

Unapportioned Justice: Local Elections, Social Science, and the Evolution of the Voting Rights Act

Joseph P. Viteritti

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Available at: <http://scholarship.law.cornell.edu/cjlp/vol4/iss1/10>

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UNAPPORTIONED JUSTICE: LOCAL ELECTIONS, SOCIAL SCIENCE, AND THE EVOLUTION OF THE VOTING RIGHTS ACT

Joseph P. Viteritti[†]

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I have incurred many debts in the preparation of this article. Rosemary Salomone, Frank Macchiarola, Robert Bailey, Edward Costikyan, and Roy Sparrow commented on an earlier draft. Barbara Lawrence and Nat Cipollina collaborated on a previous paper giving this project a good head start. I am sincerely grateful.

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INTRODUCTION

Perhaps we have come full circle. At-large districting schemes, once legally suspect for compromising the voting rights of minorities, have gained a new acceptability among some civil rights activists. Social science and legal research indicate that, when linked with semi-proportional voting systems, at-large plans can provide fair access to protected groups, thereby passing judicial scrutiny under the provisions of the federal Voting Rights Act.¹ In fact, under certain circumstances, courts have found these modified at-large systems preferable to single-member districts, which were long considered appropriate remedies to plans that denied effective representation to minority voters.²

Undoubtedly, the growing interest in semi-proportional voting systems is partly attributable to the recent notoriety of Professor Lani Guinier. Her spectacular fall from grace with the Clinton administration, occasioned by the withdrawal of her

¹ The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1(1988)).

² See Richard L. Cole & Delbert A. Taebel, *Cumulative Voting in Local Elections: Lessons from the Alamogordo Experience*, 73 SOC. SCI. Q. 194 (1992); Richard L. Engstrom & Charles J. Barrilleaux, *Native Americans and Cumulative Voting: The Sisseton-Wahpeton Sioux*, 72 SOC. SCI. Q. 388 (1991).

nomination for Assistant Attorney General, has provided her with a national forum in which to air some innovative and timely ideas on cumulative voting that were once confined to the pages of scholarly journals.³ Ultimately, however, the U.S. Supreme Court's recent decision in *Shaw v. Reno* is more significant.⁴ By ruling against a practice in North Carolina described by some as a form of racial gerrymandering, the Court may have set a new limit on the use of districting as a remedy for illegal voting practices and has certainly underscored the need to explore alternatives to the single-member district as a solution to unfair election procedures. Modified at-large plans provide viable options.

A turn-of-the-century reform movement, organized to reduce the power that party bosses held in American cities, produced the original at-large election systems. Reformers believed that selecting local officials through at-large systems would make elections more visible and open to scrutiny, thus undermining the ward-based mechanism of nomination that assured the outcome of most contests.⁵ Though municipal corruption was indeed a reality of city life, the reform program camouflaged a class conflict and served to undermine the governmental access the party machine provided to immigrants and ethnic minorities.⁶ With the passage of the Voting Rights Act in 1965, and the U.S. Justice Department's more vigorous enforcement of constitutional guarantees at the polls, at-large systems came under close examination. Through the aid of sophisticated social science techniques, these systems were often identified as

³ See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994); Lani Guinier, *Who's Afraid of Lani Guinier?* N.Y. TIMES MAG., Feb. 27, 1994, at p.41, col. 1.

⁴ 113 S. Ct. 2816 (1993).

⁵ See CHARLES BEARD, *AMERICAN CITY GOVERNMENT* (1912); FRANK J. GOODNOW, *CITY GOVERNMENT IN THE UNITED STATES* (1910); ERNEST GRIFFITH, *A HISTORY OF AMERICAN CITY GOVERNMENT, 1900-1920* (1974); WILLIAM B. MUNRO, *THE GOVERNMENT OF AMERICAN CITIES* (1926); Samuel P. Hays, *The Politics of Reform in Municipal Government in the Progressive Era*, 55 PAC. NW. Q. 157 (1974); Joseph P. Viteritti, *The City and the Constitution: A Historical Analysis of Institutional Evolution and Adaptation*, 12 J. URB. AFF. 221 (1990).

⁶ See MELVIN HOLLI, *REFORM IN DETROIT: HAZEN S. PINGREE AND URBAN POLITICS* (1969); JON C. TEAFORD, *THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870-1900* (1984); JAMES WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE* (1968).

mechanisms for diluting the voting strength of minority populations.⁷ As a result of court action during the 1970s, many cities—including San Antonio and Fort Worth, Texas, Charlotte and Raleigh, North Carolina, and Mobile, Alabama—changed their election systems from at-large to single-member plans. Nevertheless, the single-member district schemes imposed by the courts to rectify historic abuses carried their own limitations and problems. First, these schemes build on the sometimes untrue assumption that protected groups are geographically concentrated. More generally, arbitrary assumptions about the nature, composition, and location of group interests in and among political communities inform single-member systems. Most significantly, single-district systems perpetuate the need for local districting, which at its core involves an exercise in political accommodation and manipulation often designed to protect those already in power.⁸ Experimentation with semi-proportional voting systems has provided a reasonable alternative that may result in combined benefits of single-district and at-large systems. This article traces the evolution of the Voting Rights Act, demonstrating how the integration of legal analysis and social science research has influenced both the interpretation and enforcement of voting laws over the last three decades. The article is an illustrative study of how methodological innovation in the field of political science has allowed the judiciary to respond to one of the most vital issues in the American political process. Additionally, the article shows how the well-intentioned implementation of these techniques has sometimes become an end in itself, thus undermining the original goals of fair and effective representation.

Part I presents the legislative history of the Voting Rights Act. Following a long period of judicial restraint, aggressive legislative action by the President and Congress finally led to a consensus among the three branches of government to interpret and enforce voting rights in a positive way. Part II begins with

⁷ See BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 61-108 (1992) [hereinafter *QUEST FOR VOTING EQUALITY*]; Richard L. Engstrom & Michael D. McDonald, *Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*, 17 *URB. LAW.* 369 (1985); James W. Loewen & Bernard Grofman, *Recent Developments in Methods Used in Vote Dilution Cases*, 21 *URB. LAW.* 589 (1989).

⁸ See Bruce Cain, *Assessing the Partisan Effects of Districting*, 79 *AM. POL. SCI. REV.* 320 (1985); Andrew Gelman & Gary King, *Enhancing Democracy through Legislative Districting*, 88 *AM. POL. SCI. REV.* 541 (1994).

an overview of the social science literature which helped to define the initial consensus; advancing the goal of equality from a set of abstract concepts to an empirically defined set of standards. This section shows how use of these standards would allow the courts to identify violations of the law and to craft remedies to existing violations. An examination of more recent empirical evidence indicates, however, that the practice of creating "safe districts" through apportionment does not advance the interests of all minorities and works to the advantage of African-Americans only under certain conditions. Part III provides a critical examination of single-member districting schemes, highlighting the limitations of racial gerrymandering as a judicial strategy to improve the representation of minorities and making a case for the wider use of semi-proportional systems, particularly cumulative voting. This section reviews both relevant case law and the available social science evidence, arguing that although cumulative voting does not resolve the dilemma of protecting minority interests in a majoritarian system, it serves to modify the ill effects of majority rule.

I. CONSTITUTIONAL AND LEGISLATIVE DEFINITIONS OF VOTING RIGHTS

A. A RELUCTANT JUDICIARY

Voting rights in the United States are protected by the Fourteenth and Fifteenth Amendments to the Constitution. The Fourteenth Amendment, ratified in 1868, granted citizenship to persons born or naturalized in the United States and extended federal safeguards against the infringement of constitutional rights by the states.⁹ The Fifteenth Amendment, ratified in 1870, explicitly prohibited racial discrimination in voting.¹⁰ By 1871, Congress had passed two Enforcement Acts designed to bolster the new constitutional protections.¹¹ However, subsequent Supreme Court decisions made it clear that the federal

⁹ "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

¹⁰ "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, §1.

¹¹ Civil Rights Act of 1866, 14 Stat. 27; Civil Rights Act of 1870, 16 Stat. 144.

judiciary did not intend to aggressively intervene in Southern politics on behalf of black voters.¹²

Segregationists were quite inventive in their determination to obstruct the black franchise. Specific race-based prohibitions on black voting were unnecessary so long as devices such as white primaries, literacy tests, and poll taxes could accomplish the same purpose. Due to the noble efforts of the National Association for the Advancement of Colored People, some modest and temporary judicial victories were achieved during the first half of this century.¹³ Given the steadfast reluctance of the courts to enter the "political thicket,"¹⁴ however, a century passed before the post-Civil War provisions of the Constitution would have any importance to aggrieved parties. In 1946, Justice Felix Frankfurter wrote his famous majority opinion explaining that congressional districting clearly was out of bounds for the judiciary and should be left to the legislative branch.¹⁵ A year later, the Supreme Court refused to hear a case by the same Illinois plaintiff concerning state legislative districting, declaring lack of jurisdiction.¹⁶

The tide began to turn in 1962, when the Supreme Court accepted jurisdiction for a case brought by urban residents in Tennessee challenging the state's failure to reapportion legislative seats in accordance with population changes. Writing for a

¹² *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Reese*, 92 U.S. 214 (1876).

¹³ The Supreme Court declared unconstitutional an Oklahoma literacy test in *Guinn v. United States*, 238 U.S. 347 (1915), but the decision was soon undermined with the passage of subsequent state legislation. After two decades of litigation, the Supreme Court finally struck down a Texas primary law as an integral and impermissible part of the election process in *Smith v. Allwright*, 321 U.S. 649 (1944).

¹⁴ *Colgrove v. Green*, 328 U.S. 549, 556 (1946).

¹⁵ *Colgrove v. Green*, 328 U.S. 549, 556 (1946). It was here that Justice Frankfurter wrote in response to the plaintiff's action, "To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter the political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."

¹⁶ *Colgrove v. Barrett*, 330 U.S. 804 (1947). Later, there were several successful challenges to voting arrangements in the South based on Constitutional grounds. For example, in *Terry v. Adams*, 345 U.S. 461 (1953), the Supreme Court struck down the exclusion of blacks from party primaries as a violation of the Fifteenth Amendment. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court invalidated an alteration of city boundaries that excluded almost four hundred black voters.

6-2 majority, Justice William J. Brennan based this landmark decision on the Equal Protection Clause of the Fourteenth Amendment.¹⁷ Because of its focus on malapportionment, this case was also instrumental in changing the focus of litigation from access to the more complex issue of representation. In a subsequent decision, Chief Justice Earl Warren would declare, "[T]he weight of a citizen's vote cannot be made to depend on where he lives."¹⁸

The former Chief Justice believed that the accumulated impact of these voting rights cases, fifteen in all, was the most significant legacy of the Warren Court.¹⁹ Notwithstanding their profound effect on American political life, these decisions provided future plaintiffs with rather vague guidelines for litigation. The Court did not specify how equal participation in elections should be achieved and left the job of fashioning relief to the federal district courts. This provided an impetus for Congress to pass the Voting Rights Act a year later.²⁰

¹⁷ *Baker v. Carr*, 369 U.S. 186 (1962). While this case specifically dealt with the apportionment of state legislative seats, the Supreme Court subsequently applied the Fourteenth Amendment to set standards for general-purpose local governments and school districts. See *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976); *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970); *Avery v. Midland County*, 390 U.S. 474 (1968). For commentary on the case, see M. DAVID GELFAND, *FEDERAL CONSTITUTIONAL LAW AND AMERICAN LOCAL GOVERNMENT* 10-16 (1984); Stanley Friedelbaum, *Baker v. Carr: The New Doctrine of Judicial Intervention and its Implications for American Federalism*, 29 U. CHI. L. REV. 673 (1962); Robert G. McCloskey, *The Reapportionment Case*, 76 HARV. L. REV. 54 (1962); Thomas I. Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 64, 65 (1962).

¹⁸ *Reynolds v. Sims*, 377 U.S. 533, 567 (1964). Prior to this case, the Supreme Court explicitly had applied the Fourteenth and Fifteenth Amendments to prohibit vote dilution on the basis of race or gender in *Gray v. Sanders*, 372 U.S. 368 (1963).

¹⁹ See G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 337 (1982). In a similar vein, President Lyndon B. Johnson assessed the Voting Rights Act as the most significant legislative accomplishment of his administration. See Chandler Davidson, *The Voting Rights Act: A Brief History, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 7 (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter *CONTROVERSIES IN MINORITY VOTING*].

²⁰ Congress had passed Civil Rights Acts in 1957, 1960 and 1964. These laws relied heavily on long-term litigation at the district-court level as a means for enforcement. The process proved to be burdensome for plaintiffs and generally ineffective. See Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523 (1973); Barry Hawk & J.J. Kirby, *Federal Protection of Voting Rights*, 51 VA. L. REV. 1051 (1965).

B. THE VOTING RIGHTS ACT OF 1965²¹1. *Major Provisions*

In March 1965, eight days after the American people witnessed the public beating of black and white marchers by Selma police, President Lyndon Johnson went on national television to urge the passage of new legislation. On August 6 of the same year, the Voting Rights Act was signed into law. This legislation, as amended over the years, prohibits both overt barriers to registration and electoral arrangements that dilute the voting power of protected groups. It also authorizes the Justice Department to take direct administrative action on behalf of plaintiffs, thereby avoiding the usual obstructions found in the Southern courts.

In its original form, Section 4 of the Act set down criteria to determine which states or counties would be covered by its special provisions during a temporary five-year period. These provisions would take effect in a jurisdiction if, as of November 1, 1964, the district used a test or devise as a precondition for voting, less than fifty percent of the voting-age population was registered to vote, or less than fifty percent of the voting-age population actually voted. Under these provisions, all tests in the involved jurisdictions were suspended for five years.²² According to Section 5 of the Act, any jurisdiction covered by the criteria specified in the law would be required to acquire "preclearance" from the Justice Department or the U.S. District Court in Washington, D.C., before changing its voting practices or procedures.²³ Under Sections 6 through 8, the Justice Department could deploy federal examiners and observers to locations it deemed necessary. Section 9 detailed procedures for challenging eligibility lists created by federal registrars.

²¹ The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1971, 1973 to 1973 bb-1 (1988)).

²² The states originally covered under this trigger mechanism were Alabama, Georgia, Louisiana, Mississippi, North Carolina (in part), South Carolina and Virginia.

²³ The significance of this provision was made clear in *Allen v. State Bd. of Educ.*, 393 U.S. 544 (1969), when the Court, applying the provision to strike down an at-large election system for county supervisors in Mississippi, found that the new system served to dilute black votes. The Court later reaffirmed the broad construction of Section 5 in *Perkins v. Matthews*, 400 U.S. 379 (1971).

In 1970, Congress extended the temporary provisions of the Act for five years. In 1975, these provisions were extended another seven years, the coverage formula was expanded to include any jurisdiction falling under the above criteria as of November 1, 1972, and literacy tests were permanently eliminated. The most significant feature of the 1975 legislation was the inclusion of language minorities (including Alaskan natives, Native Americans, Asian Americans, and people of Hispanic heritage) as protected classes. If a jurisdiction conducted registration or elections in English only and five percent of its population was composed of a protected-language group, the jurisdiction fell under Section 4 criteria.²⁴

2. *Initial Interpretations*

Several months after the passage of the Voting Rights Act of 1965, the Supreme Court went beyond the issue of malapportionment in defining vote dilution. While the Court rejected a claim by Georgia plaintiffs that multi-member legislative districts are inherently unconstitutional, it found that such systems might be deemed illegal if they operated to "minimize or cancel out voting strength . . ."²⁵ Thus the decision opened the door for more creative evidentiary presentations on behalf of aggrieved parties. In 1971, the Court refused to strike down a multi-member district in Marion County, Indiana, on the basis of evidence indicating that the number of black legislators was not proportionate to minority membership in the population.²⁶ In reversing a District Court finding of vote dilution, the Supreme Court ruled that the issue is not whether blacks lost in this particular contest but whether they lost because ghetto dwellers had "less opportunity ... to participate in the political processes and to elect legislators of their choice."²⁷ The Court

²⁴ The extension of coverage to language minorities broadened the law's reach beyond the South and into the West and Southwest. States covered would now include Alaska, Arizona and Texas, as well as parts of California, Colorado, Florida and South Dakota. The Bronx, Brooklyn and Manhattan in New York were added under the 1970 Amendments. See David H. Hunter, *The 1975 Voting Rights Act and Language Minorities*, 25 CATH. U. L. REV. 250 (1976).

²⁵ *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). See *Burns v. Richardson*, 484 U.S. 73 (1966).

²⁶ *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971).

²⁷ *Id.*

seemed to send an unambiguous message that failure at the polls constituted insufficient evidence of illegality. Plaintiffs would need to demonstrate that political efficacy, or lack thereof, was a function of discrimination. But what would constitute such evidence? In 1973, a unanimous Supreme Court in *White v. Regester* applied a "totality of circumstances" test to invalidate multi-member legislative districts in San Antonio and Dallas,²⁸ accepting the "intensely local appraisal" utilized in the District Court's findings, thus acknowledging specific factors used by the plaintiffs to determine discrimination.²⁹ The *White* test provided lower courts with a standard under which to review subsequent claims of voting violations.³⁰

With the passage of the Voting Rights Act, the courts began to look beyond the overt denial of the franchise and focused on electoral practices that undermine the ability of racial and language minorities to elect representatives of their own choice. Hence the standard of fairness was elevated from one of access to one of meaningful participation, if not representation. At the local level, multi-member districts and at-large elections received particular attention. While the courts did not categorically declare these systems unlawful, they became highly suspect. The "totality of circumstances" concept became an essential part of the language of litigation. The promulgation of the *White*³¹ and *Zimmer*³² standards left the impression that the

²⁸ 412 U.S. 755, 769 (1973).

²⁹ *Id.* at 766. Among the factors considered were: the history of official racial discrimination in Texas elections, the use of white primaries, poll taxes, multi-member districts, white-controlled slating organizations, the use of racial tactics in election campaigns, the absence of minority elected officials, and the election of officials who were not sufficiently responsive to minority interests.

³⁰ One of the more notable decisions was handed down by the Fifth Circuit Court of Appeals in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). What became known as the *Zimmer* factors included the following:

[W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particular interests, a tenuous state policy underlying the preference for multimember or at-large districting, or that the exercise of past discrimination in general precludes the effective participation in the electoral system, . . . the existence of at-large districts, majority vote requirements, anti-single-shot voting provisions, and the lack of provision for at-large candidates running from particular geographical subdistricts.

Id. at 1305.

³¹ *White v. Regester*, 412 U.S. 755 (1973).

courts were aggressively enforcing voting rights. That impression would change.

3. *The Impact of City of Mobile v. Bolden*

In 1980, in *City of Mobile v. Bolden*,³³ the Supreme Court upheld an at-large municipal election system in Alabama because the plaintiffs failed to prove discriminatory intent. The six-person majority reversed two lower court decisions accepting the application of the *White* and *Zimmer* tests. Rejecting a finding of discrimination based solely upon circumstantial evidence, the Court held that the plaintiffs must demonstrate that the voting law in question was enacted "because of," not merely "in spite of," its adverse effect on minorities.³⁴ Justice Potter Stewart, reaching back to an 1875 decision for precedent,³⁵ reasoned that "the Fifteenth Amendment does not confer the right of suffrage upon everyone."³⁶

The landmark decision laid down three basic principles that could essentially set back the clock for voting rights: first, only when evidence of purposeful discrimination exists can a violation of the Equal Protection Clause be found; second, disproportionate effects alone provide inadequate grounds for claiming vote dilution; and third, the Fourteenth Amendment does not require proportional representation.

This decision made it clear to voting rights advocates that they were losing ground in their struggle for equality of opportunity.³⁷ By replacing the discriminatory-effect standard with the more difficult intent test, the Court, in effect, increased the burden of proof for plaintiffs seeking relief from discriminatory election practices.³⁸ The Court also shifted attention to the

³² *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

³³ 446 U.S. 55 (1980).

³⁴ *Bolden*, 446 U.S. at 72.

³⁵ *United States v. Reese*, 92 U.S. 214, 217 (1875).

³⁶ *Bolden*, 446 U.S. at 62 (citing *Reese*, 92 U.S. at 217-18).

³⁷ See Peyton McCrary, *History in the Courts: The Significance of City of Mobile v. Bolden*, in *MINORITY VOTE DILUTION* 47 (Chandler Davidson ed., 1984) [hereinafter *MINORITY VOTE DILUTION*]; James Blacksher & Lester Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden*, 34 *HASTINGS L.J.* 1 (1982).

³⁸ The Supreme Court, by this time, already had imposed the intent standard in several civil rights cases. See *Personnel Adm'r v. Feeney*, 442 U.S.

legislative branch, where civil rights activists would plead their case through the political process. In 1982, Congress responded by amending the Voting Rights Act.

4. 1982 Amendments to the Voting Rights Act

The special provisions of the Voting Rights Act that had been enacted in 1975 were scheduled to expire in August 1982. The dramatic response to *Bolden* created the political momentum to adopt a particularly strong version of the bill, which President Reagan signed into law on June 23, 1982. The amended law, in direct response to *Bolden*, established that "proof of discriminatory intent is not required to establish a violation,"³⁹ and thus lessened the burden of proof for a party bringing a claim in court.⁴⁰ Section 2, as amended, stipulates:

- a. No voting qualification or prerequisite . . . be imposed or applied . . . which results in a denial or abridgement of the right of any citizen to vote . . . on account of race or color. . .
- b. A violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to members of a class of citizens protected . . . in that its members have less opportunity than

256 (1979); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). The intent standard was somewhat modified in *Rogers v. Lodge*, 458 U.S. 613 (1982), when the Court ruled that discrimination could be inferred circumstantially from such factors as historical discrimination, unresponsiveness of elected officials, and particular structural voting schemes. This decision was handed down two days after Congress amended the Voting Rights Act. See Bernard Grofman, *Criteria for Districting; A Social Science Perspective*, 33 UCLA L. REV. 77 (1985) [hereinafter *Criteria for Districting*].

³⁹ REPORT OF THE COMMITTEE ON THE JUDICIARY ON S. 1992, 97th Cong. 2d Sess. [hereinafter SENATE JUDICIARY COMMITTEE REPORT]. See Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992).

⁴⁰ See Armand Derfler, *Vote Dilution and the Voting Rights Amendments of 1982*, in MINORITY VOTE DILUTION, *supra* note 37, at 145; Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representation*, in CONTROVERSIES IN MINORITY VOTING, *supra* note 19; Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983); Frank R. Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715 (1983); Edwin J. Sebold, *Applying Section 2 of the Voting Rights Act to Single-Member Offices*, 88 MICH. L. REV. 2199 (1990).

other members to participate in the political process and to elect representatives of their choice.⁴¹

The amended law extended the special provisions of the original act for twenty-five years. Congress sought nothing less than an assessment of the "totality of circumstances" inherent in any election scheme in order to determine violations. Although Section 2 allows the courts to consider, as one measure of opportunity, the actual extent to which minorities have been elected to office within a jurisdiction, the Voting Rights Act of 1982 stopped short of establishing a right to proportional representation.

C. AN EMERGING CONSENSUS

1. *The Senate Judiciary Committee Report*

The Senate Judiciary Committee Report accompanying the 1982 version of the bill contains the most comprehensive exploration of congressional intent regarding factors which warrant review in voting rights cases. As a legislative response to *Bolden*, Congress intended to recapture the standards originally defined in *White*⁴² and *Zimmer*.⁴³ Although the listed factors were intended to be neither exclusive nor exhaustive, factors warranting review in voting rights cases are:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of members of the minority group to register to vote or otherwise to participate in the democratic process;⁴⁴
2. The extent to which voting in the elections of the state or political subdivision is racially polarized;⁴⁵
3. The extent to which the state or political subdivision has used unusually large election districts, majority voting requirements, anti-single-shot provisions, or other voting practices or procedures that may enhance

⁴¹ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§1971, 1973 to 1973bb-1 (1988)).

⁴² 412 U.S. 755 (1973).

⁴³ 485 F.2d 1297 (5th Cir. 1973).

⁴⁴ SENATE JUDICIARY COMMITTEE REPORT, *supra* note 39, at 28-29.

⁴⁵ *Id.*

the opportunity for discrimination against the minority group;⁴⁶

4. If there is a slating process, whether the members of the minority group have been denied access to this process;⁴⁷

5. The extent to which the members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health care, which hinder their ability to participate effectively in the political process;⁴⁸

6. Whether political campaigns have been characterized by overt or subtle racial appeals;⁴⁹ and

7. The extent to which the members of the minority group have been elected to public office in the jurisdiction.⁵⁰

Additional factors bearing probative value in some plaintiffs' cases are:

1. Whether elected officials are significantly unresponsive to the particularized needs of the members of the minority;⁵¹

2. Whether the state's or a political subdivision's use of such voting-qualification prerequisite, or standard, practice, or procedure rests on a tenuous underlying policy.⁵²

2. *Thornburg v. Gingles*⁵³

Several years after the passage of the Voting Rights Act, the Supreme Court accepted the above standards in unanimously striking down a North Carolina electoral system which had set up five multi-member state legislative districts. In *Thornburg v. Gingles*, the Court ruled that the District Court had acted properly in utilizing the nine criteria appearing in the Senate Report. The lower court had found a history of official

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ 478 U.S. 30 (1986).

discrimination in voting, education, housing, employment and health services, as well as evidence that prior campaigns had appealed to racial prejudice.⁵⁴ The Supreme Court noted these factors and their relevance to the plaintiff's claims, finding that the "most important" factors were the "extent to which minority-group members have been elected to public office in the jurisdiction" and "the extent to which voting in elections of the state or political subdivision have been racially polarized."⁵⁵ Although the Supreme Court voted unanimously to uphold the lower court decision, the Court handed down four separate opinions. The majority opinion set down three criteria for determining the validity of a vote-dilution claim.⁵⁶ This three-part test, which would become the standard for reviewing challenged districting schemes, includes the following factors:

1. The minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.
2. The minority group must be able to demonstrate that it is politically cohesive.
3. The minority group must be able to demonstrate that the white majority votes sufficiently as a block to usually enable the majority to defeat the minority's preferred candidate.⁵⁷

The majority devoted a significant portion of its decision to defining "racial polarization," holding that polarization could be proven by demonstrating a statistical correlation between race and voter choice. The Court clearly stated that demonstrating a causal relationship between race and voting patterns was not necessary; a simple statistical correlation would suffice.⁵⁸

⁵⁴ *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984).

⁵⁵ 478 U.S. at 37.

⁵⁶ Justices William Brennan, Harry Blackmun, Thurgood Marshall, John Paul Stevens and Byron White formed the majority.

⁵⁷ 478 U.S. at 46-51.

⁵⁸ *Id.* at 62-63. For critical assessments of the Amendments and the Court's interpretation of the law, see Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 90 MICH. L. REV. 1077 (1991) [hereinafter *Triumph of Tokenism*]; Timothy G. O'Rourke, *The 1982 Amendments and the Voting Rights Paradox*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 19, at 85; Abigail M. Thernstrom, *The Odd Evolution of the Voting Rights Act*, 55 PUB. INT. 49 (1979); Alexander Athan Yanos, Note, *Reconciling the Right to Vote with the Voting Rights Act*, 92 COLUM. L. REV. 1810 (1992) [hereinafter *Reconciling the Right to Vote*].

A growing consensus between the Congress and the Court to pursue an activist approach to the definition and enforcement of voting rights emerged from *Gingles*. This consensus resulted, for the first time, in a set of standards for evaluating existing laws and practices. Putting these standards into effect required the support of sophisticated empirical tests.⁵⁹ As these tests became more methodologically and statistically advanced, they influenced both the interpretation and the implementation of the law.

II. SOCIAL SCIENCE RESEARCH

A. OVERVIEW

The central role elections play in the democratic process has prompted political scientists and other scholars to devote much attention to such questions as: Who participates in elections?⁶⁰ Why do some people vote while others do not?⁶¹ Are there structural and systemic explanations for levels of participation?⁶² Does the system provide a fair opportunity for all citizens to participate?⁶³ What is the nature of representation in a demo-

⁵⁹ See *supra* note 22.

⁶⁰ See MARGARET CONWAY, *POLITICAL PARTICIPATION IN THE UNITED STATES* (1991); ROBERT E. LANE, *POLITICAL LIFE: WHY AND HOW PEOPLE GET INVOLVED IN POLITICS* (1959) (discussing factors that motivate people to vote); NORMAN H. NIE ET AL., *THE CHANGING AMERICAN VOTER* (1976) (chronologically analyzing voter participation in the United States); RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, *WHO VOTES?* (1980).

⁶¹ See ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* (1964) (explaining why some classes are more likely to vote than others); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957) (analyzing the effect of the inequality of voting power); V.O. KEY, *SOUTHERN POLITICS* (1949) (discussing factors that have influenced voting behavior in the southern United States).

⁶² See *CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES* (Arend Lijphart & Bernard Grofman eds., 1984) [hereinafter *CHOOSING AN ELECTORAL SYSTEM*]; *ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES* (Bernard Grofman & Arend Lijphart eds., 1986) [hereinafter *ELECTORAL LAWS AND THEIR CONSEQUENCES*]; DOUGLAS RAE, *THE POLITICAL CONSEQUENCES OF ELECTION LAWS* (1971) (discussing the effect electoral laws have on voter participation).

⁶³ See ROBERT DIXON, *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLICY* (1968); Chandler Davidson & George Korbel, *At-Large Elections and Minority Group Representation: A Reexamination of Historical and Contemporary Evidence*, in *MINORITY VOTE DILUTION*, *supra* note 37, at 65.

cratic society?⁶⁴ While many of these studies have focused on the American political system, voluminous comparative literature also exists on participation, representation, and voting behavior in Western democracies.⁶⁵

This research and its findings have been relevant to litigation in federal and state courts, especially since the passage of the Voting Rights Act in 1965. The studies reviewed below, spanning the period from 1978 to 1994, reveal how scholarship has evolved from the testing of intuitive, fairly simple hypotheses about the relationship between election structure and minority representation⁶⁶ to the development of more complex propositions and methods of analysis.⁶⁷ The role of social science has changed over this period from objective descriptive studies of electoral systems and their effects⁶⁸ to a more activist role in the litigation process.⁶⁹ Indeed, by developing operational standards for identifying violations of the law,⁷⁰ by becoming expert witnesses on behalf of plaintiffs,⁷¹ and by craft-

⁶⁴ See HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* (1967); Heinz Eulau & Paul D. Karps, *The Puzzle of Representation: Specifying Components of Responsiveness*, 2 LEGIS. STUD. Q. 233 (1977); Warren E. Miller & D.E. Stokes, *Constituency Influence in Congress*, 62 AM. POL. SCI. REV. 45 (1963).

⁶⁵ See GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE* (1963) (suggesting a pattern of political attitudes and an underlying set of social attitudes that is supportive of a stable democratic process); AREND LIJPHART, *DEMOCRACIES* (1984); SEYMOUR M. LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* (1960) (discussing factors that influence voter participation); G. BINGHAM POWELL, *CONTEMPORARY DEMOCRACIES: PARTICIPATION, STABILITY AND VIOLENCE* (1982) (discussing voting behavior in the context of democratic political performance); SIDNEY VERBA ET AL., *PARTICIPATION AND EQUALITY: A SEVEN NATION COMPARISON* (1978) (stressing the importance of analyzing participatory behavior over participatory attitudes due to the more immediate impact they have on politics).

⁶⁶ See Susan MacManus, *City Council Election Procedures and Minority Representation: Are They Related?*, 59 SOC. SCI. Q. 153 (1978).

⁶⁷ See Robert L. Engstrom & Michael D. McDonald, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements in the Seats/Population Relationship*, 75 AM. POL. SCI. REV. 344 (1981).

⁶⁸ MacManus, *Election Procedures*, *supra* note 66, at 154-56.

⁶⁹ James W. Loewen, *Sand in the Bearings: Mistaken Criticisms of Ecological Regression*, 22 URB. LAW. 503 (1990).

⁷⁰ Bernard Grofman et al., *The Totality of Circumstances Test in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective*, 7 LAW & POL'Y 199, 201-16 (1985).

⁷¹ Loewen, *supra* note 69, at 503.

ing remedies that would change electoral practices in many jurisdictions,⁷² social scientists became an integral part of the judicial proceedings.

The findings in the descriptive research show that the structure of elections does matter, but in what way depends on several other variables.⁷³ The early research indicates, in general, that at-large elections result in the underrepresentation of blacks.⁷⁴ Single-member district elections can afford minority candidates, particularly blacks, a significant advantage over at-large elections.⁷⁵ But more recent evidence warns us that this advantage is circumstantial, and its effects are conditioned by variables such as population size.⁷⁶ Furthermore, for some minority groups such as Hispanics, single-member districts are less likely to yield proportionate representation under certain conditions.⁷⁷

Additionally, research on representation has expanded in scope to include not only descriptive and passive aspects but also a behavioral dimension that is focused on the political efficacy of certain groups.⁷⁸ The point made here is that while

⁷² Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 160-80 (1985) (suggesting alternative election systems and focusing on points which are of particular relevance to U.S. judicial decision making).

⁷³ See MacManus, *supra* note 66, at 161 (stating that voting "procedures vary in impact according to the demographic and socioeconomic environments in which they operate).

⁷⁴ Robert Engstrom & Michael McDonald, *The Effect of At-Large Versus District Elections on Racial Representation in U.S. Municipalities*, in CHOOSING AN ELECTORAL SYSTEM, *supra* note 62.

⁷⁵ *Id.* See also SUSAN WELCH & TIMOTHY BLEDSOE, URBAN REFORM AND ITS CONSEQUENCES: A STUDY IN REPRESENTATION 50 (1988) (discussing factors that affect city council elections).

⁷⁶ See Susan Welch, *The Impact of At-Large Elections on the Representation of Blacks and Hispanics*, 52 J. POL. 1050 (1990).

⁷⁷ See Engstrom & McDonald, *supra* note 74.

⁷⁸ See ROBERT P. BROWNING ET AL., PROTEST IS NOT ENOUGH: THE STRUGGLE OF BLACKS AND HISPANICS FOR EQUALITY IN URBAN POLITICS (1984) (discussing this issue in the context of blacks and Hispanics in northern California cities); RACIAL POLITICS IN AMERICAN CITIES (Robert Browning et al. eds., 1990) (surveying works by several researchers dealing with this issue in major cities throughout the United States); Timothy Bledsoe, *A Research Note on the Impact of District/At-Large Elections on Black Political Efficacy*, 22 URB. AFF. Q. 166 (1986) (analyzing election date and concluding that type of structure affects political efficacy of black voters); Kenneth J. Meier & Robert E. England, *Black Representation and Educational Policy: Are They*

it is important for minorities to elect representatives who share their descriptive characteristics, such representatives should be able to affect policy outcomes in ways that benefit their constituents.

B. EMPIRICAL STUDIES

1. *MacManus (1978)*

Notable for both its scope and its approach, one of the early major studies of council election procedures was completed by Susan MacManus.⁷⁹ MacManus noted the already emerging literature proclaiming the negative effect of at-large election schemes on minority elections.⁸⁰ Even the most rigorous of these works, however, focused on either one city or a geographically restricted group of cities.⁸¹ MacManus' survey covered 243 cities nationally. In addition to studying different types of city council election plans, her survey analyzed a variety of socioeconomic variables. She rejected the standard procedure of analysis that simply compared at-large schemes to single-member districts and instead adopted a seven-part typology for distinguishing between election systems.⁸² She went beyond the accepted

Related? 78 AM. POL. SCI. REV. 392 (1984) (analyzing data which indicate that black membership on school boards is associated with more equitable education policies); Joseph Stewart et al., *Black Representation in Urban School Districts: From School Board to Office to Classroom*, 42 WEST. POL. Q. 287 (1988) (concluding that political efficacy of blacks is determined by black population, district elections, and geographic region).

⁷⁹ See MacManus, *supra* note 66.

⁸⁰ See James H. Kessel, *Government Structure and the Political Environment*, 56 AM. POL. SCI. REV. 615 (1962); Robert Lineberry & Edmund Fowler, *Reformism and Public Policies in American Cities*, 61 AM. POL. SCI. REV. 701 (1967); Raymond Wolfinger & John O. Field, *Political Ethos and the Structure of City Government*, 56 AM. POL. SCI. REV. 306 (1962).

⁸¹ See Leonard A. Cole, *Electing Blacks to Municipal Office: Structural and Social Determinants*, 10 URB. AFF. Q. 17 (1974).

⁸² These are defined as follows:

At-Large, No Residency Restrictions: Candidates run en masse, and those receiving the highest number of votes are declared elected.

At-Large with Seat (or Position) Restrictions: Candidates can run for a particular seat, but the seat is not geographically defined, and all candidates are voted on city-wide.

At-Large With District Residency for All Seats: City is divided into geographically defined districts and each candidate must live in the district of

practice of measuring minority representation in councils as a proportion of minority seats and developed an equity standard which was operationalized as a differential between the proportion of minorities in the city population and the proportion of minorities on a city council.⁸³

MacManus found that such socioeconomic variables as education, income, ethnicity, age of city, and regional location are "more highly correlated with equity of minority representation than is the council member election plan."⁸⁴ Contrary to conventional wisdom, she concluded that "[t]he traditional, and inaccurate, assertion that at-large election procedures depress minority representation more than single-member district election procedures is based on . . . erroneous assumptions"⁸⁵ She explained that not all at-large systems are identical in structure or impact, and that demographic and socioeconomic variables modify the impact of election procedures.

The results of the MacManus survey had significant implications for future research as well as forthcoming cases before the courts. First and foremost, this study anticipated the notion, which later emerged in the courts, that election systems must be evaluated in the context of the "totality of circumstances." Second, the study raises a point that courts and civil rights activists have fully appreciated only more recently: Single-member districts are not always preferable to at-large election systems as a mechanism for fair representation.

the seat for which he or she is running but the candidates are voted on city-wide.

At-Large, Combination of District Residency and Positional Seats: Some seats are position seats; some are district seats. Candidates for each type of seat are voted upon citywide.

Partially Mixed Plan: The mayor is elected at-large and is officially a member of the Council; remaining council members are elected from geographically defined districts.

Mixed Plan: Some members are elected at-large with no seat or residency restrictions, and some by single-member ward.

Single-Member District: Candidate runs from geographically defined district, and is elected only by eligible voters also residing in that district.

⁸³ MacManus, *supra* note 66, at 156.

⁸⁴ *Id.* at 159.

⁸⁵ *Id.* at 161.

2. *Karnig and Welch (1978)*

While MacManus was conducting her research on city councils, Albert Karnig and Susan Welch were examining local school board elections. Karnig's earlier work indicated that at-large elections tended to depress black representation on city councils, and that the problem was more pronounced when fewer seats were available.⁸⁶ His collaborative effort with Susan Welch investigated the effect of electoral institutions and selection procedures on black school board representation in forty-three American cities.⁸⁷ They compared elected and appointed boards and factored in several other variables beyond method of selection: board size, region, the existence of a black mayor, council representation and the relative size of the black population.⁸⁸

Karnig and Welch specifically targeted big city school districts. The average population in their sample was 497,000, each city having a minimum black population of five percent.⁸⁹ Eight-and-a-half million blacks lived in the cities studied, constituting one-third of the nation's black population and approximately one-half of the black urban population at that time.⁹⁰ Surprisingly, Karnig and Welch found that blacks were "proportionately represented—or slightly overrepresented,"⁹¹ having "about 106% of the representation that would be expected on the basis of their population proportion."⁹² Therefore, the aggregate data showed that blacks fared better on school boards than they did on city councils, where the rate was only seventy-five percent.⁹³

Contrary to expectations, the research indicated that at-large systems resulted in slightly higher black representation

⁸⁶ Albert K. Karnig, *Black Representation on City Councils*, 12 URB. AFF. Q. 223, 223 (1976).

⁸⁷ Albert K. Karnig & Susan Welch, *Representation of Blacks on Big City School Boards*, 59 SOC. SCI. Q. 162 (1978).

⁸⁸ *Id.* at 164, 169.

⁸⁹ *Id.* at 164.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

than did district or mixed systems.⁹⁴ This was true even though at-large systems resulted in depressed black representation on the city councils of the same sample of cities. However, greater variance was found among at-large school districts than between at-large and other systems, indicating that the type of at-large procedure significantly affected representational outcomes.⁹⁵ Appointed boards showed black representation rates slightly lower than at-large elected boards and higher than district boards.⁹⁶

Karnig and Welch noted several intervening variables influencing the overall results. Blacks did considerably better in the North under at-large election systems (and also somewhat better under appointive, district and combination schemes) than they did in the South. In cities with a high black population (over thirty-five percent) blacks fared best under appointive systems, with no differences between at-large and other systems.⁹⁷ The smaller the black population, the better they fared proportionately under at-large plans.⁹⁸ Black representation in at-large systems was also related to board size. Under such systems, larger boards (more than seven members) had a 1.34 ratio of representation to population compared to a 0.75 ratio for smaller boards (five members) and a 1.27 ratio for seven-member boards.⁹⁹

Although Karnig and Welch did not draw the fine distinctions between types of election systems that MacManus did,

⁹⁴ *Id.* at 164-71.

⁹⁵ *Id.* at 164-65.

⁹⁶ *Id.* at 163.

⁹⁷ *Id.* at 166-68.

⁹⁸ In their study of 140 school board elections in North Carolina, Arrington and Watts found that district election systems afford minorities more electoral success (than at-large systems) in cases where blacks constitute a substantial portion of the voting population. See Theodore S. Arrington & Thomas G. Watts, *The Election of Blacks to School Boards in North Carolina*, 44 W. POL. Q. 1099, 1100-05 (1990).

⁹⁹ In later studies of city councils, Karnig and Welch found that the proportional representation of blacks increases with council size. See Albert K. Karnig & Susan Welch, BLACK REPRESENTATION AND URBAN POLICY (1980)[hereinafter Karnig & Welch, URBAN POLICY]; Albert K. Karnig & Susan Welch, *Electoral Structure and Black Representation on City Councils*, 63 SOC. SCI. Q. 99 (1982) [hereinafter Karnig & Welch, *Electoral Structure*]. For other studies that document the relationship between council size and minority representation, see Clinton Jones, *The Impact of Local Election Systems on Black Representation*, 11 URB. AFF. Q. 345, 351-52 (1976); Delbert Taebel, *Minority Representation on City Councils*, 59 SOC. SCI. Q. 142, 146 (1978).

their findings are similarly persuasive of the need to analyze the "totality of circumstances" when assessing election systems. Perhaps their evidence is even more compelling on the need to avoid generalizations about the opportunities afforded minorities by at-large elections. Other researchers, however, armed with larger data bases, would do just that.

3. *Robinson and England (1981)*

Theodore Robinson and Robert England sought to expand Karnig and Welch's work on school board elections in the United States. They increased the sample size from forty-three to seventy-five cities, but selected for their sample only those cities in which blacks constituted fifteen percent or more of the population.¹⁰⁰ Using a "Black Representation Index" (BRI) similar to that of Welch and Karnig, they also compared the ratio of black school board membership to blacks in the general population.¹⁰¹ Their findings were significantly different. Although they found representation on school boards to be more equitable than on city councils, they concluded that the manner of selecting school boards had an unambiguous influence on representation. Specifically, they discovered that at-large elections "significantly reduce opportunities for a population-based equitability in school board representation."¹⁰² The representation ratio for at-large systems was computed at 0.58. Contrary to the other authors, their research indicated that representation levels are not influenced by board size.¹⁰³ Overall, they found appointed boards (1.01 index) to be more representative than elected boards.¹⁰⁴

A later study by Kenneth Meier and England confirmed these results.¹⁰⁵ Here, again, Meier and England found appointed systems to be preferable (1.10 index), and they noted wide variations existing between district plans (0.98 index) and at-large systems (0.69 index).¹⁰⁶ Given that the social science

¹⁰⁰ Theodore Robinson & Robert E. England, *Black Representation on Central City School Boards Revisited*, 62 SOC. SCI. Q. 495, 496 (1981).

¹⁰¹ *Id.* at 496.

¹⁰² *Id.* at 501.

¹⁰³ *Id.* at 499.

¹⁰⁴ *Id.* at 501.

¹⁰⁵ Meier & England, *supra* note 78, at 400.

¹⁰⁶ *Id.* Meier & England sought to extend their work to descriptive

evidence on at-large systems was somewhat inconsistent, one could argue that the courts acted reasonably in subsequently holding that while such procedures were highly suspect, they would not categorically be found to be illegal.

4. *Engstrom and McDonald (1981)*

As a result of the work that had appeared in the late 1970s, a division had begun to emerge in the field of voting analysis as to whether election systems decisively affected minority representation, or whether the results were being driven by other ecological variables. Robert Engstrom and Michael McDonald sought to resolve that dispute in a study which examined electoral arrangements for the city councils in 239 jurisdictions.¹⁰⁷ They divided their population of cities into three types: at-large, district and mixed. In order to test the ecological argument of the "revisionist" scholars, they added five variables to their regression equation.¹⁰⁸

Their data came down strongly on the side of the traditional viewpoint with certain notable qualifications. They found that "at-large elections, at least in comparison with district-based electoral systems, tend to 'under-represent' black people."¹⁰⁹ They found the relationship between electoral structure and black representation to be unaffected by all but one of the socioeconomic factors, the relative income of the black population. Black income appeared to be a more influential determinant than election format in those jurisdictions where the black population was small (under fifteen percent).

representation. They make a connection between passive descriptive representation and active representation that effects policy outcomes in the interest of those represented. See Stewart, *supra* note 78, at 297-300. Here they describe representation as a developmental sequence from school board membership, to the administrative ranks, through to classroom teaching.

¹⁰⁷ See Robert L. Engstrom & Michael D. McDonald, *supra* note 74.

¹⁰⁸ *Id.* at 350. These variables included population size, rate of population change from 1960 to 1970, median family income, median school years completed by those over age 25, and the percentage of the labor force employed in white-collar occupations.

¹⁰⁹ *Id.* at 352. The authors noted evidence that in some jurisdictions districting, with the use of gerrymandering, is a technique for reducing minority representation. See Robert L. Engstrom & John K. Wildgen, *Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering*, 2 LEGIS. STUD. Q. 465, 465-66 (1977).

In 1982, Karnig and Welch, whose pioneering work on school districts in 1978 had helped focus attention on variables other than electoral systems,¹¹⁰ published a study of representation on city councils.¹¹¹ They found that districted systems had significantly greater black representation than either at-large or mixed systems, and they did not identify any notable variables other than election format.¹¹² This finding was consistent with Karnig's original work on city councils.¹¹³ By the mid-1980s, the weight of the evidence appeared to be mounting against the revisionist point of view. But the research literature was far from conclusive in determining the extent to which electoral systems influence minority representation.

5. Welch (1990)

Welch revisited the issue in 1990. Obviously, she was familiar with the substantial evidence favoring district systems over at-large plans. However, she also understood that many of the major studies might have become dated, since much had changed during the fifteen years since these empirical studies began to appear. Black representation in local government had increased dramatically.¹¹⁴ As a result of the Voting Rights Act and judicial intervention, the electoral systems of many jurisdictions had begun to change.¹¹⁵ Using data from 1988, Welch

¹¹⁰ Karnig & Welch, *URBAN POLICY*, *supra* note 99, at 164-68.

¹¹¹ Karnig & Welch, *Electoral Structure*, *supra* note 99.

¹¹² Karnig & Welch, *Electoral Structure*, *supra* note 99, at 99.

¹¹³ Karnig & Welch, *URBAN POLICY*, *supra* note 99, at 35-36. See also Timothy Robinson & Thomas Dye, *Reformism and Representation on City Councils*, 59 *SOC. SCI. Q.* 133, 140-41 (1978) (discussing the impact of government structure on representation afforded blacks on city councils).

¹¹⁴ Welch, *supra* note 76, at 1051. The number of black municipal officials had grown from 623 in 1970, to 1,889 in 1976, to more than 3,200 in 1987. See JOINT CENTER FOR POLITICAL STUDIES, *NATIONAL ROSTER OF BLACK ELECTED OFFICIALS*, 1987 (1987).

¹¹⁵ Welch, *supra* note 76, at 65. Svara reported that in the early 1970s, 63% of city councils elected their members at-large, and 15% had a combined at-large and district method. See James Svara, *Unwrapping Institutional Packages in Municipal Government*, 39 *J. POL.* 166, 168-69 (1977). Renner reported that by 1986, while at-large systems were the dominant form in cities with populations of less than 50,000, only about half the cities with populations between 50,000 and 99,000, and less than half of those with populations over 100,000 had at-large systems. See Tari Renner, *Municipal Election Processes: The Impact on Minority Representation*, in *MUNICIPAL YEARBOOK*

examined every American city with a population of at least 50,000, covering 314 cities in all. Recognizing the more important role that Hispanics were beginning to play in American political life, Welch focused this study on both blacks and Hispanics. Her overall finding, while somewhat consistent with her earlier study, managed to capture the changing political landscape of the nation:

We found evidence of both stability and change in this representation-electoral structure linkage. Blacks are still most equitably represented by district elections (when compared to at-large systems), at least up to the point that they are majorities or near majorities in cities. Then it is whites who need district representation to obtain their proportional share of council seats.¹¹⁶

Although the size of a minority population had emerged as a significant factor in previous studies,¹¹⁷ here it would appear more profoundly. This study served as a bellwether to future research revealing that single-member districting schemes do not accommodate the interests of minorities where the minority populations are relatively small or not concentrated in a particular geographical area. Two additional factors qualify the study's conclusion. First, the data indicated that the ability of at-large systems to represent blacks had improved substantially since the 1970s, to the point that the differences among the systems were no longer statistically significant.¹¹⁸ Thus, Welch concluded, "[r]epresentational levels in the two systems are converging. . ."¹¹⁹ Second, the outcome for Hispanics proved to be equally significant. The study showed that district elections generally do not function to the advantage of Hispanic voters.¹²⁰ Three factors influence the ability of district elections to promote Hispanic representation: their level of residential segregation, their population proportion, and the state or

(1988).

¹¹⁶ Welch, *supra* note 76, at 1072.

¹¹⁷ Karnig & Welch, URBAN POLICY, *supra* note 99, at 32.

¹¹⁸ Welch, *supra* note 76, at 1072.

¹¹⁹ *Id.*

¹²⁰ *Id.*

region where they live.¹²¹ Overall, the study found that small Hispanic populations enjoyed the best representation under mixed systems, a finding corroborated by earlier studies of Hispanic representation.¹²²

6. *Bullock and MacManus (1990)*

Charles Bullock and Susan MacManus focused their collaborative effort entirely on the Hispanic population. Their survey covered 945 cities with populations over 25,000 and was specifically designed to examine those structural features referenced in the 1982 version of the Voting Rights Act: electoral districting format, staggered terms, majority vote requirements, council size, and length of term.¹²³ The most revealing discovery of the project was the general underrepresentation of Hispanics on city councils.¹²⁴ No Hispanics served on the city councils in 835 cities.¹²⁵ Of the 110 cities with Hispanic council members, seventy-nine (seventy-two percent) had only one member.¹²⁶ In only nine cities did Hispanics constitute at least half of the council.¹²⁷ The single best predictor of representation was the size of the Hispanic population.¹²⁸ Hispanic council representation was shown to increase with the percent of the Hispanic population,¹²⁹ but since most city populations are overwhelmingly non-Hispanic,¹³⁰ representation levels across the nation are weak. Most cities with Hispanic members are concentrated in five states: Arizona, California, Colorado, New Mexico and Texas.¹³¹

¹²¹ *Id.*

¹²² See MacManus, *supra* note 66, at 156-58; Taebel, *supra* note 99, at 145-52.

¹²³ Charles S. Bullock & Susan A. MacManus, *Structural Features of Municipalities and the Incidence of Hispanic Council Members*, 71 SOC. SCI. Q. 665, 666 (1990).

¹²⁴ See *id.*

¹²⁵ *Id.* at 670.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 678.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 670.

There was no discernable evidence that electoral format had a significant impact on voting outcomes.¹³² To state it differently, there is no reason to believe here that Hispanics, who constitute a relatively small population minority in most jurisdictions and are not residentially segregated to the degree that blacks are, will improve their lot in any substantial way by adopting district voting systems.

7. Alozie (1992)

Like Hispanics, Asians constitute a relatively small population group, and they are not geographically concentrated to the degree that blacks are.¹³³ Their educational achievement level, however, usually exceeds that of other racial minorities, and on the average, Asians enjoy higher incomes than whites.¹³⁴ Nicholas Alozie surveyed every American city — sixty-six in all — with a population of 25,000 or more and an Asian population of at least five percent.¹³⁵

The most telling revelation from the data pointed to the general underrepresentation of Asians in local legislatures. While the mean percentage of Asians in the population of these cities was ten percent, they held 4.1% of the council seats.¹³⁶ In only one jurisdiction did they hold more than one seat, and in that case, Asians held two seats.¹³⁷ The study concluded that "the district and mixed election systems do not differ markedly from at-large plans in the opportunities they grant Asians for election to city councils."¹³⁸ The most crucial element in deter-

¹³² Some early studies did find that at-large election methods depress Hispanic representation. See Chandler Davidson & George Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 J. POL. 982, 985-92 (1981); Taebel, *supra* note 99, at 145-51. However, later studies, utilizing more elaborate analytic approaches and more recent data, indicated that electoral systems do not have a significant impact on Hispanic representation. Of particular importance to Hispanics is population size and residential patterns. See Jeffrey S. Zax, *Election Methods and Black and Hispanic City Council Membership*, 71 SOC. SCI. Q. 338, 346-53 (1990).

¹³³ Nicholas O. Alozie, *The Election of Asians to City Councils*, 73 SOC. SCI. Q. 90, 91, 93, 97-98 (1992).

¹³⁴ *Id.* at 94.

¹³⁵ *Id.* at 92.

¹³⁶ *Id.*

¹³⁷ *Id.* at 94.

¹³⁸ *Id.* at 96.

mining Asian representation was the proportion of the Asian population in a jurisdiction. Some evidence linked Asian presence in a local legislature to level of income.

8. *Davidson and Grofman (1994)*

Chandler Davidson and Bernard Grofman, two of the nation's leading scholars on the Voting Rights Act, are prolific contributors to the social science literature and are recognized expert witnesses in cases brought before the courts on behalf of aggrieved minorities. Their most recent collaborative project is a collection of readings designed to assess the effect of the Voting Rights Act on the South.¹³⁹ Specifically, they sought to determine what effect a change in election systems, from at-large to single-member or mixed systems, has had on black representation in the eight Southern states covered by Section 5.¹⁴⁰ Previous research had documented evidence of substantial black progress in the South as a result of the Voting Rights Act.¹⁴¹ In addition to updating research, this project introduced more sophisticated techniques, utilizing longitudinal analysis and a control group of cities that did not undergo changes in their election systems.¹⁴²

¹³⁹ QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter QUIET REVOLUTION].

¹⁴⁰ The survey covered the seven states that the Act continuously has covered: Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia as well as Texas, which came in under the Act's provisions of 1975.

¹⁴¹ Davidson & Korbel, *supra* note 132; Peggy Heilig & Robert J. Mundt, *Changes in Representational Equity: The Effect of Adopting Districts*, 64 SOC. SCI. Q. 393 (1983).

¹⁴² Davidson and Grofman describe the data set as follows:

The data were collected for two points separated on average by about fifteen years. The earlier time was 1974 in a plurality of the states, but for Alabama it was 1970; for North Carolina, 1973; for Virginia, 1977; and for Georgia, 1980. The latter time was 1989 for all states except Georgia, for which it was 1990.... In all but two states, only cities with a black population of 10 percent or more were examined. Exceptions are Texas, where a combined black and Hispanic population of 10 percent is the threshold...and North Carolina, where a combined black and American Indian population threshold of 10 percent is used.... The population threshold is 1,000 in Mississippi; 2,500 in Louisiana; 6,000 in Alabama; and 10,000 in Georgia, Texas and South Carolina. In North Carolina all incorpo-

In a summary chapter on municipal election outcomes, Grofman and Davidson reported continued progress in achieving fair representation. Using an equity score that relates population ratios to representation on city councils, they found:

1. Majority-white cities with single-member districts gave blacks almost proportional representation. Cities that were ten to twenty-nine percent black had a mean equity score of 1.14, those that were thirty to forty-nine percent black, a score of .92.¹⁴³
2. Majority-white cities with at-large systems had a much lower black equity score of 0.56.¹⁴⁴
3. In majority-black jurisdictions with districted systems, black equity was nearly proportionate at 0.92.¹⁴⁵
4. In the four states for which data was available that had at-large elections for majority-black populations, the scores were mixed: in Alabama, it was 1.09; in Louisiana, 0.80; in Mississippi, 0.70; and in North Carolina 0.14.¹⁴⁶

While this presentation supports the argument that single-member districts promote minority equity, a closer examination using longitudinal data better explains the conditions under which blacks can most benefit from such plans. Here, again, population size figures in as a key variable. Grofman and Davidson conclude:

On average, the greatest effect of a change from an at-large plan to single member districts occurred in majority-black cities (53 percentage points); the next greatest effect occurred in cities that were 30-49.9% black (34 points); and the lowest but still substantial effect oc-

rated cities are examined, including cities with a population fewer than 500. The Virginia chapter reports on all cities that are 'independent.'

Bernard Grofman & Chandler Davidson, *The Effect of Municipal Election Structure on Black Representation in Eight Southern States*, in QUIET REVOLUTION, *supra* note 139, at 303.

¹⁴³ *Id.* at 309.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

curred in cities that were 10-29.9% black (23 points). In terms of the net difference measure, the equivalent net gains were 33, 19, and 16 percentage points respectively.¹⁴⁷

The lesson to be drawn here is that single-member districting schemes are most likely to have a positive effect on minority representation in jurisdictions where the racial minority is a numerical majority. This point comes through even more powerfully in a companion chapter on legislative representation by Hadley and Grofman.¹⁴⁸

Here again, substantial progress is noted. Between 1965 and 1985, the number of black state legislators in the eleven states of the old confederacy increased from three to 176.¹⁴⁹ By most standards of equity, this dramatic improvement failed to satisfy those concerned with black representation. The increase represented only ten percent of the legislative seats, although blacks comprised twenty percent of the population.¹⁵⁰ The data is nevertheless informative. Hadley and Grofman concluded that the increase in black legislators resulted directly from an increase in the number of black-majority districts. They further explained that, given the low turnout rates of blacks, these population majorities must be decisive in order to reap the benefits of districting strategies: "[E]ven today black populations well above 50 percent appear necessary if blacks are to have a realistic opportunity to elect representatives of their choice in the South."¹⁵¹

In understanding the conditions under which districting plans are likely to benefit blacks, one also must understand the limits of this strategy. If blacks comprise only twenty percent

¹⁴⁷ *Id.* at 308. Changes in electoral systems were not the only actions that were taken in these jurisdictions as a result of the Voting Rights Act. Key to the Justice Department strategy was the removal of barriers to the franchise such as poll taxes, literacy tests, and white primaries. See James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, in QUIET REVOLUTION, *supra* note 139, at 351.

¹⁴⁸ Lisa Hadley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, in QUIET REVOLUTION, *supra* note 139, at 335.

¹⁴⁹ *Id.* at 336.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 335.

of the entire population, then a mathematical limitation exists as to just how many such districts with extraordinary majorities can be created. This limit, by definition, appears disproportionately low for the size of the population. Moreover, most Southern blacks do not live in majority-black districts.¹⁵² Since not a single black legislator was elected by a majority-white district in the South,¹⁵³ this approach leaves the majority of Southern blacks without effective representation — at least as representation is defined in terms of race, which is the premise of such schemes.

9. Summary

The substantial body of research that has evolved over the last fifteen years indicates generally that at-large voting systems do not afford minorities, especially blacks, the same opportunities as district plans. But the evidence is somewhat circumstantial, modified by environmental factors and changes over time as voting systems have been altered to comply with the law. Indeed, not all blacks benefit from such schemes. Only a distinct minority, clustered into voting districts with supermajority population margins, benefits. Single-member districting systems apparently do not benefit other minorities even to the extent that they benefit blacks. Hispanics, Asians and those groups who comprise a small proportion of the population are not as likely to improve their representation as a result of districting schemes. In fact, those groups with small proportionate numbers in the population quite often fare better under mixed or modified at-large systems.

C. SOCIAL SCIENCE AND THE COURTS

1. Operationalizing Standards

The 1986 Supreme Court decision in *Thornburg v. Gingles*¹⁵⁴ went further than any judicial ruling in history to define standards for determining discrimination in voting.

¹⁵² In five Southern states, more than 80% of blacks lived outside of majority-black senate districts; in three states, more than 70% of blacks lived outside of majority-black house districts; and in two states, 50% percent of blacks lived outside of majority-black house districts. *Id.* at 338.

¹⁵³ *Id.*

¹⁵⁴ 478 U.S. 30 (1986).

Gingles adopted in full the factors outlined in the Senate Committee Report that had accompanied the 1982 Amendments to the Voting Rights Act.¹⁵⁵ The Court put forward a three-part set of criteria that could be used to review claims of vote dilution.¹⁵⁶ Among the concepts applied to assess the constitutionality of at-large election systems, particular attention was given to the element of "racial polarization." Although the Senate Report emphasized that no one factor for consideration is dispositive under the "totality of circumstances" principle, Justice Brennan, writing for the majority, went to great lengths to explain that "racial polarization" is a prerequisite to a finding of discrimination:

While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multi-member districts, . . . a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular . . . group These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice.¹⁵⁷

Subsequent lower court decisions also have treated racial polarization as a "keystone" to voting rights claims.¹⁵⁸

¹⁵⁵ SENATE JUDICIARY COMMITTEE REPORT, *supra* note 39, at 2. In fact the Report of the Subcommittee on the Constitution to the Senate Committee on the Judiciary listed 20 factors that the courts had considered in prior cases. These factors are: some history of discrimination; at-large voting systems or multi-member districts; some history of "dual" school systems; cancellation of registration for failure to vote; residency requirements for voters; special requirements for independent or third-party candidates; off-year elections; substantial candidate cost requirements; staggered terms of office; high economic costs associated with registration; disparity in voter registration by race; history of lack of proportional representation; disparity in literacy rates by race; evidence of racial block voting; history of English-only ballots; history of poll taxes; disparity in distribution of services by race; numbered electoral posts; prohibitions on single-shot voting; majority vote requirements. See Paul W. Jacobs & Timothy G. O'Rourke, *Racial Polarization in Vote Dilution Cases Under Section 2 of the Voting Rights Act: The Impact of Thornburg v. Gingles*, 3 J.L. & POL. 295, 308 (1988).

¹⁵⁶ 478 U.S. 30 at 50-51.

¹⁵⁷ *Id.* at 48-49.

¹⁵⁸ See, e.g., *Lee County Branch NAACP v. City of Opelika*, 748 F.2d 1473,

By the time the Court handed down the *Gingles* opinion, a substantial body of social science research already existed, prompting the courts to view at-large systems as suspect. As evidence of racial polarization became pivotal in vote-dilution cases and the Court accepted statistical correlation as a method of proof, social scientists gained new stature in the litigation process. Few major cases would proceed without the presentation of sophisticated social science evidence by attorneys on one or both sides. Many of the factors specified in the Senate Report — for example, a history of discrimination, special election provisions, slating, social disadvantage, racial campaigns, and minority success — were readily susceptible to direct observation.¹⁵⁹ But the issue of racial polarization is more subtle and complex, and its prominence in forthcoming cases would open the door to heated methodological debates among attorneys and social scientists. These professional disagreements remain unresolved.

2. *Early Cases*

Many decisions in the late 1960s and early 1970s alluded to the phenomenon of "block voting."¹⁶⁰ However it was not until 1972, in *City of Petersburg v. United States*,¹⁶¹ that the U.S. District Court for the District of Columbia applied the concepts of "block voting" and "polarization" as part of a formal analysis of evidentiary data. In *Petersburg*, the city pursued an annexation plan that would have increased its white population by fifty percent, thereby removing the majority status of the black population. A question arose as to whether an at-large election

1481 (11th Cir. 1984); *United States v. Dallas County Comm'n*, 739 F.2d 1529, 1535 (11th Cir. 1984); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1566 (11th Cir. 1984); *Latino Political Action Comm. v. City of Boston*, 609 F. Supp. 739, 743 (D. Mass. 1985). See also *Jacobs & O'Rourke*, *supra* note 155, at 301, 310 n. 69 (characterizing racial polarization as the linchpin to a claim of vote dilution).

¹⁵⁹ See Bernard Grofman, *Expert Witness Testimony and the Evolution of Voting Rights Case Law*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 19, at 197, 202-06; Grofman et al., *Totality of Circumstances*, *supra* note 70, at 209.

¹⁶⁰ See *Burns v. Richardson*, 384 U.S. 73, 88 (1966); *Dolson v. Mayor of Baltimore*, 330 F. Supp. 1290, 1297 (D. Md. 1971); *Chavis v. Whitcomb*, 305 F. Supp. 1364, 1367 (S.D. Ind. 1969). See also *Jacobs & O'Rourke*, *supra* note 155, at 303.

¹⁶¹ 354 F. Supp. 1021, 1025-26 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973). See *Jacobs & O'Rourke*, *supra* note 155, at 303-04.

plan for the city council would result in the dilution of black votes.

The methodological approach used to determine polarization was "homogeneous precinct analysis." This analysis focused on the voting returns of four precincts over the course of four elections. The population of two precincts was nearly all black; the population in the others was nearly all white. The data indicated that in every election studied, white-precinct support for white candidates never fell below ninety-one percent, whereas black precinct support for black candidates never fell below eighty-one percent. The court accepted this evidence as proof of racial block voting.

Homogeneous precinct analysis would become a widely accepted approach for determining racial polarization.¹⁶² This approach commonly applies a ninety-percent threshold for identifying precincts or districts by race. For example, only those precincts that contain a black population of ninety percent or more would be considered black precincts. The great advantage of the homogeneous precinct analysis as an analytic technique is its straightforward simplicity, which allows the approach to be easily understood by those unfamiliar with statistical methods.

Homogeneous precinct analysis, however, also contains significant flaws. The approach relies on the existence of homogeneous districts, but when the particular protected group in question is either small or not geographically concentrated — as is often the case with Hispanics or Asians and other minorities — then such precincts do not exist. Even when they do exist, homogeneous precinct analysis makes generalizations about the entire voting population on the basis of a rather limited sample. Specifically, the approach assumes that those who live in racially isolated areas behave similarly to those from more integrated places. This assumption may not be true either. As Engstrom and McDonald have pointed out:

Hypothetically, black people residing in racially integrated neighborhoods may tend to be better educated and more gainfully employed than those residing in racially segregated neighborhoods; those socioeconomic

¹⁶² For a general discussion of the evolution of homogenous-precinct analysis, see JAMES W. LOEWEN, *SOCIAL SCIENCE IN THE COURTROOM* (1982).

differences might result in differences in political behavior.¹⁶³

Throughout the 1970s and early 1980s, no one methodological technique prevailed for determining racial polarization in voting. Even the *White*¹⁶⁴ and *Zimmer*¹⁶⁵ decisions that had so explicitly identified factors for reviewing vote-dilution claims did not provide any clear direction. In fact, neither case even mentioned polarization or block voting among its respective laundry list of items for consideration. Reviewing the cases in the decade preceding *Gingles*, *Jacobs* and *O'Rourke* cite four mathematical tests that various federal courts have used as a threshold of polarization.¹⁶⁶

1. **Opposing Percentage Test.** Voting is declared polarized when some specific majority of one race votes in opposition to a specific majority of another race. This standard can range from a simple majority¹⁶⁷ to ninety percent.¹⁶⁸

2. **Single Index Test.** Voting percentages for different groups are combined into a single index. If the combined percentage of voters voting for candidates of their own race exceeds 160 (out of a possible 200), then polarization is found. Courts have accepted several variations of this test.¹⁶⁹

3. **Correlation Test.** A statistical correlation is computed to determine if a relationship exists between the racial composition of precincts and voting patterns.¹⁷⁰

4. **Separate Electorates Test.** This test simply asks whether the outcome of an election would have been different if the

¹⁶³ Engstrom & McDonald, *supra* note 7, at 373.

¹⁶⁴ *White v. Regester*, 412 U.S. 755 (1973).

¹⁶⁵ *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

¹⁶⁶ *Jacobs & O'Rourke*, *supra* note 155, at 336-37.

¹⁶⁷ See *Butts v. City of New York*, 614 F. Supp. 1546 (S.D.N.Y. 1985) (accepting simple-majority standard); *but see Collins v. City of Norfolk*, 679 F. Supp. 557, 566-68 (E.D. Va. 1988) (rejecting simple-majority standard).

¹⁶⁸ See *Mosley v. Sadler*, 469 F. Supp. 563, 568 (E.D. Tex. 1979).

¹⁶⁹ See *United States v. Dallas County Comm'n*, 739 F.2d 1529, 1535 (11th Cir. 1984); *Political Civil Voters Org. v. City of Terrell*, 565 F. Supp. 338, 348 (N.D. Tex. 1983); *City of Port Arthur v. United States*, 517 F. Supp. 987, 1007 (D.C.C. 1981).

¹⁷⁰ See *NAACP v. Gadsden County Sch. Bd.*, 691 F.2d 878, 883 (11th Cir. 1982); *McMillan v. Escambia County*, 688 F. 2d 960, 966 (5th Cir. 1982); *Major v. Treen*, 574 F. Supp. 325, 337 (E.D. La. 1983).

election were held separately among different groups. The trial court in *Gingles* used this test.¹⁷¹

3. After *Gingles*

In *Thornburg v. Gingles*,¹⁷² the Supreme Court accepted the application of two techniques for making inferences about voting behavior from aggregate data: homogeneous precinct analysis and bivariate ecological regression. With its facility for application and explanation, homogeneous precinct analysis remains an acceptable approach for review of elections suspected of racial polarization. Due to the limitations noted above, however, homogeneous precinct analysis is rarely utilized exclusively to demonstrate vote dilution.¹⁷³ More significant weight is given to ecological regression. The major advantage of this technique is its use of data on voting behavior from all districts in a jurisdiction, not just those that are racially homogeneous. In fact, ecological regression can be adopted even in those situations where no homogeneous districts exist.

Ecological regression is a technique for measuring the relationship between two variables, in this case racial composition and voting preference. It usually involves two tests: correlation analysis and regression analysis. A correlation coefficient measures the consistency between a racially defined voting age population (VAP) and votes for a particular candidate. A score "r" can range from +1.0 (perfect positive relationship) to -1.0 (perfect negative relationship). A positive score would predict that the number of votes cast for a candidate of a given race increases as the proportion of the VAP of the same race increases. Data from such an analysis can be presented on a scattergram. While an "r" score indicates the existence of a relationship between two variables, a regression coefficient ("b" score) measures the strength of the relationship. From the latter one can predict the degree to which votes for a particular

¹⁷¹ *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.Y. 1984).

¹⁷² 478 U.S. 30 (1986).

¹⁷³ See Loewen & Grofman, *supra* note 7 (using homogeneous precinct analysis, ecological regression and correlation to more accurately analyze voting patterns); Grofman et al., *Totality of Circumstances*, *supra* note 70, at 209 (arguing that ecological regression and homogeneous precinct analysis should be used simultaneously, so that they offset each other's weaknesses).

candidate change as a result of specific changes in the racial composition of the VAP.

Despite its wide-ranging acceptance by the courts, ecological regression has its critics among reputable social scientists. Some argue that limiting an analysis of elections to only two variables — race and choice — does not sufficiently explain differences in the political behavior of blacks and whites. Instead the choices may be determined by other factors not accounted for such as income, education, the policy positions of candidates, and expenditures by candidates. These experts apply multivariate methods of analysis to assess a causal relationship between voting behavior and a number of other variables, only one of which would be race.¹⁷⁴ In fact, one expert witness, Charles Bullock, presented a multivariate regression analysis of city commission races in Fort Lauderdale, Florida, to successfully defeat a claim of vote dilution both at the district and appellate court levels.¹⁷⁵ Notwithstanding such criticism, bivariate ecological regression remains the standard approach used in voting rights cases.¹⁷⁶ Its proponents argue that under the standards adopted by the Supreme Court in *Gingles*, it is unnecessary to explain the cause of racially polarized voting as long as one can demonstrate that such polarization exists.¹⁷⁷

¹⁷⁴ See John K. Wildgen, *Vote Dilution Litigation and Cold Fusion Technology*, 22 URB. LAW. 487, 487-94 (1990) (attacking ecological regression because of the "impossible" results it often generates). See also W.S. Robinson, *Ecological Correlations and the Behavior of Individuals*, 15 AM. SOC. REV. 351 (1950). Richard L. Engstrom and Michael D. McDonald have recommended the use of multivariate analysis to measure the extent to which different minority groups within a population vote the same. See Richard L. Engstrom & Michael D. McDonald, *Quantitative Evidence in Vote Dilution Litigation, Part II: Minority Coalitions and Multivariate Analysis*, 19 URB. LAW. 65 (1987).

¹⁷⁵ *McCord v. City of Fort Lauderdale*, 787 F.2d 1528, 1532 (11th Cir. 1986). See Charles Bullock, *Racial Crossover Voting and the Election of Black Officials*, 46 J. POL. 238 (1984).

¹⁷⁶ For a defense of this approach, see Bernard Grofman, *Multivariate Methods and the Analysis of Racially Polarized Voting: Pitfalls in the Use of Social Science in the Courts*, 72 SOC. SCI. Q. 826 (1991) [hereinafter *Pitfalls in the Use of Social Science*]; Loewen, *supra* note 69, at 503, 504-05, 512-13 (offering a defense of ecological regression).

¹⁷⁷ *Pitfalls in the Use of Social Science*, *supra* note 176, at 828.

4. *Creating Safe Districts*

Nearly two decades of social science research and a preponderance of judicial rulings reveal that at-large and multi-member voting districts often block the fair representation of minorities, especially blacks. The major thrust of the court-imposed remedies was the creation of single-member districts that did not dilute the voting strength of protected groups. As early as 1977, the Supreme Court declared its intent to go beyond the standard of racial neutrality in order to review the overall racial consequences of voting plans.¹⁷⁸ Before the 1982 Amendments to the Voting Rights Act, the Court ruled that in order to pass judicial scrutiny, a single-member district plan must "overcome the effects of past discrimination and racial bloc voting."¹⁷⁹

Later judicial decisions put forward several principles that would guide the architects of districting remedies, including population equality, compactness, and contiguity.¹⁸⁰ Natural boundaries and communities of interest supposedly were recognized, and under certain circumstances some protection of incumbents was permitted.¹⁸¹ Except for county boundaries, political geography was not usually accepted as a consideration prior to *Bandemer*.¹⁸² Some principles could be applied rather straightforwardly; others would require more rigorous analysis. For example, based on the one-person, one-vote standard, measuring and comparing the size of election districts becomes a fairly easy way to assure that votes are of equal value.¹⁸³

¹⁷⁸ *United Jewish Orgs. v. Carey*, 430 U.S. 144, 164 n.22 (1977).

¹⁷⁹ *Allain v. Brooks*, 469 U.S. 1002, 1004 (1984) (quoting the App. to Motion to Dismiss or Affirm in No. 83-1772, p.14a).

¹⁸⁰ *Ketchum v. Byrne*, 740 F.2d 1398, 1410-16 (7th Cir. 1984); *Terrazas V. Clements*, 581 F. Supp. 1329, 1358-59 (N.D. Tex. 1984); *Major v. Treen*, 574 F. Supp. 325, 352-54 (E.D. La. 1983). A three-judge panel in Arkansas later adopted the *Gingles* standards for reviewing a single-member districting scheme. See *Jeffers v. Clinton*, 730 F. Supp. 196, 202-11 (E.D. Ark. 1989).

¹⁸¹ See *Davis v. Bandemer*, 478 U.S. 109, 138-141 (1986); *Gonzalez V. Monterey County*, 808 F. Supp. 727, 735-36 (N.D. Cal. 1992); *Burton v. Sheheen*, 793 F.Supp. 1329, 1343-44 (D.S.C. 1992).

¹⁸² 478 U.S. at 130-31; see James U. Blacksher, *Drawing Single-Member Districts to Comply With the Voting Rights Amendments of 1982*, 17 URB. LAW. 347 (1985); QUEST FOR VOTING EQUALITY, *supra* note 7, at 110-22.

¹⁸³ *Mahan v. Howell*, 330 F.Supp. 1138, 1140 (E.D. Va. 1971), *aff'd*, 410 U.S. 315 (1973), established that state legislative districts may vary in size by up to 15% if legitimate reasons were offered. *Mahan* set the standard for local

Natural boundaries are visible to the naked eye. The qualities of compactness and contiguity, however, are matters of judgment, and more difficult to ascertain.¹⁸⁴ In America's pluralistic system of government "communities of interest" are not always stable. Groups that align on one issue may find themselves on opposite sides regarding another. In the end, race becomes the proxy for defining group interest, an easy formula but simplistic and presumptive at best. How might one determine whether a districting plan would "overcome the effects of past discrimination"?¹⁸⁵ Social scientists became intricately involved in defining remedies for past practices. Single-member districts were identified as the solution of choice. And the task was a rather ambitious one: Draw boundaries that would guarantee minority success at the polls. Based on the study of past elections, analysts would define mathematical thresholds revealing how many members of a protected group must live in a district in order to assure certain outcomes.¹⁸⁶

An issue that remained was how large a popular majority a protected group needed in order to win a contest. A simple majority would not necessarily work. Other demographic and

government jurisdictions in *Abate v. Mundt*, 403 U.S. 182, 185 (1971). Later, in *Karcher v. Daggett*, 462 U.S. 725, 732-34 (1983), the Court set a standard of strict equality for congressional districts. See generally Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643 (1993) (arguing that even though the opportunity exists for those who control the redistricting process to employ partisan gerrymandering for their benefit, the standards enunciated in *Bandemer* were fundamentally unworkable due to their ambiguity, and thus would do little to advance the one-person, one-vote standard); see also Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Interactions Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

¹⁸⁴ See Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301 (1991); Richard G. Niemi et al., *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. POL. 1155 (1990); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts" and Voting Rights: Evaluating Election District Appearances after Shaw v. Reno*, 92 MICH. L. REV. 483, 553, 586 (1993).

¹⁸⁵ *Allain v. Brooks*, 469 U.S. 1002, 1004 (1984).

¹⁸⁶ A "threshold of representation" is a measure of a district in a jurisdiction with the smallest minority proportion that has elected a black representative. A "threshold of exclusion" is a measure of a district with the largest minority proportion that has never elected a black representative. See Bernard Grofman, *Alternatives to Single-Member Plurality Districts: Legal and Empirical Issues*, 9 POL'Y STUD. J. 875, 881 (1980-81).

behavioral characteristics of the population had to be considered: What proportion of the voting age population were citizens? Of these, how many were registered to vote? What proportion actually would choose to exercise their franchise? One popular rule of thumb to emerge in the literature was the sixty-five percent rule. Expert witnesses have persuaded the courts that in order to assure a minority victory at the polls at least sixty-five percent of the population in a district must consist of the protected group.¹⁸⁷

In recent years, computer technology has been introduced into the districting process, allowing practitioners to redraw boundaries while taking into account all the demographic and geographic variables needed to achieve the desired results.¹⁸⁸ By the time of the 1990 census, the Topologically Integrated Geographic Encoding and Referencing (TIGER) system had been developed in conjunction with the U.S. Geological Survey to produce a digital street map of the entire country.¹⁸⁹ Software packages enable a user to redraw district boundaries on a personal computer. One cannot help but to be struck by the technical power that exists to alter the structure of electoral systems and to manipulate election results. This new capability has allowed the courts and the experts who testify before them to assume an unparalleled role in the political process.

5. Summary

Throughout the evolution of voting rights legislation and its enforcement by the courts, the role of social scientists has changed from one of objective evaluation to active participation.

¹⁸⁷ See *Mississippi v. United States*, 451 U.S. 934 (1981); *United Jewish Orgs. v. Carey*, 430 U.S. at 164; *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d. 139, 150 (5th Cir. 1977). For a critical assessment of the 65% rule, see Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 LAW & POL'Y 43, 44-47 (1988).

¹⁸⁸ See Arthur J. Anderson & William S. Dahlstrom, *Technological Gerrymandering: How Computers Can Be Used in the Districting Process to Comply With Judicial Criteria*, 22 URB. LAW. 59, 74 (1990); Pildes & Niemi, *supra* note 184, at 553.

¹⁸⁹ Anderson & Dahlstrom, *supra* note 188, at 73. For an analysis on how computer technology was utilized to facilitate the districting process for the City Council in New York City, see Frank J. Macchiarola & Joseph G. Diaz, *The 1990 New York City Districting Commission: Renewed Opportunity for Participation in Local Government or Race-Based Gerrymandering*, 14 CARDOZO L. REV. 1221-24 (1993).

Social scientists have contributed much to our understanding of how the structure of election systems affects representation. They have been influential in enhancing the courts' ability to identify such complex phenomena as vote dilution and racial polarization. Most significantly, expert witnesses have become involved in crafting judicial remedies that will determine both the structure and the outcome of election systems.

Some of the social scientists' remedial action has been inconsistent with their own objective findings. For example, although a causal relationship between voting behavior and race cannot always be established, most remedies have revolved around racial criteria. The corrective actions that the courts accepted moved in the direction of erecting single-member districts. However, both the national research data and the remedies chosen indicate that single-member districting schemes are most likely to succeed when protected groups constitute a strong majority of the population. Therefore, these remedies may fail to serve the interests of protected groups whose numbers are small. Perhaps most important of all, one might question the underlying strategy of this more activist intervention. Does districting on the basis of race contribute to racial polarization? In cases where protected groups do not constitute a viable voting minority, have the architects of districting plans resorted to a new form of racial gerrymandering? What is the legitimate role of the courts and expert intervenors in manipulating the outcome of the electoral process?

D. *SHAW V. RENO*

1. *The Claim*

As a result of population growth evidenced in the 1990 census, North Carolina became entitled to an additional seat in the U.S. House of Representatives. Consequently, in 1991 the North Carolina General Assembly enacted a reapportionment plan that expanded the number of its congressional districts from eleven to twelve. This plan included one "safe district" for blacks in the northeastern corner of the state. When the plan was submitted to the U.S. Department of Justice pursuant to Section 5 of the Voting Rights Act, the Attorney General rejected the plan on the grounds that it minimized minority voting strength by failing to carve out a second minority district in the

southern part of the state, where black residents were concentrated.¹⁹⁰

In response to the Attorney General's objection, the North Carolina legislature prepared a revised plan that included a second minority district along a 160-mile narrow strip of territory in the north-central part of the state. The unusually shaped district has been described by various critics as "ugly," "grotesque," "tortured," "labyrinthine," "an offense to the sensibilities," a "monstrosity," "political pornography," "an angry snake," "a Rorschach ink-blot test," a "ketchup splash," and a "bug splat."¹⁹¹ Although this second district was not located in the southern sector of the state, as originally suggested by the Attorney General, the Justice Department gave its approval. Subsequently, five white voters sued state and federal officials, seeking a permanent injunction against the plan. The plaintiffs alleged that the arbitrary creation of two districts along racial lines with the explicit purpose of assuring the election of two minority candidates constituted racial gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁹² Furthermore, the plaintiffs claimed that the revised plan denied their right to participate in a colorblind political process, and they argued that the plan did not abide by ordinary considerations for districting, such as compactness, contiguity, geographical boundaries, or political subdivisions. After the District Court dismissed the claim,¹⁹³ the U.S. Supreme Court granted certiorari. In a five-person majority opinion, a highly fractious Supreme Court reversed the lower court's decision and remanded the case.¹⁹⁴

¹⁹⁰ An Assistant Attorney General found that "the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area of the state." *Shaw v. Barr*, 808 F.Supp. 461, 463 (E.D.N.C. 1992).

¹⁹¹ As cited in Ripley Eagles Rand, Note, *The Fancied Line: Shaw v. Reno and the Chimerical Gerrymander*, 72 N.C. L. REV. 725 (1994). Even some notable voting rights experts who historically had been strong supporters of the "safe district" concept were critical of this contorted plan. See Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said: "When It Comes to Redistricting, Race Isn't Everything, Its the Only Thing"?*, 14 CARDOZO L. REV. 1237, 1261 (1993).

¹⁹² *Shaw v. Barr*, 808 F. Supp. at 467.

¹⁹³ *Id.* at 466-77.

¹⁹⁴ *Shaw v. Reno*, 113 S. Ct. 2816 (1993). The majority included Chief

2. *The Decision*

Writing for the majority, Justice O'Connor particularly noted the peculiar shape of the challenged district,¹⁹⁵ maintaining that it "resembles the most egregious racial gerrymanders of the past."¹⁹⁶ Justice O'Connor went to great lengths to acknowledge that no absolute constitutional standard exists for compactness or contiguity.¹⁹⁷ The Court explained further that race-conscious decision-making is permissible under some circumstances.¹⁹⁸ In what many analysts consider the most significant aspect of *Shaw*, the Court stated that such irregular districting, apparently designed to politically segregate the races, must be subjected to strict scrutiny to assure the existence of a sufficiently compelling state interest.¹⁹⁹

Finally, the Court clearly articulated that when it comes to districting, appearances are important:

[W]e believe that apportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the

Justice Rehnquist and Justices O'Connor, Kennedy, Scalia and Thomas.

¹⁹⁵ Justice O'Connor wrote:

It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.' *Shaw v. Barr*, at 476-477 (Voorhees, C.J., concurring in part and dissenting in part). Northbound and Southbound drivers on I-85 sometimes find themselves in separate districts in one county, only to 'trade' districts when they enter the next county. Of the 10 counties through which District 12 passes, five are cut into three different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them.

113 S. Ct. at 2820-21.

¹⁹⁶ *Shaw v. Reno*, 113 S. Ct. at 2824.

¹⁹⁷ *Id.* at 2826-27. See Pildes & Niemi, *supra* note 184, at 494-95.

¹⁹⁸ "This court has never held that race-conscious decision-making is impermissible in *all* circumstances. . . ." *Shaw*, 113 S. Ct. at 2824. "[R]edistricting differs from other kinds of state decision making in that the legislature always is *aware* of race when it draws district lines. . . . That sort of race consciousness does not lead inevitably to impermissible racial discrimination." *Id.* at 2826.

¹⁹⁹ "Express racial classifications are immediately suspect. . . . They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Id.* at 2824.

same race, but who are otherwise widely separated by geographical and political boundaries, and who have little in common with one another, but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group — regardless of age, education, economic status, or the community in which they live — think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.²⁰⁰

Beyond the issues of racial classification and segregation, the Court explained how racial gerrymandering influences political decision-making and the quality of representation:

The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.²⁰¹

3. *The Impact*

Well-deserved disagreement exists on what lasting effect *Shaw* will have on future apportionment plans. On the one hand, one might argue that subjecting apportionment plans to strict judicial scrutiny amounts to a complete reversal of the race-conscious districting that the Court accepted in previous decisions. The Court did not admit to such a reversal, even though it had previously permitted plans designed to overcome historical patterns of discrimination.²⁰² Moreover, the Court

²⁰⁰ *Id.* at 2827. See David D. Polsby & Robert D. Popper, *Ugly: An Inquiry Into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652 (1993); Pildes & Niemi, *supra* note 184, at 492-541.

²⁰¹ *Shaw*, 113 S. Ct. at 2827.

²⁰² See Jonathan M. Sperling, Note, *Equal Protection and Race-Conscious Reapportionment: Shaw v Reno*, 17 HARV. J.L. & PUB. POL'Y 283 (1994). Rand

also hinted at the need to refocus attention upon the "compactness" requirement in an earlier decision.²⁰³ On the other hand, the case may merely be an exceptional response to an extraordinary set of circumstances, including the ugly district itself. Therefore, *Shaw* may not set any sweeping new precedent for the Court.²⁰⁴

Unfortunately, the present decision does not provide us with any substantial guidance as to what the Constitution permits.²⁰⁵ Nonetheless, we do know that judicial tolerance for gerrymandering, no matter what its justification, is limited. The extent of that limit, however, is uncertain. In such a climate of legal uncertainty, exploring alternatives to single-member districting plans — and their accompanying racial gerrymandering — becomes increasingly appealing as a means of overcoming voting discrimination.

4. *A New Consensus?*

Exactly one year after handing down *Shaw*, the Supreme Court issued two rulings that continued the debate on the proper interpretation of the Voting Rights Act. In *Johnson v. DeGrandy*,²⁰⁶ the Court denied a claim of vote dilution by Hispanics and blacks in Dade County, Florida, after a three-judge panel at the District Court level ruled in their favor. The plaintiffs, claiming that population patterns justified the creation of two additional Hispanic districts, challenged an apportionment plan for the state legislature that resulted in the creation of nine Hispanic districts in the House.²⁰⁷

Finding that Hispanics enjoyed "roughly proportional" representation under the plan in question, the Court rejected the vote dilution claim and the concept that protected groups

argues that such districting plans can survive strict scrutiny given the history of discrimination in voting. See *Rand*, *supra* note 191, at 750.

²⁰³ *Grove v. Emison*, 113 S. Ct. 1075 (1993).

²⁰⁴ See T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588 (1993).

²⁰⁵ See *Pildes & Niemi*, *supra* note 184, at 575-87.

²⁰⁶ 114 S. Ct. 2647 (1994).

²⁰⁷ Plaintiffs had also challenged the existence of three state Senate districts, asserting that it would be possible to carve out a total of four. However, the lower court rejected the latter claim. *DeGrandy v. Wetherell*, 815 F. Supp. 1550 (N.D. Fla. 1992).

are entitled to maximum representation under the Voting Rights Act.²⁰⁸ Writing for the majority, Justice David Souter, who had issued a strong dissent in *Shaw*, stated:

We hold that no violation . . . can be found here, where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population.²⁰⁹

Justice Souter continued, "One might suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast."²¹⁰

In a concurring opinion, Justice O'Connor explained:

The critical issue in this case is whether . . . the Voting Rights Act . . . requires courts to "maximize" the number of districts in which minority voters may elect their candidates of choice The Court today makes it clear that the Voting Rights Act does not require maximization.²¹¹

Although the Court used proportionality to measure the level of opportunity afforded minorities in this case, it also emphasized that proportionality, while relevant in determining vote dilution, is not in itself dispositive.

Despite the distinct facts surrounding *Shaw* and *Johnson*, the decisions consistently exhibit an underlying philosophical disposition toward judicial restraint. The Court now appears more reluctant than ever before in the last three decades to intrude in state and local politics when such involvement is legally avoidable. In each case, a lower court ruling that restructured an electoral process was thrown out and found unwarranted under the terms of the Voting Rights Act. This pattern persists in the companion case handed down with the

²⁰⁸ *Johnson v. DeGrandy*, 114 S. Ct. at 2653.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 2660.

²¹¹ *Id.* at 2664 (O'Connor, J., concurring).

Johnson opinion. If the seven-person majority²¹² in *Johnson* suggests the emergence of a consensus on the Court regarding voting rights, that impression evaporates with the accompanying decision.

In *Holder v. Hall*,²¹³ the Supreme Court overturned a ruling by the Eleventh Circuit Court of Appeals. The appellate court found that the existence of a single-member commission with executive and legislative powers in rural Bleckley County violated Section 2 of the Voting Rights Act and suggested that the commission could be modeled after the county's school board election system, which included five electoral districts, one of which was predominantly black.²¹⁴ Once again, the Supreme Court refrained from intervening in local politics. In *Holder*, however, the Justices' opinions were splintered, revealing some deep-seated differences among the members.

Justice Kennedy wrote an opinion joined by Chief Justice Rehnquist and Justice O'Connor holding that no legal benchmark existed for assessing the size of a governmental body and rejecting the claim of vote dilution.²¹⁵ Justices Blackmun, Ginsberg, Souter and Stevens filed a dissenting opinion holding that the size of a governing body is subject to review under the Voting Rights Act, and that "minority voters may challenge the dilutive effects of this practice by demonstrating their potential to elect representatives under an objectively reasonable alternative practice."²¹⁶ Justices Thomas and Scalia joined the majority in striking down the appellate decision, but in a separate opinion, they summoned their colleagues to reassess the Court's interpretation of Section 2.²¹⁷

The long and controversial concurrence written by Justice Thomas begins with the assertion that the Voting Rights Act "was originally perceived as a remedial provision directed

²¹² In addition to Justice Souter, the majority in this case included Chief Justice Rehnquist and Justices Blackmun, Ginsberg, O'Connor and Stevens. Justice Kennedy joined all parts of the majority opinion except III.B.2, III.B.4, and IV.

²¹³ 114 S. Ct. 2581 (1994).

²¹⁴ *Holder v. Hall*, 955 F.2d 1563 (11th Cir. 1992).

²¹⁵ "[T]he search for a benchmark is quite problematic when a section 2 dilution challenge is brought to the size of a government body. There is no principled reason why one size should be picked over another as a benchmark for comparison." *Holder v. Hall*, 114 S. Ct. at 2586.

²¹⁶ *Id.* at 2619 (Blackmun, J., dissenting).

²¹⁷ *Id.* at 2591-2619 (Thomas, J., concurring).

specifically at eradicating discriminatory practices that restricted blacks' ability to register and vote in the segregated South."²¹⁸ Justice Thomas targets for re-examination the entire body of case law regarding vote-dilution claims, declaring, "In construing the Act to cover claims of vote dilution, we have converted the Act into a devise for regulating, rationing, and apportioning political power among racial and ethnic groups."²¹⁹ Justice Thomas cites *Shaw* quite extensively to support his argument that districting schemes implemented at the behest of the courts may actually contribute to racial segregation and political polarization.²²⁰ However, unlike *Shaw*, this opinion moves beyond a critique of racial gerrymandering, and questions whether the courts appropriately may consider vote-dilution claims. Justice Thomas' opinion drew a strong rebuttal from dissenting Justices in *Holder*, highlighting deep divisions that remain on the Court even as it seriously rethinks its proper role in the political process.²²¹

III. JUSTICE WITHOUT BOUNDS

A. THE LIMITS OF GERRYMANDERING

As we celebrate the thirtieth anniversary of its passage, the Voting Rights Act — or more precisely its interpretation by the courts — remains a major object of contention among legal scholars and political scientists on both the left and right of the political spectrum. A brief review of the Act's history has shown that courts' definitions of voting rights have become more expansive and that courts have more aggressively entered the

²¹⁸ *Id.* at 2592.

²¹⁹ *Id.*

²²⁰ Justice Thomas found that:

A review of the current state of our cases shows that by construing the Act to cover potentially dilutive electoral mechanisms, we have immersed the federal courts in a hopeless project of weighing questions of political theory — questions judges must confront to establish a benchmark concept of an 'undiluted' vote. Worse, in pursuing the ideal measure of voting strength, we have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success.

Id. at 2591-92.

²²¹ *Id.* at 2625-30 (Stevens, J., dissenting).

"political thicket" to enforce these rights as they see fit. Now these practices are being questioned by members of the Supreme Court itself. In an attempt to explain the evolving definition of voting rights by the judiciary, Pamela Karlan conceptualizes voting as a three-part continuum of political activity: voting as participation, voting as aggregation, and voting as governance.²²²

Voting as participation concerns the fundamental franchise and the courts' elimination of such blatant limitations on voting as poll taxes, literacy tests, and white primaries.²²³ According to Karlan, the principal value sought in these early cases was "civic inclusion," which pertains to "a sense of connectedness to the community and of equal political dignity."²²⁴ This feeling of belonging motivates people to accept the decisions of public bodies and provides government with legitimacy.²²⁵ The right to vote indicates one's full citizenship in a community. By contemporary standards, courts' protection of such basic voting rights constitutes the least controversial aspect of judicial intervention.

Voting as aggregation concerns the way collective participation influences the outcome of electoral contests.²²⁶ Unlike participation claims involving individual rights, aggregation

²²² Pamela S. Karlan, *The Right to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709-20 (1993).

²²³ *Id.* at 1709-10.

²²⁴ Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 180 (1989). For a detailed discussion of the concept of civic inclusion, see *id.* at 179-99.

²²⁵ For a discussion of the act of voting and political participation as an inherently self-fulfilling and valuable experience, see ROBERT A. DAHL & EDWARD R. TUFTTE, *SIZE AND DEMOCRACY* 41-66 (1973); CAROL PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 1-44 (1970); JUDITH N. SCHLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 27 (1991). See generally Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449 (1988) (discussing political participation of minorities); Robert A. Dahl, *The City and the Future of Democracy*, 61 AM. POL. SCI. REV. 953 (1967). For a more detailed discussion of the sources of political legitimacy in political systems, see DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 278-310 (1965). For a technical essay on the assessment of legitimacy in political systems, see M. Stephen Weatherford, *Measuring Political Legitimacy*, 86 AM. POL. SCI. REV. 149 (1992).

²²⁶ Karlan, *supra* note 222, at 1712-13.

claims are group based.²²⁷ Plaintiffs charge that while a particular protected group (or groups) has been allowed to vote, the system of voting does not allow the group to actually elect candidates of its choice. Such litigation is more complex because it requires evidence of some form of vote dilution, which is not always a simple burden to meet. Litigation constructed around these group claims tends to be controversial for at least two reasons. First, courts have been inconsistent, perhaps even ambivalent, in defining violations. For example, as Karlan explains, although both the Voting Rights Act and subsequent court decisions have refrained from using proportional representation as an absolute standard of fairness, they have applied proportional representation as one of several means for measuring vote dilution.²²⁸ Second, courts' aggressive involvement in crafting remedies to vote dilution grievances has raised questions as to whether courts have stepped over the line of legitimate involvement in the political process.²²⁹

Voting as governance concerns the manner in which group interests are represented in the governmental decision-making process.²³⁰ In this sense, voting is not perceived as an end in itself, but as the means to influencing public policy through the selection of delegates to a legislative body. While this dimension of Karlan's continuum is not as central to the ongoing scholarly dialogue on voting rights, it is certainly relevant.²³¹

²²⁷ See Issacharoff, *supra* note 39, at 1840-41.

²²⁸ Karlan, *supra* note 222, at 1713-15. Here, she points to *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973), as indications of the Court's unwillingness to apply proportional representation as an absolute standard even though it is the most elegant measurement of vote dilution extant, and one which is regularly used with other factors to assess the merits of a claim. See also Deutsch, *supra* note 183; Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257 (1985) (discussing the appropriateness of court intervention as a means of resolving gerrymandering issues).

²²⁹ One of the strongest and most controversial arguments against this form of judicial intervention appears in ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 230-243 (1987).

²³⁰ On the concept of interest representation, see PITKIN, *supra* note 64, at 190-208. See also *supra* note 78.

²³¹ Among legal scholars, Lani Guinier has paid particular attention to the issue of governance. See Lani Guinier, *Keeping the Faith: Black Voters in the Post Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 393-435 (1989); Lani

In fact, one can argue that effective interest representation is indeed the ultimate question in a democratic political process.²³² Just as one might assert that the right to vote — or participate, to use Karlan's term — can be diluted if groups are not permitted to strategically aggregate ballots, one can reasonably claim that the significance of selecting a representative is reduced when a chosen delegate lacks the institutional power to advance the group's interest.

My own assessment is that Voting Rights Act legislation fails to recognize this final dimension of the voting continuum, thereby leaving the courts incapable of discovering remedies to the problem. In a later part of this article I will argue that the problem of effectively representing the demands of all groups goes to the heart of the democratic process. Stated another way, the fundamental dilemma of a majoritarian form of government is the effective advancement of minority interests. I contend that no real resolution to this classic democratic dilemma can be reached in a governmental system such as ours. Its effects upon minority populations, however, may be modified in order to minimize minority underrepresentation. Unfortunately, the remedial strategy adopted by the courts — focusing on the creation of safe single-member districts for aggrieved parties — magnifies and perpetuates the negative effects of majoritarian government. Before developing these arguments, I will first review some of the common criticisms launched against the standard approach. These may be summarized as follows:

- a. Single-member districting schemes often involve an inappropriate intrusion by the courts in the political process;
- b. The creation of safe districts can violate the voting rights of the majority population and unprotected minorities;

Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991) [hereinafter *No Two Seats*]; *Triumph of Tokenism*, *supra* note 58. See also Kathryn Abrams, *Relationships of Representation in Voting Rights Act Jurisprudence*, 71 TEX. L. REV. 1409 (1993) (suggesting statutory provisions which would eliminate gerrymandering).

²³² Karlan argues that the one-person, one-vote standard adopted by the Supreme Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), was actually meant to protect the governance rights of the majority who were legally entitled to be put in legislative districts that enjoyed proportionate institutional representation. Karlan, *supra* note 222, at 1717-19.

- c. Single-member districting schemes do not serve the interests of all protected groups alike;
- d. Single-member districting schemes do not always provide effective remedies to vote dilution and may, in fact, exacerbate the problem;
- e. Single-member districting schemes are based on the questionable presumption that group interests are defined primarily by race;
- f. Single-member districting schemes can contribute to racially polarized voting and a general climate of racial competition and animosity; and
- g. Single-member districting schemes do not provide any assurances that protected groups will effectively participate in governing.

1. *The Courts and Majority Interests.*

Once the courts began to define voting rights in terms of aggregate claims, they opened the door to a bevy of commentary about the propriety of the role that the judicial branch had assumed in the political process. In the most detailed criticism of voting rights litigation to date, Thernstrom looked back at the original purpose of the Act, which she described simply as voter registration.²³³ She argued that even though the 1982 Amendments did not guarantee proportional representation or outlaw at-large voting, subsequent action in the courts essentially resulted in a rewriting of the law to promote the former and restrict the latter.²³⁴

Thernstrom placed particular blame on Justice Department attorneys "who invent law as they enforce it" and act as a surrogate for the courts by subjecting "the broad and subtle question of equal electoral opportunity" to administrative review.²³⁵ Thernstrom rejected the idea that only blacks can represent blacks, contending that candidates often are elected by biracial coalitions and, therefore, are capable of responding

²³³ THERNSTROM, *supra* note 229, at ix.

²³⁴ *Id.* at 230-37. Thernstrom points to *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973), as the basis for the standards set in the 1982 Amendments, and notes that neither disproportionately low minority office-holding nor black residential clustering were held sufficient to make a claim. *Thernstrom*, *supra* note 229, at 194.

²³⁵ *Id.* at 236-37.

to a broader range of interests.²³⁶ Holding that the Constitution does not guarantee representation, she decried an unnecessary intrusion into politics by the courts.²³⁷

Other scholars have observed a decided shift in judicial thinking that has placed the courts squarely in the middle of the reapportionment process.²³⁸ Howard and Howard drew an analytic distinction between the racial equality norm and the political equality norm.²³⁹ The racial equality norm, derived from Article I, Section 2 of the Constitution and the Equal Protection Clause of the Fourteenth Amendment, protects citizens against governmental action that discriminates on the basis of arbitrary characteristics such as race. The political-equality norm, also derived from Article I, Section 2 and the Equal Protection Clause, guarantees the right of citizens to

²³⁶ *Id.* at 215.

²³⁷ Thernstrom's book has received strong criticism. See Pamela S. Karlan & Peyton McCrary, *Without Fear or Research: Abigail Thernstrom on the Voting Rights Act*, 4 J.L. & POL. 751 (1988).

²³⁸ Wells focuses on several key decisions that highlight a diversity of opinions regarding the extent to which the courts might use districting as a means of influencing the outcome of electoral contests. See Wells, 9 Poly Stud. J. at 863-74. He starts with the decision in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), where, in his opinion, the Court struck down a legislative plan that would single out a segment of the population for special treatment. Wells, *supra* at 867. He compares *Gomillion* to *Gaffney v. Cummings*, 412 U.S. 753, 754 (1973), in which the Court, ruling on a plan designed to allocate districts between Democrats and Republicans, found such "benevolent bipartisan gerrymandering" not only acceptable but admirable. Wells, *supra*, at 863. He also points to *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977), in which the Court stated, "Neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment." Wells, *supra*, at 866 (citing *United Jewish Orgs.*, 430 U.S. at 160). Chief Justice Warren Burger's dissenting opinion in *United Jewish Orgs.* is particularly interesting in this context: "If *Gomillion* teaches us anything, I had thought it was that drawing of political boundary lines with the sole, explicit objective of reaching a predetermined racial result can not ordinarily be squared with the Constitution." Wells, *supra*, at 867 (citing *United Jewish Org.*, 430 U.S. at 181). Wells takes note of a similar dissenting opinion written by Justice William O. Douglas in *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964), where the Justice stated, "The principle of equality is at war with the notion that District A must be represented by a Negro (and) that District B must be represented by a Caucasian. . . . That . . . is a divisive force in a community. . . . Government has no business designing electoral districts along racial or religious lines." Wells, *supra*, at 868 (citing *Wright*, 376 U.S. at 66).

²³⁹ Alan Howard & Bruce Howard, *The Dilemma of the Voting Rights Act - Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615 (1983).

participate in elections on an equal footing.²⁴⁰ This emergent standard of political equality, according to Howard and Howard, prohibits the government from participating in actions designed to influence the outcome of an election.²⁴¹

Howard and Howard took particular aim at the creation of "safe districts" that increase the probability of electing representatives with specific racial characteristics. Like Thernstrom, they saw the Court, despite claims to the contrary, abandoning a neutral political stance and moving toward an implicit goal of proportional representation. They recognized the increased use of safe districting as a means to remedy past discrimination and integrate blacks into the political process — all in pursuit of the racial equality norm.²⁴² Howard and Howard, however, found the practice conflicts with the political equality norm. Specifically, they argued that granting any voter group or interest an arbitrary advantage in choosing representatives is tantamount to unequal treatment.²⁴³ If the architects of the plan have performed their task proficiently, residents of safe districts who

²⁴⁰ *Id.* Howard and Howard trace the emergence of this norm to decisions in the mid-1960s and early 1970s, e.g. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626-28 (1969); *Harp-er v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966); Howard & Howard, *supra*, at 1617. However, they recognize its principal application with regard to the specific right of an equally weighted vote, as required in the one-person, one-vote doctrine in *Reynolds v. Sims*, 377 U.S. 533 (1964).

²⁴¹ The authors point to *Baker v. Carr*, 369 U.S. 186 (1962), in which the Court first found justiciable a challenge to inequitable districting on the basis of the Equal Protection Clause and prohibited "arbitrary government interference that disfavors . . . [certain voters] in the process of selecting representatives." Howard & Howard, *supra* note 239, at 1649. Howard and Howard detected as an evolving political equality the norm against excessive enforcement of the one-person, one-vote standard in *Karcher v. Daggett*, 462 U.S. 725 (1983). Here, four dissenting justices warned against the use of political gerrymanders as a serious "potential threat to equality of representation." Howard & Howard, *supra* note 239, at 1638-39 (citing *Karcher*, 462 U.S. at 776).

²⁴² Howard & Howard, *supra* note 239, at 1620-32. In subsequent decisions concerning other types of civil rights suits, a plurality of the Court held that racial classifications require strict scrutiny no matter what their purpose or who the beneficiary. See *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493-98 (1988); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986). See Sperling, *supra* note 202, at 284.

²⁴³ Howard & Howard, *supra* note 239, at 1633-40. This position is more recently argued by Yanos, see *supra* note 58.

are not members of a targeted protected group have little chance of electing one of their own.

Many voting rights advocates would contend that the transgression is well worth it; if the involvement of the courts in political contests advances the goal of racial equality, then so be it. We have seen that the level of judicial intervention needed to create safe districts is quite substantial. For example, taking into consideration social demographics and past political behavior, drawing boundaries that allow protected groups to enjoy majority status is not sufficient; a sixty-five percent popular margin is called for to guarantee a desired electoral result. The entire process of racial gerrymandering is indeed presumptuous. The process assumes not only that all members of protected groups define their political interests primarily on the basis of race, but also that these interests are generally at odds with majority interests. Such political engineering has all the makings of a self-fulfilling prophecy, for it forces people into alliances solely on the basis of race and undermines social policies that were consciously designed to promote racial integration.²⁴⁴

Racial gerrymandering represents an aggressive and far reaching form of judicial policymaking and strikes at the heart of the political process. Its desirability and necessity remain a matter of vigorous debate, especially in light of *Shaw*. One should keep in mind that nothing in the Constitution or the Voting Rights Act requires the adoption of safe districts for aggrieved groups. Safe districts are a remedy developed within the courts at the urging of litigants and their expert witnesses. In assessing whether such intrusive public action is worthwhile, we return to the original dilemma defined by Howard and Howard, who warned against compromising the political equality norm: Does the creation of safe districts promote racial equality?

²⁴⁴ For example, if I am a member of a racial minority living in a minority district, I have a political disincentive to move into a predominantly white district where interests have been predefined as being in conflict with mine. Likewise if I am a white person living in a predominantly white district, then I assume a political risk by moving into a minority district whose interests are pre-determined as being contrary to mine. See Katharine Inglis Butler, *Reapportionment, the Courts and the Voting Rights Act: A Resegregation of the Political Process?*, 56 U. COLO. L. REV. 1, 11-33 (1984).

2. *What's Good for Minorities?*

The social science research reviewed above demonstrates that single-member districting schemes do not benefit all minorities alike. In order for such plans to result in a safe bet for a particular group, the group must be geographically concentrated and relatively large in size. A significant amount of evidence indicates that Hispanics and Asians, who are sometimes better integrated residentially and less numerous than blacks, do not enjoy comparable benefits from single-member districts, making it more difficult to design a safe district for them.²⁴⁵ Additionally, blacks reap such advantages only when district boundaries can be drawn to create a supermajority of black residents.²⁴⁶

Political gerrymandering at the behest of the courts provides little advantage to minorities who are not specifically protected by the Voting Rights Act, but who actually may be victimized by potent forms of discrimination. Most of the gay community, for example, is not residentially segregated, but has clearly defined political interests. Only on rare occasions have apportionment plans been designed to accommodate a gay district.²⁴⁷ One might argue that the smaller, less concentrated and more politically weak a group is, the less likely the group's interests will be considered in the districting process. Apportionment is by definition a highly politicized exercise in

²⁴⁵ See *supra* II.B.5-7.

²⁴⁶ See *supra* II.B.8.

²⁴⁷ The redistricting scheme that was adopted in 1990 for the City Council of New York City did, in fact, include a "gay district." This was possible in New York because the gay community is highly organized and, notwithstanding its dispersement throughout the city, enjoys residential concentrations in certain city neighborhoods. In this case the district was carved out of the Chelsea and West Village areas. For an analysis, see Robert W. Bailey, *Protecting an Unprotected Minority in Urban Legislative Districting: Gay Voters and Council Districting in New York City*, paper prepared for delivery at the annual meeting of the New York State Political Science Association, Apr. 24, 1994. For a general description of the redistricting process in New York, see Macchiarola & Diaz, *supra* note 189; Frank J. Macchiarola & Joseph G. Diaz, *Minority Political Empowerment in New York City*, 108 POL. SCI Q. 37, 41-49 (1993); Frank J. Macchiarola & Joseph G. Diaz, *Decisionmaking in the Redistricting Process: Approaching Fairness*, 19 J. LEGIS. 199, 201-211 (1993). For more critical assessments of the New York City plan, see Judith Reed, *Of Boroughs, Boundaries and Bullwinkles: The Limitations of Single-Member Districts in a Multiracial Context*, 19 FORDHAM URB. L.J. 759, 764-80 (1992); Yanos, *supra* note 58, at 1842-57.

allocating influence, and notwithstanding judicial oversight, apportionment is usually controlled by those who already have power.

Single-member districting schemes originally were designed to provide relief for blacks who enjoy legal protection under the Voting Rights Act, who are often large in number, and who are usually concentrated geographically. But even for those blacks who benefit from such plans, the advantages are limited and come at a price. If the courts' inclination to define group interests according to race is presumptuous, then the primary victims of such judicial arrogance are blacks. Surely no reasonable person would understate the significance of racial politics in a nation where racial discrimination has historically been part of the civic culture. Nevertheless, at times, political preferences and voting choices are made on the basis of other criteria. If I am a black Catholic lesbian, I may choose to define some issues on the basis of my race, others on the basis of my religion, some on the basis of my gender, and still others on the basis of my sexual orientation. My personal calculation of how to vote on a political issue or how to choose a candidate becomes somewhat complicated and unpredictable, but the choices should be mine, and not be prejudged or limited by the action of the courts.

Even if the courts happen to make the correct choices for me in defining group interest, the powers I enjoy as a resident of a "safe district" are undermined by the very process in question. Lani Guinier has pointed out that single-member districting schemes function to deny minorities "authentic representation" because, however homogeneous a district is, candidates are motivated to build coalitions among diverse groups in order to win.²⁴⁸ Therefore, such candidates make compromises and generally advance a middle-of-the-road agenda that may not accommodate the specific needs of blacks. This makes the election of third-party candidates or individuals with unorthodox viewpoints nearly impossible. The "winner-take-all" rules of single-member districting plans also lead to wasted votes. If I am a member of a voting minority in a safe district, my candidate is predestined to lose, and for all practical purposes, according to Guinier, my vote is wasted.²⁴⁹

²⁴⁸ See Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1152 (1993).

²⁴⁹ *Id.* at 1151-1163. This argument is seemingly difficult to reconcile with the previous one. If candidates running for office are forced to the "middle of the road" by the voting minority or minorities, then these minorities have had an effect on the political process, and their votes are not really wasted. Here,

3. *Minority Interest Representation*

The ultimate flaw in the use of apportionment strategies to achieve racial equality is found at the governance level.²⁵⁰ In order to produce safe districts for minority candidates, racial districting also must lead to the creation of safe districts for the majority. As a function of both definition and mathematics, safe districting results in more white districts than black. Given the sixty-five-percent rule, racial gerrymandering requires minorities to be highly concentrated into a relatively small number of safe districts. This concentration assures minority status to black representatives in the policy-making process, whether in a legislative body or on a public board that is governed by the principle of majority rule. Furthermore, representatives elected from safe majority districts containing few or no minority constituents possess little political motivation to sympathize with minority interests.

Guinier proposes the adoption of semi-proportional voting systems as an alternative to racial gerrymandering.²⁵¹ Minimally, semi-proportional voting allows people to vote according to interest rather than geography. However, most important of all, this system permits voters to define their own interest as they choose.²⁵² Therefore, in any given election, a voter may

the important issue again is the size of the voting minority. If the voting minority is large enough to form part of a winning coalition, then its votes count, even if only to push the candidate towards the middle. If the voting minority is small and insignificant enough to be discounted by a majority candidate, then perhaps the minority votes are wasted.

²⁵⁰ This point is made by Guinier throughout several of her papers. See *No Two Seats*, *supra* note 231, at 1458-93; *Representation of Minority Interests*, *supra* note 248, at 1138-50; *Triumph of Tokenism*, *supra* note 58. It is also effectively argued in Karlan, *supra* note 224, at 199-213; Pamela S. Karlan, *Undoing the Right Thing: Single Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 29, 39 (1991) [hereinafter *Undoing the Right Thing*].

²⁵¹ For a recent presentation, see Lani Guinier, *Groups, Representation, and Race Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1617, 1641 (1993). Although Guinier makes a general case for semi-proportional voting, most of her writing emphasizes cumulative voting as an alternative to single-member districts.

²⁵² The umbrella of semi-proportional systems includes a variety of systems. *Cumulative voting* grants each voter as many ballot choices as there are positions to be filled in a multi-member race. Voters may allocate these ballots among as many candidates as they choose, allowing minorities, or any interest for that matter, to concentrate their support among a particular

decide to pool her interest with others on the basis of race, ethnicity, gender, sexual orientation, profession, philosophy, neighborhood, or issue. These crucial choices are not mediated by the courts or a districting commission.

Under semi-proportional systems, the population threshold for electing a representative is less than fifty percent. Therefore, individuals and groups select from a full range of candidates. This functionally increases the political efficacy of small groups and opens the political system to candidates and political parties that typically lie on the fringe of mainstream politics. In the end, these balloting mechanisms improve the opportunity for what Guinier calls authentic representation, and they reduce the casting of wasted votes. If the system Guinier advocates operates as it should, the result will be not only fair representation for racial minorities, but also a general reconfiguration of the political process that is more pluralistic.²⁵³ Representation of diverse interests at the level of governance reduces the probability of forming a dominant majority. Consequently, representation increases the capacity of minorities to negotiate as viable forces within a governing coalition. While Guinier's position is anti-majoritarian, her proposal is no less democratic than the system to which we are accustomed in most localities. But will it work?

B. CUMULATIVE VOTING

1. *The Simple Arithmetic*

For Americans, single-member districts are the norm of politics. Most Western democracies, however, use some form of

candidate. *Limited voting* grants each voter a number of ballots that is less than the total number of positions to be filled, serving to dilute the advantage enjoyed by political majorities. See Edward Sill, *Alternatives to Single-Member Districts*, in MINORITY VOTE DILUTION, *supra* note 37, at 249-58. These systems vary in principle from proportional representational schemes that attempt to achieve a more direct relationship between voter choice and representation. For a discussion of the latter, see DOUGLAS AMY, REAL CHOICES, NEW VOICES: THE CASE FOR PROPORTIONAL REPRESENTATION ELECTIONS IN THE UNITED STATES 21-41 (1993); Sill, *supra*, at 258-263; Leon Weaver, *The Rise, Decline, and Resurrection of Proportional Representation in Local Government in the United States*, in ELECTORAL LAWS AND THEIR CONSEQUENCES, *supra* note 62, at 191.

²⁵³ Other scholars have argued a similar position. See Karlan, *supra* note 224, at 213-36; Karlan, *Undoing the Right Thing*, *supra* note 250, at 41-45; Reed, *supra* note 247, at 179-80.

proportional voting system.²⁵⁴ Single-member systems persist today only in those countries once ruled by the British crown, such as Great Britain, Canada, and New Zealand, as well as the United States.²⁵⁵ Since the founding of the United States, proportional representation has existed in nearly two dozen American cities,²⁵⁶ but in its pure form it is found today in only two places: Cambridge, Massachusetts (both the city council and the school board) and New York City (community school board elections).

Semi-proportional systems, although they are less confusing to voters and more straightforward to operate, also are a rarity on the contemporary American landscape. Throughout the twentieth century, cumulative voting was used in only one circumstance: the election of members of the Illinois State House of Representatives, where the practice was ended in 1980. In 1987 cumulative voting was instituted to elect part of the City Council in Alamogordo, New Mexico. Its adoption resulted from a court settlement that emerged after claims of vote dilution by Hispanics and blacks.²⁵⁷ Beginning in 1987, several local jurisdictions adopted cumulative voting voluntarily as an alternative to at-large systems that courts found discriminatory.²⁵⁸ In April 1994 a U.S. District Court ordered Worcester County, Maryland to introduce cumulative voting for its county commissioner elections after the court found evidence of vote dilution in the existing at-large system.²⁵⁹

The attraction of cumulative voting as a mechanism for improving minority representation is a matter of simple arithmetic. Under cumulative voting, the *threshold of exclusion*—that

²⁵⁴ Countries that use some form of proportional voting system include Belgium, Denmark, Finland, Germany, Greece, Ireland, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, and Switzerland. AMY, *supra* note 252, at 2; ENID LAKEMAN, *POWER TO ELECT: THE POWER FOR PROPORTIONAL REPRESENTATION* (1982).

²⁵⁵ AMY, *supra* note 252, at 2.

²⁵⁶ These include Boulder, Kalamazoo, Sacramento, Cambridge, Cleveland, Cincinnati, Toledo, New York, and Wheeling. AMY, *supra* note 253, at 10.

²⁵⁷ *Vega v. City of Alamogordo*, Civ. No. 86-0061-C (D.C. N.Mex. 1987).

²⁵⁸ In addition to Alamogordo, New Mexico, cumulative voting is used today in Peoria, Illinois; the municipalities of Centre, Guin, and Myrtlewood, Alabama; the County Commission and Board of Education in Chilton County, Alabama; and the Sisseton, South Dakota School District. Engstrom & Barrilleaux, *supra* note 2, at 388 n.2.

²⁵⁹ *Cane v. Worcester County*, 847 F. Supp. 369 (D.Md. 1994).

proportion of the electorate a group must exceed in order to successfully elect a candidate — is significantly lower than that needed in a majoritarian system, where the threshold is fifty percent.²⁶⁰ In a four-seat election, for example, the threshold of exclusion would be twenty percent. Any group that contains more than twenty percent of the population could elect a candidate if it "plumped" all of its votes for that one person. This threshold varies inversely with the number of seats being filled. Therefore, the greater the number of seats contested, the smaller the number of the threshold of votes needed to elect a candidate.²⁶¹

2. *Cane v. Worcester County*

In January 1994 a group of citizens successfully sued Worcester County, Maryland, claiming that its system for electing county commissioners violated Section 2 of the Voting Rights Act.²⁶² Under the challenged plan, the entire electorate voted at-large for candidates for each of five seats, four of which corresponded to four residency districts, and one of which was a countywide commissioner. When the defendants failed to provide the U.S. District Court with an acceptable remedial

²⁶⁰ The threshold of exclusion = $1/n + (\text{number of seats}) \times 100$. This coefficient is based upon the following assumptions: majority voters cast all of their votes, none of the majority votes are cast for the minority candidate, majority votes are concentrated on a number of candidates equal to the number of seats being filled, majority votes are divided evenly among candidates. Richard L. Engstrom et al., *Cumulative Voting as a Remedy for Minority Vote Dilution*, 5 J.L. & POL. 469, 478-79 (1989) [hereinafter *Cumulative Voting as a Remedy*]; See also Richard L. Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution*, 21 STETSON L. REV. 743, 750 (1992).

²⁶¹ For example, using the formula presented in note 260, the relationship between the number of positions competed for and the threshold of exclusion would be as follows:

No. of Seats	% of Threshold
2	33.3
3	25.0
4	20.0
5	16.7
6	14.3
7	12.5
8	11.1
9	10.0

Cumulative Voting as a Remedy, supra note 260, at 479.

²⁶² *Cane v. Worcester County*, 840 F. Supp. 1081, 1081-82 (D.Md. 1994).

plan, the plaintiffs offered the court two alternative proposals: a single-member district arrangement, or a cumulative voting plan.²⁶³ Two aspects make *Cane* particularly interesting: First, unlike previous cases in which cumulative voting schemes were accepted by challenged jurisdictions on a voluntary basis, here the court imposed the plan. Second, in light of *Shaw v. Reno*²⁶⁴ and the criticisms of racial gerrymandering reviewed above, the court's rationale in accepting cumulative voting over single-member districts is noteworthy. The *Cane* court calculated the threshold of exclusion, and under a single-member plan, one of the five districts in the county would have a black voting-age population that constituted sixty-two percent of the total. The court found that a fifty-percent threshold of exclusion gave blacks a "realistic opportunity to elect a candidate of their choice."²⁶⁵ Under cumulative voting, however, the threshold was computed at 16.7%.²⁶⁶ Because blacks made up 19.16%²⁶⁷ of the population, cumulative voting also offered them an opportunity to elect their own candidate.

Of primary concern to the court in *Cane* was the level of judicial intervention necessary to craft a remedy: both intrusion into the existing political system, and intrusion into the personal prerogatives of voters. Because the existing electoral system was based upon at-large voting, cumulative voting "would not disturb the existing structure of government" as would a districting scheme.²⁶⁸ This is a rather interesting observation, given the thirty-year history of the Voting Rights Act, in which the courts replaced at-large districting plans with single-member plans as a matter of course.

In *Cane*, the court deemed cumulative voting to be less intrusive because of the choices it allowed for the voters themselves. As the court stated, "[c]umulative voting, unlike single member districts, will allow the voters, by the way they exercise their votes, to 'district' themselves based on what they think rather than where they live."²⁶⁹

²⁶³ *Cane v. Worcester County*, 847 F. Supp. 369, 370-71 (D.Md. 1994).

²⁶⁴ 113 S. Ct. 2816 (1993).

²⁶⁵ *Id.* at 372.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 373.

²⁶⁹ *Id.*

Finally, the court took up the question of polarization and the risks involved when the courts take it upon themselves to make choices for voters as to how those voters might define their own political interests: "[c]umulative voting is less likely to increase polarization between different interests since no group receives special treatment at the expense of others as would occur in a single member district with one black majority district."²⁷⁰

Although the language of *Cane* was not nearly as provocative as the warning of "political apartheid" sounded in *Shaw v. Reno*,²⁷¹ the *Cane* opinion made some cogent points about the policy options before the courts. *Cane* advanced considerations about the relative effectiveness of remedies, the preferable, if not proper, role of the courts in the "political thicket," and the effect judicial action could have in separating the races. Referring in passing to the "special treatment"²⁷² afforded some through the creation of safe districts, the court even hinted at the possibility that racial gerrymandering might be unfair to certain groups. Nevertheless, *Cane* was a strong decision. In no way was the court blind to the issue of race, and the decision was not a return to what Karlan might refer to as the first dimension of voting rights: mere participation or inclusion in the political process.²⁷³ *Cane* responded to a group claim of racial vote dilution, to the point that the court rejected a remedy proposed by the defendant as being ineffective.

In *Cane*, the court seemed to calculate the opportunity costs involved with the respective choices. The court's goal was to intervene in a local political matter to the extent that was needed to resolve a constitutional violation. But the court sought to do so in a way that would not cross beyond the boundaries of what some might perceive to be legitimate judicial action. Whether the Maryland court was guided by *Shaw v. Reno* is purely speculative, since *Cane* did not cite this Supreme Court ruling. In assessing the risks involved in choosing between two apparently effective alternatives, however, the *Cane* court reasonably suggested that *Shaw v. Reno* raises the risk factor in selecting a plan that involves racial gerrymandering. In this sense, cumulative voting stands out as a more sure-footed legal strategy so long as it proves effective.

²⁷⁰ *Id.*

²⁷¹ 113 S. Ct. 2816, 2827 (1993).

²⁷² *Cane*, 847 F. Supp. at 373.

²⁷³ Karlan, *supra* note 222, at 1709-20.

3. *Empirical Evidence*

The evidence of the effectiveness of cumulative voting is not voluminous, but it is consistent. Cumulative voting serves as an effective vehicle for electing minorities in local elections. The voting data for three localities, Chilton County, Alabama; Alamogordo, New Mexico; and Sisseton, South Dakota support this conclusion. Chilton County was the most striking of these cases because it involved five jurisdictions: the cities of Centre and Guin, the town of Myrtlewood, the Chilton County Commission, and the Board of Education.²⁷⁴

Prior to the institution of cumulative voting in Chilton County, no blacks had been elected in any of these jurisdictions. Through a series of consent decrees in 1987, the at-large majoritarian systems in each of these jurisdictions was replaced with a seven-candidate system of cumulative voting. Karlan reports that, although in four of the jurisdictions, the total black population, and therefore the black voting-age population and black turnout, was slightly below the threshold of exclusion, a black candidate was elected in all but one of the jurisdictions.²⁷⁵ She indicates that the election data "strongly suggest" that black success at the polls in these contests was largely due to their ability to concentrate support behind a few candidates.²⁷⁶

Alamogordo, New Mexico, adopted a mixed voting system in 1987, where four council members were chosen from single-member districts and three were elected at-large through cumulative voting. Although the voting-age population was twenty-one percent Hispanic and 4.9% black, no minority had been elected since 1970.²⁷⁷ Exit polls in a 1987 election, in which a Hispanic candidate was elected, indicated that the change in the election procedure was crucial to her victory.²⁷⁸

²⁷⁴ Karlan, *supra* note 224, at 234.

²⁷⁵ *Id.* at 234-35. The one jurisdiction that did not elect a black candidate was the City of Myrtlewood. Karlan also reports on the adoption of limited voting systems in two dozen Alabama municipalities and in Granville County, North Carolina, where the results in electing black candidates were equally impressive. *Id.* at 225-30, 234 n. 255

²⁷⁶ *Id.* at 234-35.

²⁷⁷ *Cumulative Voting as a Remedy, supra* note 260, at 480-81.

²⁷⁸ Richard L. Cole et al., *Cumulative Voting in a Municipal Election: A Note on Voter Reactions and Electoral Consequences*, 43 WEST. POL. Q. 191, 197-98 (1990).

These results were repeated in the 1990 election. An analysis of exit-poll data from the later contest indicated that voters from both minority and Anglo groups developed positive attitudes toward the system, although minorities were more inclined to use the plumping option.²⁷⁹

In the Sisseton School District of South Dakota, Native Americans constituted 33.9% of the residents.²⁸⁰ Under a system of at-large voting that had been in place until 1989, Native Americans were rarely elected to the board even though tribal members regularly ran for office. On two occasions when Native Americans had been elected, the leaders of the Sisseton-Wahpeton Sioux claimed that these candidates had been hand-picked by the Anglo majority and were not representatives of the Native American population.²⁸¹ When the first election using cumulative voting procedures was held in 1989, a Native American ran first in a field of seven candidates. This assured him of one of the three vacant seats on the nine-person board. Once again, exit-poll data indicated that the election of a minority was determined by the opportunity to concentrate votes on a particular candidate of choice.²⁸²

Evidence of the success of cumulative voting is compelling. It provides a viable and effective mechanism for electing minorities who constitute a small proportion of a population. This system provides a clear advantage over single-member districting plans. National studies demonstrate that single-member plans accommodate only those groups who are large enough to be fashioned into a local majority. Moreover, cumulative voting works without necessitating the kinds of judicial intrusions described in *Cane*. As Guinier and others have argued, cumulative voting provides citizens with an opportunity for real choice and authentic representation without wasting votes.

Cumulative voting advances the cause of racial equality without compromising the political equality norm.²⁸³ To refer back to Karlan's continuum of voting,²⁸⁴ cumulative voting constitutes an appropriate response to aggregate claims de-

²⁷⁹ Cole & Taebel, *supra* note 2, at 195.

²⁸⁰ Engstrom & Barrilleaux, *supra* note 2, at 389.

²⁸¹ *Id.*

²⁸² *Id.* at 390-91.

²⁸³ See Howard & Howard, *supra* note 239, at 1615-16.

²⁸⁴ Karlan, *supra* note 222, at 1719.

signed to combat vote dilution. However, as an instrument to achieve full equality in a majoritarian system, cumulative voting does have limitations. These limitations become evident when voting is perceived in the context of the third element in Karlan's continuum—governance.

When participation is understood as the capacity to effectively represent group interests, minorities remain at a distinct disadvantage in a governance system that operates according to the principle of majority rule. This is particularly true when interests are defined in terms of race. It is clear that a minority group's ability to elect a minority to one of the seats of a governing body is better than being able to elect none. Nonetheless, minorities in these jurisdictions remain in a weak political position. Cumulative voting cannot cure the dilemma that majority rule fosters among those groups that have minority status. As Madison might have instructed us, however, cumulative voting may effectively counteract some of the adverse effects of majority rule.

C. THE DEMOCRATIC DILEMMA: MAJORITY AND MINORITIES

1. *The Tyranny of the Majority*

Lani Guinier focused on the fundamental dilemma of republican democracy: the capacity to effectively represent the interests of minorities in a system governed by majority rule. The liberal philosopher John Stuart Mill recognized the threat of a "tyranny of the majority" and warned his fellow Europeans of the need to take precautions against such tyranny.²⁸⁵ On his famous visit to America from France, Alexis de Tocqueville cautioned us about the political and social omnipotence of the

²⁸⁵ Mill observed that:

"The 'people' who exercise the power are not always the same people with those over whom it is exercised; and the 'self-government' spoken of is not the government of each by himself, but each by all the rest. The will of the people, moreover practically means the will of the most numerous or the most active part of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently may desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power ... in political speculations 'the tyranny of the majority' is now generally included among the evils among which society requires to be on its guard." JOHN STUART MILL, *ON LIBERTY* 5-6 (Gateway ed., 1955)(1859).

majority, whose power he found to be the most conspicuous in the legislature.²⁸⁶ But the political science of Madison has most significantly affected American thinking not only in the causes and threats of a "majority faction" but also in the ways to control its negative effects.²⁸⁷

Beyond the elimination of the liberties that allow people to form their own opinion on political issues, Madison sought to modify the threat of majority tyranny through the size and diversity of the American people.²⁸⁸ Preoccupied with the threat of ambitious and selfish factions that would use their influence to compromise the general welfare of the Republic, Madison took some comfort in the fact that the power of minority factions would be held in check by the force of majority rule. But it was in the rule of the majority that the more significant dangers could be found. Madison's prescription for the American republic was to expand and diversify; the more groups that became active in politics, the less likely it was that a working majority could be formed. The Madisonian vision of political life was one populated with numerous competing groups that would serve as a counterbalance to each other and as an obstacle to the development of a sinister majority.²⁸⁹

²⁸⁶ De Tocqueville noted: "Tyranny may be exercised by means of the law itself.... In the United States the omnipotence of the majority ... is favorable to the legal despotism of the legislature.... The majority has absolute authority both to make the laws and to watch over their execution...." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272 (Alfred A. Knopf ed., 1945)(1833).

²⁸⁷ Madison warned that "[w]hen a majority is included in a faction, the form of popular government ... enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens." *THE FEDERALIST* NO. 10, at 80 (James Madison) (New American Library ed., 1961).

²⁸⁸ Madison proposed to "[e]xtend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists it will be more difficult for those who feel it to discover their own strength and to act in unison with each other." *Id.* at 83.

²⁸⁹ Madison took up the issue of majority factions again in *THE FEDERALIST* NO. 51, (New American Library ed., 1961) at 320-25. For an analysis of Madison's work, see DAVID F. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 59-110, 136-46 (1984). See also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 471-564 (1969).

2. *Pluralism and Local Politics*

Madison's influence on American political science affected how we would study, understand, and judge politics. An entire generation of social scientists focused on the role of interest groups in policy making.²⁹⁰ Pluralism became the paradigm for explaining city politics from the 1950s through the 1970s.²⁹¹ Framed in Madisonian logic, pluralism also emerged as an idealized defense of the institutions and process of local government as we knew it.

Pluralism was a response to claims that American politics could be dominated by either minority or majority factions. Pluralists viewed power as "dispersed inequalities,"²⁹² and politics as specialized, with varied groups controlling policy making in different arenas of public policy. They felt that decentralization of power would make it difficult for any one small minority elite to control government. In true Madisonian fashion, pluralists perceived that the effective participation in politics by so many diverse groups undermined the probability of a ruling majority.²⁹³

This pluralist thinking is significantly flawed. True, local politics in America were open to a wide array of groups and interests, creating certain assurances of political democracy at

²⁹⁰ See ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT* (1908); DAVID TRUMAN, *THE GOVERNMENTAL PROCESS* (1960).

²⁹¹ The most influential work of the period was Robert A. Dahl's study of New Haven. See DAHL, *WHO GOVERNS?* (1966); NELSON W. POLSBY, *COMMUNITY POWER AND POLITICAL THEORY* (1963). But the pluralist model was eventually applied in studies of other American cities, among which were WALLACE SAYRE & HERBERT KAUFMAN, *GOVERNING NEW YORK CITY* (1960); AARON WILDAVSKY, *LEADERSHIP IN A SMALL TOWN* (1964); FREDERICK M. WIRT, *POWER IN THE CITY: DECISION MAKING IN SAN FRANCISCO* (1974).

²⁹² DAHL, *supra* note 291, at 85-86.

²⁹³ Dahl wrote:

Elections and political competition do not make for government by majorities in any significant way, but they vastly increase the size, number, and variety of minorities whose preferences must be taken into account by leaders in making policy choices.... If majorities in a democracy always govern in the broad meaning of the term, they rarely rule in Madison's terms.... In the sense in which Madison was concerned with the problem then, majority rule is mostly a myth.... If majority rule is mostly a myth, then majority tyranny is mostly a myth too.

ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 132, 133 (1956).

the governance level. Many would participate but unfortunately not all groups had access. Like Madison, the pluralists did not anticipate the significance of racial politics or the system's determination in ignoring, at least for a period of time, the legitimate claims of blacks and other minority racial groups.²⁹⁴ Because of legislation such as the Voting Rights Act, local politics is now more open than it was three decades ago. Contemporary political scientists are more astute in assessing the role minorities and elites play in forming power structures within cities. Today the conventional wisdom in the profession still holds that neither a single majority nor an all-powerful elite controls local politics. Instead, coalitions that elect candidates and form governing regimes dominate politics.²⁹⁵ Blacks are often represented in these alignments. In fact, evidence indicates that as minorities succeeded in electoral politics they also have been able to substantially influence policymaking at the governance level.²⁹⁶

3. *Pluralism and Racial Equality*

Judging Madison by contemporary standards, it is evident that the genius of his work, as appreciated by the pluralists, was his understanding of group politics. Madison perceived interests and political coalitions as transitory in nature.²⁹⁷ Nobody had to be relegated to a permanent minority station in the lottery of interest group politics; anybody could be a winner.

The tragedy of racial gerrymandering is that this scheme assures "protected groups" permanent minority status in a majoritarian system. Racial gerrymandering reinforces a tendency to define political interests in terms of race. A black person living in a white district might conclude she has, as

²⁹⁴ For critical assessments of the pluralist model, see PETER BACHRACH, *THE THEORY OF DEMOCRATIC ELITISM* (1967); PETER BACHRACH & MORTON S. BARATZ, *POWER AND POVERTY* (1970); G.W. DOMHOFF, *WHO RULES AMERICA?* (1967); DAVID M. RICCI, *COMMUNITY POWER AND DEMOCRATIC THEORY* (1971).

²⁹⁵ See, e.g., STEVEN L. ELKIN, *CITY AND REGIME IN THE AMERICAN REPUBLIC* (1987); CLARENCE N. STONE, *REGIME POLITICS: GOVERNING ATLANTA, 1947-1980* (1989).

²⁹⁶ See *supra* note 78.

²⁹⁷ This viewpoint is valid today. See JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 120-24 (1962); WILLIAM RIKER, *THE THEORY OF POLITICAL COALITIONS* 102-23 (1962).

Guinier says, a "wasted vote."²⁹⁸ The same person living in a black district might feel assured that her representative would be part of a minority coalition as long as the legislative body votes along racial lines.²⁹⁹

I am not persuaded that black representatives elected through cumulative voting or other semi-proportional schemes will be effective in representing the interests of their constituents as long as they are in a numerical minority and issues are defined in terms of race. Their power to negotiate or become part of a majority coalition will continue to be a function of numerical strength. Nevertheless, cumulative voting in an electoral process will still serve minorities better than single-member districts.

Cumulative voting may eventually serve to make local legislatures and governing boards more diverse and pluralistic. In the short run, cumulative voting may help improve the representation of minorities, especially those that are small in number, such as Hispanics, Asians, Native Americans, and gays. Most important of all, cumulative voting will provide minorities with choices — choices about defining their own interests, choices about joining political coalitions, choices about no longer being part of a permanent political minority. Cumulative voting will permit protected populations to take advantage of the transitory nature of interest-group politics, and more regularly enjoy the opportunity to be part of a majority coalition.

The goal is full integration into the political and social fabric of the community, not the homogenization of politics or society nor the suppression of a black or minority political agenda. Under cumulative voting, blacks and other minorities can vote along racial lines as it suits their interests, and several protected groups might vote as a block when they see fit to do

²⁹⁸ Guinier, *supra* note 252, at 1594.

²⁹⁹ This is not to say that all or most votes come down along racial lines. Black legislators often vote along party lines with their white colleagues. Guinier does not have much confidence in such coalitions because she thinks that white legislators from single-member districts do not have much of an incentive to work with black members from single-member districts and therefore leave it to the minority legislators to compromise the interests of their constituents. See *No Two Seats*, *supra* note 232. Guinier believes that legislators who are elected by cumulative voting and chosen by a unified constituency can represent interests more effectively. See *Race Conscious Districting*, *supra* note 251, at 1632-41.

so. The key is the expansion of individual and group options. Individuals should be given the opportunity to make real choices about politics without compromising. If I am a black man wanting to live in a racially integrated community, I should not have to throw away my vote to do so. Perhaps, by living within a diverse community, my neighbors and I will someday decide upon a political agenda without introducing the topic of racial rivalry and the consequential animosity that keeps America divided into two separate and unequal societies.

CONCLUSION

A review of the thirty-year history of the Voting Rights Act indicates that courts now define individual and group rights more broadly and enforce these rights more aggressively. The definition of voting rights progressed from the elimination of practices that denied individuals the basic franchise to the definition of group rights designed to assure minorities representation in governmental bodies. The application of sophisticated social science techniques assisted the courts in identifying violations of the law and in fashioning remedies to remove violations.

At-large voting systems, once a major target of litigation, have now been replaced by single-member districting schemes. A substantial body of empirical research, however, indicates that single-member districting plans do not help all protected groups in a similar fashion. These schemes may compromise the level of representation enjoyed by Hispanics, Asians, Native Americans, and even blacks when they do not constitute a strong numerical majority in a jurisdiction or are geographically dispersed. Moreover, single-member districting plans, and the racial gerrymandering that often accompanies them, involve the courts in intrusive public policy that disrupts local government practices, imposes limits on voter choice, and polarizes communities along racial lines.

Given recent action by the courts to limit the scope of racial gerrymandering, cumulative voting provides voting rights activists with a legal strategy that incurs less risk of being successfully challenged. The evidence indicates that using cumulative voting in at-large electoral systems constitutes a viable alternative to single-member districts. Cumulative voting provides meaningful participation and choice to all groups and does not require the courts to become as enmeshed in the political process. Cumulative voting facilitates the transitory nature of group politics so that, notwithstanding the high level

of racial consciousness that shapes the American political culture, protected groups need not be relegated to minority status in such a graphic and lasting way. Ultimately, cumulative voting is more likely to promote the political and social integration of American society without undermining the public agenda of any group.

