan. 11, 1982). This process has recently become the subject of controversy in Kentucky, based on a Democratic Senator’s claim of partisan misuse by the Republican-dominated legislature. *E.g.*, Jack Brammer, *Stein Supporters Rally To Protest Redistricting of Her State Senate Seat*, LEXINGTON HERALD-LEADER, Jan. 23, 2012, <http://www.kentucky.com/2012/01/23/2039041/stein-supporters-rally-to-protest.html>. At the time of writing, Kentucky’s system was called into question by pending litigation alleging partisan misuse. *See* *Fischer v. Grimes*, No. 12-CI-109 (Ky. Cir. Ct. Feb. 7, 2012), *appeal docketed*, Nos. 2012-SC-000091 & -000092 (Ky. Sup. Ct. 2012).
 29. The democratic and legal problems with state constitutions and statutes *assigning* legislators to purportedly elective office are beyond the scope of this Comment, but are clearly ripe for further study.

following the 1990 census;³⁰ in Kentucky just over 351,000 citizens may be deferred after the 2010 census.³¹

II. TRUNCATION, SPECIAL ELECTIONS, AND THE RESET BUTTON: THE FLORIDA MODEL

In contrast, other states avoid deferring or accelerating voters by requiring all districts to hold elections in the first cycle following redistricting. Statewide senatorial elections “reset” the staggered election cycle, ensuring that all voters are represented by a senator they had the opportunity to elect under the new districting plan.

Florida, like California, conducts staggered senatorial elections.³² Unlike California, however, Florida effectively requires that all districts hold elections in the first general election following redistricting.³³ Florida’s constitution requires all senators to be elected from the districts they represent,³⁴ and explicitly allows some state senators to serve two-year—rather than four-year—terms following redistricting.³⁵ Based on the intersection of these provisions, the Florida Supreme Court held that “senate terms [must] be truncated when a geographic change in district lines results in a change in the district’s constituency.”³⁶ To restore staggering, Florida returns to the normal election schedule after the off-cycle post-redistricting statewide elections, in effect causing odd- and even-numbered districts to alternate truncated terms every ten years.

In this way, the Florida system restores symmetry: all senators are elected by residents of their districts as currently drawn, and all voters have the opportunity to vote for their current senator. Texas,³⁷ Illinois,³⁸ Arkansas,³⁹ and

30. *Donatelli*, 2 F.3d at 511.

31. *Fischer*, No. 12-CI-109, slip. op. at 7.

32. FLA. CONST. art. III, § 15.

33. *In re Apportionment Law Appearing as Senate Joint Resolution 1 E*, 414 So. 2d 1040, 1047-48 (Fla. 1982). Technically, if a particular district’s boundaries are identical under the old and new districting plans, that district is not required to hold an election unless its senator’s term is expiring. *Id.* at 1049.

34. FLA. CONST. art. III, § 1.

35. *Id.* § 15, subsec. a.

36. *In re Apportionment Law*, 414 So. 2d at 1047-48. The Florida Supreme Court explicitly rejected the parallel to *Legislature v. Reinecke*, 516 P.2d 6 (Cal. 1973), on the grounds that the truncation clause of the Florida Constitution distinguished the two situations. *In re Apportionment Law*, 414 So. 2d at 1047.

37. TEX. CONST. art. III, § 3.

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Iowa⁴⁰ all employ similar systems, although they restore staggering by drawing lots to allocate short and long terms. These systems represent a solution to the California scheme's problems: they produce no deferred or accelerated voters. Yet they also make tradeoffs. By truncating some senators' terms once every ten years, the Florida system incurs costly statewide elections, while disrupting the continuity benefits of a staggered system of elections. However, as Parts III and IV will argue, the democratic and constitutional benefits outweigh the costs.

III. ONE PERSON, ONE VOTE, ONE SENATOR, ONE MAP: THE CASE FOR TRUNCATION

Adopting a complete truncation model like Florida's is the option most consistent with constitutional principles and the priorities of the people of California. As a matter of law, *Reinecke's* analysis of the equal protection argument against deferral is flawed on multiple levels, including the nature of the harm and the appropriate level of scrutiny; these defects call the system's constitutional legitimacy into question. As a matter of policy, a truncation system aligns much more closely with the good-government principles endorsed by California's voters in the Voters First Act than does the *Reinecke* system.

In *Reinecke*, the California Supreme Court mischaracterized deferral by conflating two constitutionally distinct harms: dilution and disenfranchisement.⁴¹ The former is more familiar in the redistricting context, but deferral's two-year total deprivation produces the latter harm. By framing deferral as a "deviation[]" from strict equality resulting from reapportionment coupled with staggered terms," akin to "permissible deviations from strict population equality among districts" in the vote-dilution context,⁴² the court elided the distinction and hid the true costs of deferral.⁴³

38. ILL. CONST. art. IV, § 2, subsec. a; 10 ILL. COMP. STAT. 5/29C-15 (2011).

39. ARK. CONST. art. V, § 3, art. XIII, § 6; *see also* Moore v. McCuen, 876 S.W.2d 237 (Ark. 1994).

40. *See* IOWA CONST. art. III, § 35; *In re* Legislative Districting of Gen. Assembly, 193 N.W.2d 784, 791 (Iowa), *supplemented by* 196 N.W.2d 209 (Iowa), *amended by* 199 N.W.2d 614 (Iowa 1972).

41. *Reinecke*, 516 P.2d 6.

42. *Id.* at 12.

43. Adding insult to injury, the court's choice of analogies trivialized the harm to deferred voters. *Reinecke* argued that deferral "results in even less temporary disenfranchisement than the up to four-year disenfranchisement that may be imposed on residents who move into a

For the duration of their deferral, deferred voters are prohibited from participating in the selection of the State Senate due solely to the state's decision to place their residence in an even- rather than odd-numbered district.⁴⁴ Unlike in a dilution case, deferred voters do not have the value of their vote partially reduced or debased—they are shut out altogether. Voting for legislators is the primary way most citizens participate in our government.⁴⁵ Therefore, excluding some otherwise-qualified voters from that process, even if only temporarily, fundamentally undermines the democratic legitimacy of decisions made by the legislature and of California's system of government.⁴⁶ Indeed, even the California Supreme Court has acknowledged, albeit in dicta, that deferral means “partially disenfranchising substantial numbers of ‘odd-numbered district’ voters who otherwise would be entitled to vote for senatorial offices.”⁴⁷

The *Reinecke* court's misleading casting of the deferral harm, in turn, led to the application of the standard of constitutional scrutiny appropriate to vote dilution, rather than the stricter scrutiny appropriate to disenfranchisement. The court claimed that the relevant equal protection test for electoral districting is found in *Mahan v. Howell*,⁴⁸ which applied a relaxed, rational basis-style

senate district or who become of voting age shortly after an election has taken place.” *Id.* This analogy neglects the crucial constitutional difference that coming of age is never, and moving is rarely, the result of state action, whereas redistricting-based deferral is quintessential state action.

44. See James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. REV. 1237, 1242-43 (2002) (“[R]edistricting inevitably creates a population of political transients—people who, though they never physically relocate, are taken from one district and placed in another to satisfy the demands not of community, but of population equality.”).
45. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (“Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them.”).
46. See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (“Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.”); *cf. id.* at 627-28 (“Legislation which delegates decision making to bodies elected by only a portion of those eligible to vote for the legislature can cause unfair representation. Such legislation can exclude a minority of voters from any voice in the decisions just as effectively as if the decisions were made by legislators the minority had no voice in selecting.”).
47. *Wilson v. Eu*, 823 P.2d 545, 559 (Cal. 1992). Recently, the California Supreme Court rejected a challenge to the Commission's plan, in part because the proposed alternative would have substantially increased the number of deferred voters. *Vandermost v. Bowen*, No. S198387, 2012 WL 246627, at *31 (Cal. Jan. 27, 2012). The court also suggested that “double-deferral” arising from the use of an interim map in 2012 and a new map in 2014 might violate Section 2 of the Voting Rights Act because of its impact on minority voters. *Id.*
48. 410 U.S. 315 (1973).

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analysis in identifying permissible bases for diverging from exact population equality between districts.⁴⁹ However, *Mahan* established a standard specific to vote dilution in the context of state electoral districting, not for all possible equal protection violations in the context of state electoral districting. The California Supreme Court elided the distinction, stating without argument that the standard applied in *Mahan* was “equally applicable” to the deferral scenario.⁵⁰

The different types of voting-rights claims conflated in *Reinecke* reflect interrelated but distinct conceptions of voting, as identified by Professor Pamela Karlan,⁵¹ which generate different kinds of constitutional responses. Deferral affects the right to *participation*, “the formal ability of individuals to enter into the electoral process by casting a ballot.”⁵² Participation claims, as made in the white primary cases, de-annexation cases, poll tax cases, and literacy test cases, are first-order limitations of who can and cannot access the ballot and have been subjected by the Court to strict scrutiny.⁵³ Such claims sound in norms of political equality and civic inclusion, touching on the basic legitimacy of our democracy.⁵⁴ Vote dilution claims, on the other hand, are about *aggregation*—“the choice among rules for tallying votes to determine election winners”—and *governance*—“the ability to have one’s policy preferences enacted into law within the process of representative decisionmaking.”⁵⁵ Aggregation and governance claims have traditionally received less harsh scrutiny from the Court, because they are thought to be outside the “core” right to participate.⁵⁶ Deferral, therefore, is a living fossil, an

49. *Legislature v. Reinecke*, 516 P.2d 6, 12 (Cal. 1973) (“It is now settled that as it applies to state electoral districting ‘the proper equal protection test is not framed in terms of “governmental necessity,” but instead in terms of a claim that a State may “rationally consider.”’ (quoting *Mahan*, 410 U.S. at 326)).

50. *Id.* (“Although the *Mahan* case dealt with permissible deviations from strict population equality among districts, its rationale appears equally applicable to deviations from strict equality resulting from reapportionment coupled with staggered terms.”).

51. Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1707-08 (1993).

52. *Id.* at 1708.

53. *Id.* at 1709-11.

54. *Id.* at 1710-11.

55. Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1350 (2001); see also Karlan, *supra* note 51, at 1717 (“To my mind, *Reynolds* was ultimately a governance case.”).

56. Karlan, *supra* note 51, at 1712 (“[O]nce these claims are excluded from the core right to participate and the Court applies rational-relationship scrutiny, disenfranchising restrictions survive challenge.”).

example of a species thought nearly extinct in our advanced democracy: a first-order participation-based deprivation of the right to vote, implicating “intrinsic political liberties.”⁵⁷

The Supreme Court has never applied a universal level of scrutiny to all burdens on participation in the franchise.⁵⁸ While earlier cases suggested that for direct barriers strict scrutiny applied,⁵⁹ more recent decisions have balanced the severity of the burden on the franchise against the importance of the government interest served.⁶⁰ In *Crawford v. Marion County Election Board*,⁶¹ one of the most recent major voting rights decisions, six Justices across two opinions of the split Court concluded that “severe” burdens on the franchise must be justified by more than merely rational state interests, although they advanced differently formulated inquiries.⁶² Both opinions stated that the preliminary inquiry was into the severity of the burden on voters and concluded that because the law at issue (Indiana’s requirement of photo identification to vote) applied to all Indiana citizens equally and imposed a burden that could be overcome with relatively little effort by a particular voter, it was not a “severe” burden invoking strict scrutiny.⁶³ *Crawford* therefore

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57. See Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 52 (2004) (“Thus, at least in mature democracies, cases concerning democratic processes today do not often implicate what might be considered intrinsic political liberties (leaving aside in the American context, perhaps, the few remaining access-to-the-ballot-box issues, such as voter-registration or felon-disfranchisement laws).”).
58. See, e.g., Joshua A. Douglas, *Is the Right To Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL’Y 143 (2008); Joel A. Heller, Note, *Fearing Fear Itself: Photo Identification Laws, Fear of Fraud, and the Fundamental Right To Vote*, 62 VAND. L. REV. 1871, 1876-77 (2009); Demian A. Ordway, Note, *Disenfranchisement and the Constitution: Finding a Standard that Works*, 82 N.Y.U. L. REV. 1175 (2007).
59. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966).
60. See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).
61. 553 U.S. 181 (2008).
62. *Id.* at 191 (Stevens, J.) (plurality opinion) (“In neither *Norman* nor *Burdick* did we identify any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear, as *Harper* demonstrates, it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” (quoting *Norman v. Cook Cnty. Officers Electoral Bd.*, 502 U.S. 279, 288-89 (1992))); *id.* at 205 (Scalia, J., concurring in the judgment) (“[S]trict scrutiny is appropriate only if the burden is severe.” (alteration in original) (quoting *Clingman v. Beaver*, 544 U.S. 581, 592 (2005))).
63. *Id.* at 203 (Stevens, J.) (plurality opinion) (“When we consider only the statute’s broad application to all Indiana voters we conclude that it ‘imposes only a limited burden on voters’ rights.” (quoting *Burdick*, 504 U.S. at 439)); *id.* at 209 (Scalia, J., concurring in the judgment) (“The universally applicable requirements of Indiana’s voter-identification law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo

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suggests that for severe burdens applying only to some voters, significant (rather than merely rational) state interests must be shown.

Because the *Reinecke* system wholly bars some voters from participating in State Senate elections for an entire four-year cycle based solely on the state's own actions in redistricting, the state would need to show a commensurately strong interest to survive constitutional scrutiny under even the most relaxed standard applied by the Court to laws concerning the right to vote. Given the extreme skepticism with which the Court has historically treated unilateral exclusions of some voters from participation based on characteristics unrelated to voter qualifications,⁶⁴ the state interest served by continued deferral, a policy initially adopted through no deliberate choice of the legislature, would need to be extremely strong. Even if the state interest attributed to deferral by the *Reinecke* court—"the orderly operation of the four-year staggered terms system"⁶⁵—were sufficient to outweigh "dilution," it does not necessarily outweigh the stronger countervailing interest of ensuring that every eligible voter have an opportunity to participate in every election for her state senator.

However, even if the *Reinecke* court were correct in its characterization of deferral as a form of vote dilution, the California system would not meet *Mahan*'s more relaxed scrutiny for two reasons. First, *Mahan* limits deviations from population equality based on interests the state may "rationally consider."⁶⁶ Even in the vote-dilution context, however, the location of a voter's residence is not a permissible basis for distinguishing among voters. In *Gray v. Sanders*, decided a decade prior to *Reinecke*, the U.S. Supreme Court held that "there is no indication in the Constitution that homesite . . . affords a permissible basis for distinguishing between qualified voters within the State."⁶⁷ If residence was an insufficient basis for distinguishing among the *weights* of votes in *Gray*, an early vote dilution case, surely residence is also an insufficient basis for depriving citizens of the *right* to vote. Second, even if the state interest attributed to deferral by the *Reinecke* court—"the orderly

identification is simply not severe, because it does not 'even represent a significant increase over the usual burdens of voting.'" (citation omitted)).

64. *E.g. Harper*, 383 U.S. at 670; *see Crawford*, 553 U.S. at 189 (Stevens, J.) (plurality opinion) ("Thus, under the standard applied in *Harper*, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications."); *see also* Karlan, *supra* note 51, at 1711 (arguing that "[t]he Court's decision to employ strict scrutiny in assessing participation claims" means that "in cases that the Court puts within the participation rubric, the application of strict scrutiny has resulted in universal invalidation of the challenged restrictions").

65. *Legislature v. Reinecke*, 516 P.2d 6, 12 (Cal. 1973).

66. *Mahan v. Howell*, 410 U.S. 315, 326 (1973).

67. *Gray v. Sanders*, 372 U.S. 368, 380 (1963).

operation of the four year staggered terms system”⁶⁸—could be rationally considered, *Mahan* held that less-than-perfect equality of voting weight is constitutionally acceptable only when the state had not “sacrificed substantial equality to justifiable deviations.”⁶⁹ *Reinecke*, however, creates precisely the situation *Mahan* explicitly forbids: by disenfranchising some voters and, separately, double-enfranchising others, California has sacrificed substantial equality.

The *Reinecke* system also creates a separate harm, one that has not been addressed in litigation about staggering systems, based on the dilutive effects of acceleration on other voters. In *Reynolds*, the Court wrote that

it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable.⁷⁰

Within the State Senate, the votes of accelerated voters are effectively multiplied by two, as *Reynolds* forbids. While some variation from exact population equality in districting has been allowed for state legislatures,⁷¹ even the most lenient of the “one person, one vote” cases cannot support a system that for accelerated voters amounts to “one person, two votes.” Acceleration, therefore, generates a separate harm from deferral, one suffered by all non-accelerated voters.⁷²

Both before and since *Reinecke*, other courts have found no federal constitutional violation in deferral.⁷³ These cases mirror the errors of *Reinecke*’s

68. *Reinecke*, 516 P.2d at 12.

69. *Mahan*, 410 U.S. at 329.

70. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

71. See, e.g., *Brown v. Thompson*, 462 U.S. 835 (1983).

72. Note that vote multiplication might also occur any time a voter moves between districts, depending on the timing of elections in her old district relative to her new district. This form of multiplication is less troubling because the role of state action is more attenuated than in the acceleration context for most such moves (with the exception, perhaps, of situations such as where the state requires a public employee to relocate). Nevertheless, the fact that staggering systems *generally* create the possibility of such multiplication represents a partial qualification to my argument.

73. E.g., *Donatelli v. Mitchell*, 2 F.3d 508, 516 (3d Cir. 1993); *Republican Party of Oregon v. Keisling*, 959 F.2d 144, 145-46 (9th Cir. 1992); *Mader v. Crowell*, 498 F. Supp. 226, 231 (M.D. Tenn. 1980); *In re Reapportionment of Colo. Gen. Assembly*, 647 P.2d 191, 198 (Colo. 1982). *But see* *Fischer v. Grimes*, No. 12-CI-109, slip. op. at 10 (Ky. Cir. Ct. Feb. 7, 2012), *appeal docketed*, Nos. 2012-SC-000091 & -000092 (Ky. Sup. Ct. 2012); *supra* note 28.

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legal analysis: underplaying the harm,⁷⁴ evaluating disenfranchisement as dilution,⁷⁵ and applying excessively relaxed scrutiny.⁷⁶ However, even if these courts correctly interpreted the letter of the law, they miss the broader normative, democratic commitment to equal participation, rooted in constitutional principles, that underlies the “one person, one vote” cases⁷⁷ and other voting rights decisions.⁷⁸ This commitment should compel lawmakers to act to protect voters where courts have not.

IV. WHAT IS LOST: THE CONTINUITY INTEREST

Choosing a system based on truncated terms would, of course, require prioritizing among competing values. The California system of staggered terms ensures institutional continuity, since at all times the State Senate has at least some members who have not just been elected because the entire body never stands for election at once. Truncating terms uproots the compromise between continuity and responsiveness created by California’s constitutional structuring of its legislature, temporarily depriving voters of the stability created by never having the entire legislature turn over in a single election. This harm is real and should not be discounted.⁷⁹

Continuity becomes much less compelling, however, in the face of inequality generated by deferral. One might argue that the fact that all voters have a voice in the State Senate in the interim based on their ability to hold nonresponsive senators accountable at the first post-redistricting election. However, the normative democratic force of voting is not just about holding elected officials in check by ex post disapproval, but is also indispensably about equal participation in leader-choosing.⁸⁰ This power also does not remedy the

74. *E.g.*, *Mader*, 498 F. Supp. at 231 (relying on the moving or coming-of-age analogy).

75. *E.g.*, *Keisling*, 959 F.2d at 145.

76. *E.g.*, *Donatelli*, 2 F.3d at 513-14 (applying rational basis scrutiny).

77. *See, e.g.*, *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

78. *See, e.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966).

79. But note that the Supreme Court has specifically rejected the claim that elected officials have a property or contract right to a particular office. *See, e.g.*, *Snowden v. Hughes*, 321 U.S. 1, 7 (1944); *Taylor v. Beckham*, 178 U.S. 548, 577 (1900); *see also Reaves v. Jones*, 515 S.W.2d 201, 204 (Ark. 1974) (“[T]he right to hold office is not a property right.”); Letter from Gregory A. Phillips to Sen. Cale Case & Rep. Peter S. Illoway, *supra* note 22.

80. *See Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (“[E]ach and every citizen has an inalienable right to full and effective participation in the political process[] . . . [T]herefore, . . . each citizen [must] have an equally effective voice in the election of members of his state legislature.”); *supra* note 46 and accompanying text.

inequality among voters generated by deferral: deferred voters have the backward-looking ability to “vote the bums out,” but all other voters have both this retrospective power *and* the ability to prospectively choose their senators. Continuity may be a desirable goal generally, but arguments for “continuity” lose their normative force when the legislature being “continued” is not one that was chosen by the entire electorate.

Moreover, the people of California, through constitutional amendment, have repeatedly deprioritized continuity in the composition of the legislature through anti-incumbent provisions. Most recently, the Voters First Act created a districting system that formally forbade consideration of incumbent residence or likely electoral impact.⁸¹ Forbidding incumbent-conscious districting may produce fewer “safe seats” and lead to greater turnover (discontinuity) than under the previous system of pro-incumbent gerrymanders.⁸² The Act sought to ensure fairer representation and greater accountability, reflecting the sense of California voters that legislature-drawn districts had illegitimately placed the self-interested desires of legislators to perpetuate themselves in office above representing and empowering voters.⁸³ More broadly, California’s strict two-term limits, adopted through the Proposition 130 initiative in 1990, make the informal continuity of long tenures, as opposed to the formal continuity of a staggered-term system, impossible.⁸⁴ While anti-incumbent measures may have a smaller impact on continuity than would truncation, these moves are indicative of a high tolerance for discontinuity in search of better representation on the part of California’s voters and California’s constitution.

Finally, the greatest harm to continuity is done not by truncation, but by decennial redistricting itself. A system of governance that did not require regularly redrawing the lines of electoral districts every ten years in order to restore population equality would enjoy much greater continuity, but that is not a system our Constitution, as interpreted in the “one person, one vote” cases, allows. Those voters who, by no action of their own, are deferred, should

81. CAL. CONST. art. XXI, § 2, subsec. e (“The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.”).

82. Because there has not yet been an election under the new plan, we can only speculate about turnover.

83. Proposition 11 (Cal. 2008), *available at* 2008 Cal. Legis. Serv. Prop. 11 (West). Legislator-drawn districts meant “[v]oters in many communities ha[d] no political voice” due to communities being split up by redistricting to protect incumbent legislators; reform was meant to “ensure fair representation” by putting “voters back in charge.” *Id.* § 2.

84. CAL. CONST. art. IV, §§ 1.5-2; Proposition 130 (Cal. 1990), *available at* 1990 Cal. Legis. Serv. Prop. 130 (West).

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not bear alone the costs of ensuring continuity when the Constitution compels equality and therefore discontinuity through redistricting.

CONCLUSION

The principle of “one person, one vote” and the routine of equipopulational decennial redistricting it spurred are deeply embedded in our democratic and constitutional intuitions. Fifty years of case law and legislative action have, in large part, made the Court’s rhetorically powerful pronouncements realities, but in many places, like California, pre-*Reynolds* government structures simply never caught up to the post-*Reynolds* world. It is time for California, which recently took bold strides forward for democracy and equality in the Voters First Act, to catch up by following the model of states like Florida in adopting a system that truncates legislators’ terms in office following redistricting. For California and states like it, state constitutional amendments may be required to enact such a change. In so doing, California will be making a choice between representation and continuity, but that choice is one that both the Constitution and California’s voters have already made.

MARGARET B. WESTON

APPENDIX: REDISTRICTING AND STATES WITH STAGGERED ELECTIONS

| CODE | MEANING |
|------|---|
| D | Voters are deferred/accelerated (terms of state legislators continue after redistricting) |
| T | Terms of state legislators are truncated after redistricting and new elections are held |
| H | Legislators whose terms continue after redistricting (“holdovers”) are reassigned to represent new numbered districts for the remainder of their terms, usually based on the incumbent’s residence and/or which new district has the largest constituent overlap with the legislator’s old district |
| P | Handling of staggered terms after redistricting unclear, pending a decision by the state legislature or state court |

| STATE | SYSTEM | CITATION | STAGGERING PROVISION |
|------------|--------|--|---------------------------------------|
| Alaska | T | Groh v. Egan, 526 P.2d 863, 881 (Alaska 1974); Egan v. Hammond, 502 P.2d 856, 873-74 (Alaska 1972); <i>In re</i> 2001 Redistricting Cases, No. 3AN-01-8914 CI, 2002 WL 34119573 (Alaska Super. Ct. Feb. 1, 2002) (mem.). | ALASKA STAT. § 24.05.080 (2010). |
| Arkansas | T | ARK. CONST. art. V, § 3; <i>id.</i> § 6; Moore v. McCuen, 876 S.W.2d 237 (1994). | ARK. CONST. art. V, § 3. |
| California | D | Legislature v. Reinecke, 516 P.2d 6, 11-12 (Cal. 1973). | CAL. CONST. art. IV, § 2. |
| Colorado | D, H | <i>In re</i> Reapportionment of Colo. Gen. Assembly, 647 P.2d 191, 198 (Colo. 1982). | COLO. REV. STAT. § 2-2-103 (2011). |
| Delaware | T | DEL. CODE ANN. tit. 29, § 802 (2007). | DEL. CODE ANN. tit. 29, § 802 (2007). |
| Florida | T | <i>In re</i> Apportionment Law Appearing as Senate Joint Resolution 1 E, 414 So. 2d 1040, 1047-48 (Fla. 1982). | FLA. CONST. art. III, § 15. |

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| STATE | SYSTEM | CITATION | STAGGERING PROVISION |
|-----------------|--------|---|--|
| Hawaii | T | HAW. CONST. art. IV, §§ 7-8. | HAW. CONST. art. IV, §§ 7-8. |
| Illinois | T | ILL. CONST. art. IV, § 2; People <i>ex rel.</i> Pierce v. Lavelle, 307 N.E.2d 115, 117 (Ill. 1974). | ILL. CONST. art. IV, § 2. |
| Indiana | D | IND. CONST. art. IV, § 3. | IND. CONST. art. IV, § 3. |
| Iowa | T | <i>In re</i> Legislative Districting of Gen. Assembly, 193 N.W.2d 784, 791 (Iowa), <i>supplemented</i> by 196 N.W.2d 209 (Iowa), <i>amended</i> by 199 N.W.2d 614 (Iowa 1972). | IOWA CONST. art. 3, § 6. |
| Kentucky | P | Anggelis v. Land, 371 S.W.2d 857, 858-59 (Ky. 1963); 1982 Ky. Op. Atty. Gen. 2-18 (Jan. 11, 1982). | KY. CONST. § 31. |
| Missouri | D | MO. CONST. art. III, § 11. | MO. CONST. art. III, § 11. |
| Montana | D, H | Wheat v. Brown, 85 P.3d 765, 767, 771 (Mont. 2004); Op. No. 2, 40 Mont. Op. Att'y Gen. 7 (Jan. 21, 1983). | MONT. CONST. art. V, § 3. |
| Nebraska | D, H | Pick v. Nelson, 528 N.W.2d 309 (Neb. 1995); Carpenter v. State, 139 N.W.2d 541, 546 (Neb. 1966). | NEB. CONST. art. III, § 7. |
| Nevada | D | NEV. CONST. art. XVII, § 9; State <i>ex rel.</i> Herr v. Laxalt, 441 P.2d 687, 691 (Nev. 1968). | NEV. CONST. art. XVII, § 9. |
| North Dakota | T | Kelsh v. Jaeger, 641 N.W.2d 100, 107 (N.D. 2002). | N.D. CENT. CODE § 54- 03-01.8 (2008). |
| Ohio | D, H | OHIO CONST. art. XI, § 12. | OHIO CONST. art. II, § 2. |
| Oklahoma | D | Ferrell v. Oklahoma <i>ex rel.</i> Hall, 339 F. Supp. 73 (W.D. Okla. 1972), <i>aff'd sub nom.</i> Ferrell v. Hall, 406 U.S. 939 (1972), <i>abrogated</i> by Davis v. Bandemer, 478 U.S. 109 (1986). | OKLA. STAT. ANN. tit. 14, § 80.35.1 (2011). |

| STATE | SYSTEM | CITATION | STAGGERING PROVISION |
|---------------|--------|---|--|
| Oregon | D | Republican Party of Oregon v. Keisling, 959 F.2d 144, 145-46 (9th Cir. 1992). | OR. CONST. art. IV, § 4, subsec. 2. |
| Pennsylvania | D, H | Donatelli v. Mitchell, 2 F.3d 508, 511 (3d Cir. 1993). | 25 PA. STAT. ANN. § 2209 (West 2008). |
| Tennessee | D | Mader v. Crowell, 498 F. Supp. 226, 231 (M.D. Tenn. 1980). | TENN. CONST. art. II, § 3. |
| Texas | T | TEX. CONST. art. III, § 3. | TEX. CONST. art. III, § 3. |
| Utah | D | UTAH CODE ANN. § 36-1-102 (LexisNexis 2011). | UTAH CODE ANN. § 36-1-102 (LexisNexis 2011). |
| Washington | D | Prince v. Kramer, No. CIV. NO. 9668, 1972 WL 123242 (W.D. Wash. Apr. 21, 1972). | WASH. CONST. art. II, § 6. |
| West Virginia | D | W. VA. CONST. art. VI, § 3. | W. VA. CONST. art. VI, § 3. |
| Wisconsin | D | WIS. CONST. art. IV, § 5. | WIS. CONST. art. IV, § 5. |
| Wyoming | P | Wyo. Att'y Gen. Formal Op. No. 2011-003, 2011 WL 5304071 (Oct. 10, 2011). | WYO. CONST. art. III, § 2. |