

6-1-1999

Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems As Voting Rights Act Remedies

Steven J. Mulroy

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems As Voting Rights Act Remedies*, 77 N.C. L. REV. 1867 (1999).

Available at: <http://scholarship.law.unc.edu/nclr/vol77/iss5/5>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

ALTERNATIVE WAYS OUT: A REMEDIAL ROAD MAP FOR THE USE OF ALTERNATIVE ELECTORAL SYSTEMS AS VOTING RIGHTS ACT REMEDIES

STEVEN J. MULROY*

In this Article, Steven Mulroy argues that jurisdictions attempting to correct minority vote dilution should employ alternative electoral systems. Such alternative voting schemes would allow jurisdictions to maximize minority votes without creating voting districts based on race, thereby avoiding the strict scrutiny analysis of Shaw v. Reno. Of the three alternative voting systems—limited voting, cumulative voting, and preference voting—the Article advocates preference voting as the best of the three because it maximizes proportionality of representation and the incentive for cross-racial and other coalitions while minimizing the problems of strategic voting and intra-group competition. Finally, the Article finds alternative voting systems particularly appropriate in judicial election cases because such systems can serve a jurisdiction’s “linkage” interest.

INTRODUCTION	1868
I. ALTERNATIVE ELECTORAL SYSTEMS AS THE SOLUTION TO A STATUTORY-CONSTITUTIONAL DILEMMA	1870
A. <i>Vote Dilution and Single-Member Districts</i>	1870
B. <i>Section 2 and Thornburg v. Gingles</i>	1872
C. <i>Shaw v. Reno, Its Progeny, and Reverse-Discrimination “Racial Gerrymanders”</i>	1874
D. <i>Alternative Electoral Systems</i>	1876
II. CHOOSING BETWEEN SINGLE-MEMBER DISTRICTS AND ALTERNATIVE REMEDIES	1883
A. <i>Defendant’s Choice</i>	1884

* Attorney, U.S. Department of Justice, Civil Rights Division. B.A., Cornell University, 1986; J.D., William & Mary School of Law, 1989. The opinions expressed in this Article do not necessarily reflect those of the Department of Justice.

I would like to acknowledge gratefully the assistance provided by Neal Devins, Richard Engstrom, Lani Guinier, Pamela Karlan, Peyton McCrary, and Robert Richie in writing this Article, and the paralegal assistance of Sigmon Zeleke in editing this Article. This Article is dedicated to Amy Mulroy for her patience and forbearance.

B. <i>State Law Considerations</i>	1887
C. <i>General Preferability of Alternative Schemes</i>	1890
1. Diversity, Proportionality, Competition, and Turnout	1891
a. Limited Voting	1891
b. Cumulative Voting	1891
c. Preference Voting	1893
2. "Actual" Rather than "Virtual" Representation	1895
3. Elimination of Any Conflict Between "Descriptive" and "Substantive" Representation	1897
4. Criticisms of Alternative Systems	1899
III. CHOOSING AMONG ALTERNATIVE REMEDIES	1906
A. <i>Limited Voting</i>	1906
B. <i>Cumulative Voting</i>	1908
C. <i>Preference Voting</i>	1911
IV. THE SPECIAL CASE OF JUDICIAL ELECTIONS	1916
CONCLUSION	1923

INTRODUCTION

The last few years have seen a renewed interest in the use of alternative electoral systems¹ to enhance minority representation. Recent U.S. Supreme Court cases invalidating minority congressional districts as "racial gerrymanders"² have curtailed the ability of legislators and litigators to use the traditional remedy for perceived minority dilution³—drawing districts designed to enhance minority voting strength. This inability has triggered a reexamination of alternative electoral systems as a means to address minority vote dilution without confronting the constitutional difficulties⁴ posed by

1. By "alternative electoral systems," I mean cumulative voting, limited voting, and preference voting (also known as the "single transferable vote" or "the Hare system"). These electoral schemes are designed to enhance the opportunity of voting minorities to win representation in accord with their voting strength and to ameliorate the "winner-take-all" aspect of traditional at-large elections or district elections.

2. See *Abrams v. Johnson*, 521 U.S. 74 (1997); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

3. See *infra* Part I.A. "Minority vote dilution" occurs when "the voting strength of an ethnic or racial minority group is diminished or canceled out by the bloc vote of the majority." Chandler Davidson, *Minority Vote Dilution: An Overview*, in *MINORITY VOTE DILUTION* 1, 4 (Chandler Davidson ed., 1984). It is a special case of the general vote dilution process, in which "election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least one other group." *Id.*

4. See, e.g., John Anderson, *Go Back to the Drawing Board to Make More Votes*

the race-conscious imperatives of the Voting Rights Act⁵ and the race-neutral imperatives of the recent Supreme Court cases. Legal and social science scholars echo this trend.⁶ Also, a district court recently imposed an alternative electoral system as a remedy in a voting rights case, basing its decision on precisely the constitutional dilemma raised by race-conscious districting.⁷

In a recent article,⁸ I joined the chorus of advocates for alternative electoral systems. In addition to advocating alternative schemes as remedies for minority vote dilution under section 2 of the Voting Rights Act⁹—as “the way out” of the dilemma described above—I proposed a new legal standard to be used when section 2 plaintiffs seek to replace illegal, dilutive systems with alternative schemes rather than with the traditional single-member district remedy.¹⁰ I argued that this new legal standard could be used to challenge either a dilutive districting system or a dilutive traditional, winner-take-all, at-large election. In short, that article discussed what should be required to establish Voting Rights Act liability when the end result sought was the imposition of an alternative electoral system.

With that preliminary question addressed, this Article tackles the

Count, CHRISTIAN SCI. MONITOR, Jan. 12, 1996, at 18; Editorial, *Better Politics from an Old Idea*, CHI. TRIB., May 30, 1995, § 1, at 12 [hereinafter *Better Politics*]; Michael Lind, *Alice Doesn't Vote Here Anymore*, MOTHER JONES, Mar.-Apr. 1998, at 53; William Raspberry, Editorial, *Superdistricts in North Carolina*, WASH. POST, Apr. 17, 1998, at A23; *Redistricting: Look Beyond Political Fighting Over Single-Member Districts*, CHARLOTTE OBSERVER, Apr. 24, 1998, at A16; Symposium, *Reflecting All of Us*, BOSTON REV., Feb.-Mar. 1998 (providing a series of articles by various authors in a symposium issue devoted to proportional representation systems).

5. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)).

6. See, e.g., T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 627-28 (1993); Richard Engstrom et al., *One Person, Seven Votes: The Cumulative Voting Experience in Chilton County, Alabama*, in AFFIRMATIVE ACTION AND REPRESENTATION: *SHAW V. RENO AND THE FUTURE OF VOTING RIGHTS* 285, 287 (Anthony A. Peacock ed., 1997).

7. See *McCoy v. Chicago Heights*, 6 F. Supp. 2d 973, 982-83 (N.D. Ill. 1998).

8. See Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333 (1998).

9. Voting Rights Act, § 2, 79 Stat. at 437 (codified as amended at 42 U.S.C. § 1973). Section 2 prohibits any voting or electoral “standard, practice or procedure” that “results in a denial or abridgement” of rights “on account of” race or color. *Id.*; see also Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400, 401 (codified as amended at 42 U.S.C. § 1973b(f)(2)) (prohibiting the same acts against a language minority group).

10. The new standard would substitute the “threshold of exclusion” formula applicable to alternative systems for the geographic compactness standard used under the canonical districting approach. See Mulroy, *supra* note 8, at 378-80; *infra* notes 62-65 and accompanying text.

tougher problems arising in the remedial phase. It answers two questions pertinent to any use of alternative schemes pursuant to the Voting Rights Act, once liability has been established. First, where both a traditional, single-member district remedy and an alternative remedy are demographically feasible, what standards should courts and litigants use in choosing between the two? Second, what standards should be used in choosing among the three alternative electoral systems—cumulative voting, limited voting, and preference voting?

Part I sets out the necessary background on minority vote dilution, section 2 of the Voting Rights Act, the Supreme Court's "racial gerrymander" cases, and the workings of alternative electoral systems. It also summarizes the new liability analysis advanced in the previous article. Part II answers the first question posed above by arguing that courts initially should defer to the defendant jurisdiction's preference and to any applicable state law restrictions. When neither of these benchmarks speaks to the issue, courts should have a general preference for alternative systems. Part III answers the second question posed above by advocating preference voting as the best of the three alternatives because, among other things, it most effectively enhances minority voting strength without penalizing intra-group competition within a particular minority group. Part IV applies these principles to the special case of judicial elections, where courts adjudicating Voting Rights Act challenges have articulated policy concerns unique to the election of judges.

I. ALTERNATIVE ELECTORAL SYSTEMS AS THE SOLUTION TO A STATUTORY-CONSTITUTIONAL DILEMMA

A. *Vote Dilution and Single-Member Districts*

Congress passed the Voting Rights Act in 1965 to address the problem of racial discrimination in voting. When enforcement of the Act in the 1960s and 1970s led to increased voter registration among formerly excluded minority groups,¹¹ voting rights advocates discovered still another hurdle to effective participation by these groups in American democracy: minority vote dilution. Electoral

11. Evidence regarding the increase of minority voter registration in the years following the passage of the Voting Rights Act can be found in James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990*, at 351, 352-54 (Chandler Davidson & Bernard Grofman eds., 1994) (summarizing findings).

systems in many places were designed to prevent minority voters from exerting any real influence in electoral outcomes, by catering to the bloc voting patterns of white majorities. This vote dilution was accomplished in two ways: through the use of at-large electoral systems and through districts "gerrymandered" to minimize minority voting strength.

The traditional, winner-take-all form of at-large election was—and is—commonly used for local elections such as those for city councils or county commissions. In at-large elections, voters from the entire jurisdiction vote to fill open seats on jurisdiction-wide legislative bodies. Under this method of election, each voter may cast only one vote for each candidate for a particular office, up to the number of empty seats, with the top vote-getters filling these seats. A related approach elects several representatives each from large "multimember" districts. Within each multimember district, elections operate in a manner similar to at-large elections. Most local jurisdictions in the United States use single-member districts, winner-take-all at-large elections, or some combination of the two.¹²

It has long been acknowledged that when voting is polarized along racial or ethnic lines, these traditional or winner-take-all at-large/multimember methods allow the white majority to vote as a bloc and fill all seats, ensuring the defeat of candidates backed by minority voters and thereby "diluting" minority voting strength.¹³ For example, imagine a five-member county commission in a county where forty percent of the population is black.¹⁴ When, as is commonly the case, black voters consistently prefer different candidates from white voters, the three-fifths white majority can continually shut out the black minority and fill all five seats with white-preferred candidates. Even though the politically cohesive voting bloc of black voters represents two-fifths of the populace, it is unable to elect a single candidate of choice.¹⁵ This inability is the

12. See Edward Still, *Alternatives to Single-Member Districts*, in MINORITY VOTE DILUTION, *supra* note 3, at 249, 249. The dominance of these systems is a historical product stemming from their use in England.

13. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 616 (1982); *Chapman v. Meier*, 420 U.S. 1, 16 n.10 (1975); *Whitcomb v. Chavis*, 403 U.S. 124, 158-59 (1971).

14. For much of this Article, I use black persons in examples involving minority groups suffering vote dilution. These examples should be understood to apply equally to members of any minority group protected under the Voting Rights Act.

15. This exact result occurred in Granville County, North Carolina, the site of a vote dilution lawsuit under the Voting Rights Act. See *McGhee v. Granville County*, 860 F.2d 110, 113 (4th Cir. 1988) (noting that although blacks made up 43% of the population of Granville County, no black had ever been elected). Situations like this one have been, and continue to be, common. See, e.g., *Teague v. Attala County*, 92 F.3d 283, 285 (5th Cir.

inherent result of the particular method of election interacting with the preferences of white voters.

Minority vote dilution also occurs in settings involving single-member districts—geographic electoral units from which only a single candidate is elected—such as in elections for the U.S. House of Representatives. Just as the legislature can politically gerrymander these districts to elect Democrats or Republicans disproportionately, they also can be drawn to elect white-preferred candidates disproportionately and to under-represent minority-preferred candidates.

The canonical remedy for minority vote dilution stemming from electoral methods (that is, through at-large or multimember systems) and gerrymandered districting has been to draw single-member districts with significant minority populations.¹⁶ Litigants can force the creation of such minority-oriented districts through lawsuits under section 2 of the Voting Rights Act.

B. Section 2 and Thornburg v. Gingles

Section 2 prohibits states and political subdivisions from using any standards, practices, or procedures that abridge the right to vote of any member of a protected class of racial and ethnic minorities.¹⁷ In 1982, Congress amended this provision to clarify that it intended to apply a “results test” to section 2 vote dilution claims.¹⁸ Plaintiffs do not have to show a discriminatory purpose on the part of the government body implementing the challenged electoral practice; rather, a plaintiff can prevail simply by showing that the “totality of circumstances” reveals that “the political processes leading to nomination or election . . . are not equally open to participation” by

1996) (noting that no blacks had been elected at-large in Attala County in modern times, despite blacks making up nearly 40% of the population).

16. See, e.g., *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1124 (5th Cir. 1991) (ordering the creation of a remedial districting plan to remedy minority vote dilution); *Major v. Treen*, 574 F. Supp. 325, 355 (E.D. La. 1983) (requiring the creation of a black-majority congressional district in New Orleans).

17. The Voting Rights Act bars voting-related discrimination against persons on the basis of race, color, national origin, or membership in a “language minority group.” Act of Aug. 6, 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400, 401 (codified as amended at 42 U.S.C. § 1973b(f)(2) (1994)); see Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 42 U.S.C. § 1973 (1994)). The Act defines language minorities to include Asian-Americans, Hispanics, Native Americans, and Alaskan Natives. See Voting Rights Act of 1965, § 14, 79 Stat. at 445 (codified as amended at 42 U.S.C. § 1973l(c)(3) (1994)).

18. See Act of June 29, 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973b(c) (1994)).

members of the protected class because these members "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice";¹⁹ purposeful discrimination by the entity implementing the challenged electoral practice is not a required showing. The legislative history of the amendment sets out a lengthy, nonexhaustive list of factors to be considered under the "totality of circumstances,"²⁰ commonly referred to as the "Senate factors."²¹

In 1986, the Supreme Court clarified how courts were to implement the "results test" amendments in *Thornburg v. Gingles*,²² a section 2 challenge to certain North Carolina state legislative multimember districts.²³ In *Gingles*, the Court held that plaintiffs must establish three "preconditions" in order to make out a prima facie case of vote dilution in violation of section 2: (1) the minority group is sufficiently numerous and compact to form a majority in a single-member district; (2) the minority group is politically cohesive (that is, its members tend to vote alike); and (3) the white majority usually votes as a bloc sufficient to defeat the minority's preferred candidate.²⁴ The first of these preconditions is often referred to simply as "compactness,"²⁵ and the second and third are often referred to together as "racial bloc voting" or "racially polarized voting."²⁶ If plaintiffs fail to prove any of these three preconditions, they lose. Even if they can establish all three, the plaintiffs still have to prove a violation under the "totality of the circumstances" analysis, which incorporates the "Senate factors."²⁷

19. *Id.* 42 U.S.C. § 1973(b).

20. The Senate Judiciary Committee majority report on the Act lists the following factors, focused on the particular defendant's state or political subdivision: (1) the history of official discrimination affecting the right to vote; (2) the degree to which voting was racially polarized; (3) the use of other dilutive voting procedures such as majority vote requirements; (4) any denial of minority candidate access to candidate slating processes; (5) socioeconomic disparities on the part of the minority group members; (6) racial appeals in campaigns; (7) the degree of minority candidate electoral success; (8) the degree of responsiveness on the part of elected officials to the concerns of the minority group; and (9) the extent to which the policy underlying the challenged practice or procedure is tenuous. See S. REP. NO. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 205-07.

21. See, e.g., *Solomon v. Liberty County Comm'rs*, 166 F.3d 1135, 1141 (11th Cir. 1999) (referring to the "Senate factors").

22. 478 U.S. 30 (1986).

23. See *id.* at 34-35.

24. See *id.* at 50-51.

25. See *Teague v. Attala County*, 92 F.3d 283, 287 (5th Cir. 1996).

26. See *Gingles*, 478 U.S. at 55.

27. See *id.* at 43-52.

For years before *Gingles*, and with even more vigor later, voting rights litigants used section 2 to force the creation of numerous minority-oriented districts at the congressional, state, and local levels.²⁸ Some, but not all, of these districts were oddly shaped. Sometimes the districts were oddly shaped because that was the only way to create majority-minority districts while still satisfying one-person, one-vote concerns.²⁹ At other times, the odd shapes were the result of incumbent legislators' efforts to satisfy the Voting Rights Act while simultaneously protecting their own incumbencies.³⁰ The minority districts, however, were often no more oddly shaped than non-minority districts drawn by the same jurisdictions.³¹ The degree of non-compactness of both minority and non-minority districts increased over time as improvements in computer technology allowed more sophisticated analysis of demographic data by drawers of redistricting plans.³² Eventually, the race-influenced oddities were bound to attract the attention of the Supreme Court, and in 1993, one such district did.

C. *Shaw v. Reno, Its Progeny, and Reverse-Discrimination "Racial Gerrymanders"*

In *Shaw v. Reno*,³³ the Supreme Court considered a challenge to North Carolina's Twelfth Congressional District, a long, snake-like minority-majority district that stretched along Interstate 85.³⁴ The

28. See, e.g., *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1124 (5th Cir. 1991) (ordering the creation of a local remedial districting plan to remedy minority vote dilution); *De Grandy v. Wetherell*, 815 F. Supp. 1550, 1560 (N.D. Fla. 1992) (invalidating a Florida state legislative districting plan), *aff'd in part, rev'd in part sub nom. Johnson v. De Grandy*, 512 U.S. 997 (1994); *Major v. Treen*, 574 F. Supp. 325, 355 (E.D. La. 1983) (requiring the creation of a black-majority congressional district in New Orleans).

29. See, e.g., *In re Constitutionality of Senate Joint Resolution 2G*, Special Apportionment Session 1992, 601 So. 2d 543, 546 (Fla. 1992) (explaining the odd shape of a state senate district as resulting from the need to satisfy one-person, one-vote concerns); see also *Reynolds v. Sims*, 377 U.S. 533, 559 (1964) (explaining the one-person, one-vote requirement).

30. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 673 n.10 (1993) (citing assertions that the odd shape of North Carolina's congressional districts can be explained by incumbent interests).

31. See, e.g., *Lawyer v. Department of Justice*, 521 U.S. 567, 580-81 (1997) (upholding a constitutional challenge to a minority state senate district in part on this ground); *Miller v. Johnson*, 515 U.S. 900, 940 (1995) (Ginsburg, J., dissenting) (describing evidence to this effect regarding a Georgia minority congressional district).

32. See *Bush v. Vera*, 517 U.S. 952, 961 (1996) (plurality opinion) (emphasizing evidence of advanced redistricting computer abilities).

33. 509 U.S. 630 (1993).

34. See *id.* at 630, 633-35.

Court recognized a new constitutional cause of action challenging an oddly shaped minority district as a "racial gerrymander" under the Fourteenth Amendment.³⁵ This new cause of action is "analytically distinct" from the traditional vote dilution claim and does not require proof that a particular group's vote is in fact diluted.³⁶ Instead, the harm caused by such "gerrymandering" is two-fold: It reinforces the stereotype that members of the same racial group think and vote alike (stigmatic harm), and it encourages elected officials from such districts to represent only the members of their racial group rather than the district as a whole (representational harm).³⁷

As explained by the Court in *Miller v. Johnson*³⁸ and *Bush v. Vera*,³⁹ a *Shaw* plaintiff confronts a threshold question as to whether race is the "predominant factor" driving the configuration of the challenged minority district.⁴⁰ To make this showing, the plaintiff must prove that the challenged district "subordinated [to race] traditional race-neutral districting principles," such as "compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests."⁴¹ If the plaintiff fails to make this showing, the court will uphold the minority district, and the analysis ends. If the plaintiff meets the "predominant factor" threshold, the constitutional standard of strict scrutiny applies: The court will invalidate the district unless its configuration was narrowly tailored to serve a compelling governmental interest.⁴² Although the Court has not detailed a definitive list of governmental interests that would support a *Shaw*-type racial gerrymander, compliance with section 2 is likely to be one such interest.⁴³

35. See *id.* at 657.

36. See *id.* at 650-52. That is, even if a *Shaw* plaintiff could not point to a cohesive group that would have less of an opportunity to elect candidates of choice as a result of the challenged minority district, or that would be significantly underrepresented in proportion to its share of the population, the plaintiff could still prevail if it made out the other elements of the *Shaw* claim.

37. See *id.* at 647-48; see also *United States v. Hays*, 515 U.S. 737, 744 (1995) (providing further explanation of stigmatic and representational harm).

38. 515 U.S. 900 (1995).

39. 517 U.S. 952 (1996) (plurality opinion).

40. See *Bush*, 517 U.S. at 959 (plurality opinion); *Miller*, 515 U.S. at 916.

41. *Miller*, 515 U.S. at 916.

42. See *id.* at 916, 920.

43. In *Bush*, Justice O'Connor argued that compliance with the "results test" of section 2 could be a sufficiently compelling state interest to justify a "racial gerrymander" subject to strict scrutiny. *Bush*, 517 U.S. at 992 (O'Connor, J., concurring). This position is in accord with the views of four other Supreme Court Justices. See *id.* at 1007, 1034-35 (Stevens, J., dissenting) (joined by Justices Ginsburg and Breyer); *id.* at 1046, 1065 (Souter, J., dissenting) (joined by Justices Ginsburg and Breyer). The remaining Justices

The *Shaw* line of cases has curtailed severely the ability of legislators, litigants, and courts to create single-member districts that provide minority voters with a realistic opportunity to elect candidates of their choice.⁴⁴ In so doing, the cases create a dilemma for anyone interested in remedying minority vote dilution. Persons interested in assuring fair representation to minorities must steer a narrow middle course between the Scylla of the Voting Rights Act, which requires that race be taken into account when drawing districts, and the Charybdis of *Shaw*, which requires that race not be used "too much." The performers in the upcoming year 2000 redistricting circus will be walking a tightrope, and no net can cushion them from the risk of protracted, expensive litigation and disrupted election cycles. These pitfalls can be avoided, however, by eschewing districting altogether and adopting alternative electoral systems.⁴⁵

D. Alternative Electoral Systems

Although at-large systems used in the United States have traditionally been winner-take-all, other varieties exist and have been employed.⁴⁶ These systems use special voting rules designed to

who have dealt with the issue have assumed this point without deciding it. See *id.* at 977 (plurality opinion) (joined by Chief Justice Rehnquist and Justice Kennedy); *id.* at 996 (Kennedy, J., concurring); *id.* at 1003 (Thomas, J., concurring in the judgment) (joined by Justice Scalia).

44. Almost every Supreme Court opinion considering a *Shaw* challenge on the merits has invalidated the challenged districts and issued language cautioning against over-using race in making redistricting decisions. See *Abrams v. Johnson*, 521 U.S. 74, 88-89 (1997) (criticizing the proposed minority congressional districts); *Bush*, 517 U.S. at 957 (plurality opinion) (invalidating three minority congressional districts in Texas); *Shaw v. Hunt*, 517 U.S. 899, 917 (1996) (invalidating a North Carolina congressional district); *Miller*, 515 U.S. at 920-21 (invalidating a minority congressional district in Georgia). But see *Lawyer v. Department of Justice*, 521 U.S. 567, 582 (1997) (upholding a minority state senate district in Florida). The repeated Supreme Court criticism has, to put it mildly, the potential for causing a chilling effect on the creation of minority-oriented single-member districts.

45. By advocating this course, I do not mean to suggest agreement with the *Shaw* line of decisions, which I believe (for reasons outside the scope of this Article) the Court to have decided wrongly. Although I consider alternative electoral methods often to be preferable to single-member districts, see *infra* notes 124-63 and accompanying text, I consider such districts generally preferable to traditional, dilutive, "winner-take-all" at-large methods of election and to district systems that fail to reflect fairly minority voting strength. I acknowledge that there are circumstances in which minority districts are the best vote dilution remedy.

46. There is no federal constitutional or statutory provision banning the use of alternative electoral schemes or their adoption by federal courts. See *Holder v. Hall*, 512 U.S. 874, 897-99, 908-13 (1994) (Thomas, J., concurring in the judgment); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 814-15 (5th Cir.), *rev'd on other grounds*, 999 F.2d 831 (5th Cir. 1993) (en banc); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1560 (11th Cir. 1984); *Dillard v. Town of Louisville*, 730

enhance the ability of voting minorities to obtain representation. Three such systems have a history of use in the United States. They can be used in partisan or non-partisan elections and have been discussed by courts and commentators as non-district alternative voting rights remedies at the local level.⁴⁷ These three systems are limited voting, cumulative voting, and preference voting.⁴⁸

In a limited voting system, a voter casts one vote per candidate to fill a number of seats, but the total number of votes a voter may cast is less than the total number of seats to be filled.⁴⁹ For example, a voter might be allowed to vote for only four candidates to fill five seats on a city council. This limitation is designed to prevent the majority "from making a clean sweep of all seats by voting a straight ticket."⁵⁰ Limited voting systems are used in several local jurisdictions in North Carolina, Alabama, Connecticut, and Pennsylvania.⁵¹

F. Supp. 1546, 1548 (M.D. Ala. 1990).

47. See, e.g., Richard L. Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution*, 21 STETSON L. REV. 743, 756-66 (1992) (discussing court cases).

48. The description of these three alternative systems that follows borrows from my earlier article. For a more complete discussion of these systems, see Mulroy, *supra* note 8, at 339-43.

Alternative electoral systems are often referred to as "proportional representation" systems. This phrase raises two definitional concerns. First, although all three systems tend to produce electoral results that are more "proportional" to voter preferences than winner-take-all systems, only preference voting produces results that are reliably "proportional" as a strictly defined, mathematical matter. Therefore, political scientists consider only preference voting (also known as the "single transferable vote") to be an example of "proportional representation," calling limited and cumulative voting "semi-proportional" systems. DOUGLAS AMY, *REAL CHOICES, NEW VOICES* 186 (1993); Still, *supra* note 12, at 258. Second, these systems should not be confused with the party-list, parliamentary systems used in Europe. Party-line systems are also examples of proportional representation, but they have distinct features alien to the American experience, such as voting rules requiring voters to vote for parties, not candidates, and a weak executive whose administration may be truncated by a vote of those legislators. See AMY, *supra*, at 227-30. Such parliamentary features are not found in the alternative systems used in the United States, and I do not advocate their adoption here. See Mulroy, *supra* note 8, at 339.

49. See Still, *supra* note 12, at 253.

50. *Id.*

51. See *Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs*, 965 F. Supp. 72, 79 n.9 (D.D.C. 1997) (describing the use of limited voting systems in three county and two municipal elected bodies in North Carolina), *rev'd on other grounds*, 142 F.3d 468 (D.C. Cir. 1998); *Dillard v. Crenshaw County*, 748 F. Supp. 819, 824 n.9 (M.D. Ala. 1990) (noting the use of limited voting systems in Alabama as the result of litigation); AMY, *supra* note 48, at 233 app. A (noting the use of limited voting systems in a "few cities and counties" in Connecticut and Pennsylvania); see also *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1461-62 (M.D. Ala. 1988) (tracing the history of the *Dillard* litigation).

In a cumulative voting system, voters have a given number of votes that they can distribute among the candidates any way they see fit. The number of votes is usually, but need not be, equal to the number of seats to be filled.⁵² For example, if a voter has five votes, she can cast one vote each for her top five preferred candidates, she can "plump" all five votes for one candidate for whom she has an especially strong preference, or she can divide her votes three to two between her top two choices.⁵³ Cumulative voting is used in numerous jurisdictions in Texas and Alabama, as well as in Peoria, Illinois.⁵⁴ Historically, it was used to elect members of the Illinois House of Representatives from 1870 to 1980.⁵⁵

In a preference voting or single transferable vote system,⁵⁶ the voter ranks the candidates in order of preference, putting beside each candidate's name a "1," "2," etc., for as many candidates as she wishes. The votes are counted in a series of rounds. In the first

52. See Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144, 153 n.40 (1982).

53. The ability of voters to cast more than one vote is not a violation of the "one-person, one-vote" constitutional principle because each voter is entitled to the same number of votes. See *Reynolds v. Sims*, 377 U.S. 533, 559 (1964) (explaining that the gravamen of the principle is that "'one man's vote ... is to be worth as much as another's'" (quoting *Wesberry v. Sander*, 376 U.S. 1, 8 (1964))); see also *Orloski v. Davis*, 564 F. Supp. 526, 530 (M.D. Pa. 1983) (upholding a limited voting scheme in a judicial election over one-person, one-vote objections); *LoFrisko v. Schaffer*, 341 F. Supp. 743, 748 (D. Conn.) (same), *aff'd*, 409 U.S. 972 (1972); *Kaelin v. Warden*, 334 F. Supp. 602, 605 (E.D. Pa. 1971) (same); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1088, 1148 n.332 (1991) (citing additional sources and explaining why these voting systems are consistent with the one-person, one-vote principle).

54. See Robert R. Brischetto & Richard L. Engstrom, *Cumulative Voting and Latino Representation: Exit Surveys in Fifteen Different Texas Communities*, 78 SOC. SCI. Q. 973, 974 (1997) (describing the use of cumulative voting in Texas by at least 15 municipalities and 26 school boards since 1991); Engstrom, *supra* note 47, at 757 (describing the use of cumulative voting in Peoria, Illinois since 1991); Richard L. Engstrom et al., *Limited and Cumulative Voting in Alabama: An Assessment After Two Rounds of Elections*, 6 NAT'L POL. SCI. REV. 180, 185 (1997) (describing the use of cumulative voting in Alabama by four municipalities plus the county commission and the school board of another county since 1988).

55. See AMY, *supra* note 48, at 186.

56. Preference voting is sometimes referred to as the "single transferable vote" or the "Hare system," which is a particular methodology for counting preference vote ballots. Most recently, it has been called "choice voting." See Gideon Doron, *Is the Hare Voting Scheme Representative?*, 41 J. POL. 918, 918-20 (1979) (discussing the "Hare system"); Robert Richie, *Full Representation: The Future of Proportional Election Systems*, 87 NAT'L CIVIC REV. 85, 86 (1998) (discussing the terms "single transferable vote" and "choice voting"); Letter from Robert Richie, Executive Director, Center for Voting and Democracy, to author (Apr. 19, 1999) (copy on file with the *North Carolina Law Review*) (discussing all four terms).

round, candidates netting more than a certain minimum amount of first-choice votes⁵⁷ win a seat. Their "excess" votes (that is, the number of votes they received above the minimum) are reassigned to other candidates based on the voters' second-choice selections. In the second round, any candidates above the minimum quota of first-choice votes after reassignment are seated. If there are no such candidates, the lowest vote-getter is disqualified, and his votes are reassigned on the same second-choice basis. This process of seating and disqualifying candidates, and reassigning their votes accordingly, continues through as many iterations as necessary to fill all the seats.⁵⁸ Preference voting is used in several countries, including Ireland and Australia.⁵⁹ In the United States, preference voting is used in city council and school board elections in Cambridge, Massachusetts and in local community school board elections in New York City.⁶⁰ Historically, it was used to elect city councils in approximately two dozen American cities throughout the United States.⁶¹

For each of these three alternative systems, a mathematical formula expresses the minimum percentage of the electorate a

57. This minimum amount is calculated by dividing the total number of votes cast by the number of seats to be filled plus one, and then adding one. This number is the so-called "Droop quota." Still, *supra* note 12, at 259. Thus, where three seats are to be filled, the minimum amount is one more than 1/4 of the overall vote; where four seats are available, it is one more than 1/5 of the vote; and so on.

58. See *id.* at 258-61. Good explanations of the counting process can be found in AMY, *supra* note 48, at 230-31 app. A, 237-38 app. C, and Engstrom, *supra* note 47, at 765-69. Engstrom provides a diagram that is particularly helpful. See Engstrom, *supra* note 47, at 766.

59. See AMY, *supra* note 48, at 18.

60. See *id.* at 18, 137-38; Engstrom, *supra* note 47, at 766-67.

61. See Engstrom, *supra* note 47, at 766-67. These cities adopted preference voting at various points from 1915 through 1950 and continued using it for periods varying from several years to several decades. See Leon Weaver, *The Rise, Decline, and Resurrection of Proportional Representation in Local Governments in the United States*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 139, 139-41 (Bernard Grofman & Arend Lijphart eds., 1986); see also Robert A. Burnham, *Reform, Politics, and Race in Cincinnati: Proportional Representation and the City Charter Committee, 1924-1959*, 23 J. URB. HIST. 131, 132 (1996) (describing the history of the use of proportional representation in Ohio cities). New York City used preference voting to elect its city council from 1936 to 1947. See Belle Zeller & Hugh A. Bone, *The Repeal of P.R. in New York City—Ten Years in Retrospect*, 42 AM. POL. SCI. REV. 1127, 1127-33 (1948). Repeal of preference voting in these cities often came as a result of public hostility to the election of blacks (as in Cincinnati) or Communists (as in New York). See AMY, *supra* note 48, at 173 (noting the role of fear of Communism in the New York repeal); Burnham, *supra*, at 153 (noting the role of racial antagonism in the repeal of proportional representation in Cincinnati); Richard L. Engstrom, *Cincinnati's 1988 Proportional Representation Initiative*, 9 ELECTORAL STUD. 217, 219-22 (1990) (same); Zeller & Bone, *supra*, at 1133 (noting the role of fear of Communism in the New York repeal).

politically cohesive minority group needs to be in order to assure the election of at least one candidate of choice. This formula, universally acknowledged by political scientists, is called the "threshold of exclusion."⁶²

For both cumulative and preference voting, the threshold of exclusion is:

$$1 / [(number\ of\ seats\ to\ be\ filled) + 1].^{63}$$

For limited voting, the threshold of exclusion formula is:

$$(number\ of\ votes\ each\ voter\ has) / [(number\ of\ votes\ each\ voter\ has) + (number\ of\ seats\ to\ be\ filled)].^{64}$$

Thus, if five seats are up for election, and each voter has four votes, the threshold for limited voting is $4/(4+5) = 4/9 = 44\%$ of the vote. Mathematically, the threshold is lower (and thus more accessible to minority voters) when the number of votes each voter has is limited to one.⁶⁵ This result can be seen by holding the number of seats to be filled constant and plugging in increasing integers for the number of votes each voter has.

These alternative systems have proven to be effective at enhancing the ability of racial and ethnic minority voters to elect candidates of their choice.⁶⁶ Importantly, they do so in a race-neutral manner and thus do not raise *Shaw* concerns.⁶⁷ For this reason, commentators have argued that courts should use these alternative systems as remedies in minority vote dilution lawsuits under the Voting Rights Act.⁶⁸ In many cases, such remedies have been adopted by consent decree in section 2 litigation,⁶⁹ but courts have rarely imposed them as a section 2 remedy over the objection of a defendant jurisdiction.⁷⁰

62. See Still, *supra* note 12, at 256.

63. See *id.*

64. See Engstrom, *supra* note 47, at 758; Still, *supra* note 12, at 254.

65. See Still, *supra* note 12, at 254.

66. See *infra* Part II.C.1; see also Mulroy, *supra* note 8, at 349-50 (discussing the effectiveness such systems have had in electing minority-preferred candidates).

67. See Mulroy, *supra* note 8, at 350-51.

68. See *supra* notes 4, 6 and accompanying text.

69. For example, see Judge Myron Thompson's decisions approving cumulative voting remedies as settlements to several of the related *Dillard* cases brought under the Voting Rights Act. See *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1460 (M.D. Ala. 1988) (describing the history of the *Dillard* litigation).

70. See Mulroy, *supra* note 8, at 334 & n.8. In two of the four cases in which a federal court imposed an alternative electoral remedy outside the context of a consent decree, an appellate court vacated the remedial orders on fact-specific grounds. See *Cane v. Worcester County*, 35 F.3d 921, 927-28 (4th Cir. 1994); *McGhee v. Granville County*, 860 F.2d 110, 121 (4th Cir. 1988). These two appellate opinions were tied to the particular

In an earlier article, I have argued that courts have the authority to impose such alternative remedies in section 2 cases.⁷¹ This authority is less controversial when the section 2 plaintiff has established the three *Gingles* preconditions.⁷² Such remedies, however, should also be available even when a plaintiff is unable to meet the "compactness" prong of *Gingles* because the minority population, while substantial, is too dispersed geographically to form the core of a compact district. Properly interpreted, the plain language of section 2, statutory history, case law, and underlying policy considerations argue for the conclusion that compactness is not a sine qua non when a non-district remedy is sought.⁷³ I have suggested previously that in such situations, the *Gingles* test should be modified so as to substitute the "threshold of exclusion"⁷⁴ for compactness, but the conventional section 2 analysis should be retained in other respects.⁷⁵ For example, in the five-seat county commission discussed above, the threshold of exclusion would be $[1/(1+5)]$ or roughly 17%. So if blacks make up 18% of the county's voting age population,⁷⁶ the threshold of exclusion would be satisfied.

facts of the case and expressly disclaimed any intent to convey blanket denunciations of alternative remedies. See *Cane*, 35 F.3d at 928; *McGhee*, 860 F.2d at 120. In the third such case, the appellate court reversed on both liability and remedy grounds, broadly criticizing cumulative voting in dicta. See *Cousin v. Sundquist*, 145 F.3d 818, 827 (6th Cir. 1998), cert. denied, 119 S. Ct. 1026 (1999). The most recent case has not yet been heard on appeal. See *McCoy v. Chicago Heights*, 6 F. Supp. 2d 973 (N.D. Ill. 1998).

71. See Mulroy, *supra* note 8, at 356-62.

72. See *id.* at 368-70; *supra* notes 22-26 and accompanying text.

73. See Mulroy, *supra* note 8, at 363-68.

74. Because such a precondition should measure the minimum amount of minority population necessary to establish a potential to elect a candidate of choice in a given situation, I have argued that for limited voting, the value (i.e., the number of votes each voter has) should equal one. See Mulroy, *supra* note 8, at 339-40. When this value equals one, the threshold of exclusion formula for limited voting equals the formulae for cumulative and preference voting, allowing only one formula to be used in the analysis. See *id.* at 340-43.

75. See *id.* at 343-46. Although the legal theory described here would apply to elections at all levels, I envision it being experimented with initially at the local level only. This result would fit the pattern of the original "vote dilution" cases under the Voting Rights Act and the cases to date that have dealt with alternative systems. See *id.* at 336 n.12. The theory would apply to minority vote dilution challenges to districting systems that diluted minority voting strength as well as to challenges to traditional, "winner-take-all" at-large systems. See *id.* at 336 n.12, 337-38.

76. Courts generally use voting age population to determine whether section 2 plaintiffs have met the first *Gingles* precondition. See *Solomon v. Liberty County*, 899 F.2d 1012, 1018 (11th Cir. 1990) (en banc); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 944-45 (7th Cir. 1988). But see *Garza v. Los Angeles County*, 918 F.2d 763, 774-76 (9th Cir. 1990) (stating that the use of total population figures may be sufficient). A more empirically accurate approach in evaluating the threshold of exclusion would involve the use of voter turnout statistics. This approach, however, presents several disadvantages.

Alternative remedies would be safe from the pitfalls of *Shaw* because of their race-neutral nature. Although one could argue that the use of these systems as section 2 remedies evidences a motive to enhance racial or ethnic voting strength that would trigger strict scrutiny under *Shaw*, such a view would constitute a misreading of the *Shaw* line of cases. The heart of the Supreme Court's objection to "racial gerrymanders" is that they are functionally equivalent to "racial classifications," which trigger strict scrutiny.⁷⁷ Because alternative systems do not classify anyone, or in any way benefit racial minorities differently from partisan or ideological minorities, they are therefore by their nature outside the *Shaw* framework.⁷⁸ Moreover, *Shaw* liability requires a showing of some objective feature which is "subordinated" to race.⁷⁹ The mere motivation to enhance racial fairness on the part of those adopting a remedial plan cannot by itself establish heightened review if the remedy does not subordinate traditional principles in some demonstrable way. If state and local jurisdictions are free to draw race-conscious districts consistent with traditional districting principles,⁸⁰ they surely are free to adopt race-

See Mulroy, *supra* note 8, at 375-77.

77. *See Shaw v. Reno*, 509 U.S. 630, 642-45, 649-51, 657 (1993) (referring repeatedly to the centrality of "classifications" as the rationale for the new *Shaw* cause of action).

78. *See Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs*, 965 F. Supp. 72, 80 (D.D.C. 1997) (upholding a limited voting scheme against a *Shaw* challenge on this ground), *rev'd on other grounds*, 142 F.3d 468 (D.C. Cir. 1998).

79. *See Miller v. Johnson*, 515 U.S. 900, 915-16 (1995) (requiring a threshold showing that "traditional race-neutral districting principles" were "subordinated" to race).

80. *See Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion) (affording states some "leeway" to draw race-conscious districts). Arguably, the Court sent the opposite signal in *Miller*, in which it indicated that strict scrutiny could be triggered under *Shaw* through an examination of "legislative purpose," even absent a bizarrely shaped district. *See Miller*, 515 U.S. at 913-15. But the *Miller* opinion also makes clear that to trigger strict scrutiny, the challenged plan must "subordinate[] traditional race-neutral districting principles . . . to race." *Id.* at 916. The Court resolved any uncertainty on this point in the later decision, *Bush*, when seven of the nine Justices indicated that the intentional creation of a minority district would not by itself necessarily trigger strict scrutiny. *See Bush*, 517 U.S. at 962 (plurality opinion); *id.* at 1003-04 (Stevens, J., dissenting); *id.* at 1051 n.5 (Souter, J., dissenting); *see also* *Lawyer v. Department of Justice*, 521 U.S. 567, 580-81 (1997) (upholding a district court's refusal to apply strict scrutiny to a Florida senate minority district that was clearly race-conscious in design because its characteristics were in line with those of other house and senate districts in the state).

The language in *Miller* may simply stand for the narrow proposition that *Shaw* plaintiffs need not make a threshold showing of bizarre shape before being able to proceed with their claim—the precise context in which the language appears. *See Miller*, 515 U.S. at 914. Under this interpretation, a *Shaw* plaintiff could satisfy her prima facie burden by showing that a challenged district subordinated some other districting principle besides compactness, such as respect for political subdivision boundaries or considerations of communities of interest. *See id.* at 915. Or it simply may be that the Court's view on this matter has evolved over time.

neutral alternative systems to accomplish the same end.

II. CHOOSING BETWEEN SINGLE-MEMBER DISTRICTS AND ALTERNATIVE REMEDIES

If alternative electoral systems are indeed available as remedies in section 2 vote dilution cases, the following question immediately presents itself: When should courts impose or section 2 plaintiffs seek such alternative remedies instead of single-member districts?

One obvious choice is to use alternative remedies in those cases when it is impossible to draw a single-member district, or impossible to draw one in a manner consistent with *Shaw* and *Miller*. This conclusion is particularly relevant for protected minority groups such as Hispanics or Asians, who tend to be more geographically dispersed in a jurisdiction than black voters,⁸¹ and yet sufficiently numerous in many jurisdictions to benefit from a "threshold of exclusion" standard. A related situation occurs when concentrations of two different minority groups in close proximity allow a compact district to be drawn for either group but not both. This situation arises most frequently in urban areas with heavy concentrations of both blacks and Hispanics.⁸² Alternative remedies would eliminate this dilemma.

Alternative remedies also should be used when it is legally possible but impractical to use single-member districts. For example, in very small jurisdictions, perhaps rural areas, drawing district boundaries and employing multiple polling places may be troublesome.⁸³ Such considerations, therefore, might apply to many

81. See Richard L. Engstrom, *Minority Electoral Opportunities and Alternative Electoral Systems in the United States*, in VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES 227, 229 (Mark E. Rush ed., 1998) (referring to the relative residential dispersion of Latinos).

82. See *King v. State Bd. of Elections*, 979 F. Supp. 619, 625 n.4 (N.D. Ill. 1997) (three-judge court) (explaining how the odd shape of a Hispanic district in Chicago was necessary to "protect" neighboring black districts from "retrogression"), *aff'd*, 118 S. Ct. 877 (1998); *Vera v. Richards*, 861 F. Supp. 1304, 1323 (S.D. Tex. 1994) (three-judge court) (describing the need for a black district to extend tendrils winding through nearby Hispanic areas to pick up black voters), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996) (plurality opinion); *De Grandy v. Wetherell*, 815 F. Supp. 1550, 1576 (N.D. Fla. 1992) (three-judge court) (noting that the creation of a Hispanic state senate district in the Miami area would sacrifice creation of a third black senate district), *aff'd in part, rev'd in part sub nom. Johnson v. De Grandy*, 512 U.S. 997 (1994).

83. Indeed, jurisdictions generally should see alternative systems as an attractive way of saving the burden and expense of redistricting every 10 years after the release of the Decennial Census. For those jurisdictions that must obtain advance "preclearance" of voting changes pursuant to section 5 of the Voting Rights Act, the use of such systems would save the additional burden of having to obtain "preclearance" of each decennial redistricting. Section 5 of the Voting Rights Act, the "preclearance" provision, applies,

local jurisdictions in Native American areas.

A tougher question arises when both districts *and* alternative schemes are feasible. Certainly, when compact districts are possible, establishing liability is less problematic: The first *Gingles* precondition is satisfied, and there is no need to resort to using the "threshold of exclusion" as a substitute for the compactness prong. The remedy issue becomes more difficult, however, because both traditional and non-traditional remedies are available. In such circumstances, I believe a hierarchy of decisional rules should be followed in choosing the remedy.

A. Defendant's Choice

The first rule should be "defendant's choice." This rule, which borrows from well-established case law involving traditional redistricting claims, mandates the remedy that intrudes least on the province of the democratically elected governing body. After liability is established, the defendant jurisdiction must be given the first opportunity to fashion a remedial plan and present it to the court.⁸⁴ The court must defer to the choice of the governing legislative body, as long as that choice is consistent with federal statutes and the Constitution.⁸⁵ Thus, if the defendant jurisdiction chooses a single-member district remedy, the court must scrutinize the remedy first to see if it complies fully with the Voting Rights Act. Then, it must determine if the district is consistent with such constitutional requirements as "one-person, one-vote" and the strictures of *Shaw* and *Miller*. If it meets these requirements, the court should adopt the defendant-proposed districting plan, regardless of whether the plaintiffs seek an alternative electoral system or whether the court might deem an alternative electoral system better (for minorities or otherwise) on policy grounds.

according to section 4 of the Act, to certain covered jurisdictions with a history of voting discrimination. See Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 4-5, 79 Stat. 437, 438-39 (codified as amended at 42 U.S.C. §§ 1973b, 1973c (1994)). Any change in voting procedures must be affirmatively precleared as nondiscriminatory in purpose and effect, either by the U.S. Attorney General or the District Court for the District of Columbia. See *id.* § 5, 79 Stat. at 439.

84. See, e.g., *White v. Weiser*, 412 U.S. 783, 794-95 (1973) ("[J]udicial relief [in reapportionment cases] becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964))); see also *Upham v. Seamon*, 456 U.S. 37, 41 (1982) (quoting this same language from *White*).

85. See *Upham*, 456 U.S. at 40-41; *Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971).

In evaluating compliance under the Voting Rights Act, courts should examine whether a purportedly minority-opportunity district presented by the defendant jurisdiction does in fact have sufficient minority population to provide a reasonable opportunity for minority voters to elect candidates of choice.⁸⁶ Courts routinely make such determinations in section 2 cases,⁸⁷ and this type of remedial analysis survives in the post-*Shaw* era.⁸⁸

Similarly, courts should see whether the defendant's proffered plan features a sufficient number of separate minority districts. Depending on the statutorily protected minority group's percentage of the jurisdiction's population, the overall strength of the plaintiff's showing on the *Gingles* preconditions, and the Senate factors, a court can determine if section 2 requires two or more minority-viable districts.⁸⁹ It is in this situation that an alternative electoral remedy may often achieve section 2 compliance when a districting remedy fails. Alternative systems often produce minority electoral victories in rough proportion to the percentage of minority voters. Because they are unencumbered by the demographic and *Shaw* constraints affecting district remedies, these alternative systems may be able to provide sufficient relief where district remedies cannot.⁹⁰

86. See, e.g., *Harvell v. Blytheville Sch. Dist.*, 126 F.3d 1038, 1040 (8th Cir. 1997) ("The district court need not defer to a state-proposed remedial plan, however, if the plan does not *completely* remedy the violation . . ." (emphasis added)).

87. See, e.g., *id.* at 1039.

88. In *Abrams v. Johnson*, 521 U.S. 74 (1997), the Supreme Court evaluated the Georgia congressional districting plan approved by the lower court after the prior plan was struck down on *Shaw* grounds. See *id.* at 93. The Court noted with approval the district court's conclusion, after reviewing local racial bloc voting patterns, that a traditionally black-majority district in the Atlanta area should be comprised of at least 55% black registered voters. See *id.*

89. See, e.g., *Teague v. Attala County*, 92 F.3d 283, 285, 294 (5th Cir. 1996) (reversing a lower court ruling against the plaintiffs on the plaintiffs' claim that the number of black-majority county commission districts should be raised from one to two). But see *Johnson v. De Grandy*, 512 U.S. 997, 1002, 1017-22 (1994) (reversing a lower court ruling that the state should have created 11 instead of nine Hispanic-majority districts and noting that "one may 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").

90. I do not mean to suggest that section 2 plaintiffs automatically are entitled to a share of districts proportional to their share of the population. The Court in *De Grandy* made clear that that is not the case. See *De Grandy*, 512 U.S. at 1013-16. The Court, however, also made clear that "proportionality," while not a floor, is also not a ceiling: section 2 does not forbid remedial districting plans that achieve proportionality. See *id.* at 1016-18; *infra* 164-68 and accompanying text. I merely suggest that when a standard section 2 analysis would otherwise indicate that plaintiffs were entitled to a reasonable chance to fill, say, three seats with candidates of choice, but only one compact minority district can be drawn, the court should look to alternative electoral systems rather than accept a clearly insufficient districting remedy.

For example, suppose that in our hypothetical county with a five-member commission, Hispanics make up 35% of the voting age population ("VAP"), but only one compact Hispanic-majority district can be drawn. A threshold of exclusion analysis would suggest that politically cohesive Hispanic voters could elect *two* candidates of choice under an alternative system because the Hispanic VAP exceeds 34% ($2 \times 17\%$).⁹¹

If the defendant fails to respond with a legally acceptable remedy, the responsibility falls on the district court to choose or devise a remedial plan.⁹² In so doing, however, the court must still defer as much as possible to the defendant jurisdiction's stated policies and preferences as expressed in statutory provisions or in prior electoral plans.⁹³ The court must not "intrude upon [the jurisdiction's] stated policy any more than necessary."⁹⁴

One district court tried to implement this solution in *Cane v. Worcester County*.⁹⁵ At the remedy phase of the litigation, the defendant proposed a traditional at-large plan that was virtually identical to the plan found to violate section 2, and the court rejected the plan as inadequate.⁹⁶ The county expressed no preference as between a district plan and a cumulative voting plan.⁹⁷ The court then reviewed legislative statements expressing a policy preference for a traditional at-large system and, on that basis, ordered cumulative voting as a remedy because such a remedy retained the at-large

91. Generally, a cohesive share of the electorate that is X times the threshold of exclusion will elect X candidates of choice. If a minority bloc is twice the threshold, it can elect two candidates; if it is three times the threshold, it can elect three candidates; and so on. See CENTER FOR VOTING AND DEMOCRACY, PROPORTIONAL VOTING SYSTEMS: THRESHOLDS OF REPRESENTATION TO WIN ONE/MORE SEATS 1, 1 (1998) (on file with *North Carolina Law Review*).

92. See *Upham v. Seamon*, 456 U.S. 37, 39 (1982) (stating that a court should not defer to a legislature's judgment if the legislature's preferred plan violates federal law); *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1124 (5th Cir. 1991) (ordering the elimination of an at-large electoral scheme in favor of a districting system); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 504 (5th Cir. 1987) (approving a district court order invalidating an at-large electoral scheme and replacing it with a single-member district system); *League of United Latin Am. Citizens v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1503 (5th Cir. 1987) (same).

93. See *Upham*, 456 U.S. at 41-42; *White v. Weiser*, 412 U.S. 783, 794-95 (1973).

94. *White*, 412 U.S. at 794-95 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)). This rule of deference may require courts to search through the local jurisdiction's ordinances, resolutions, and other expressions of official positions regarding electoral systems to attempt to divine a clear preference.

95. 847 F. Supp. 369 (D. Md.), *aff'd in part, rev'd in part*, 35 F.3d 921 (4th Cir. 1994).

96. See *id.* at 371-72.

97. See *id.* at 371.

nature of the system.⁹⁸ The Fourth Circuit reversed because it disagreed with the district court's divination of the county's preferences, concluding that the county would prefer a single-member district plan.⁹⁹ Significantly, the Fourth Circuit did not hold that cumulative voting could never be a remedy.

The "defendant's choice" rule may also fail to provide a clear remedial solution in other situations, such as when defendants differ among themselves as to the proper remedy.¹⁰⁰ Another example occurs when the defendant's preferred remedy initially appeared to repair fully the underlying vote dilution, but flaws in the remedy appeared upon implementation.¹⁰¹

B. State Law Considerations

A corollary to the "defendant's choice" rule is the notion that when choosing between two or more remedies, all of which satisfy the Voting Rights Act and the Constitution, the court should choose the plan that does the least violence to state as well as local election requirements. The need for maximum consistency with state law is always part of a district court's remedial calculus in standard voting cases.¹⁰² Thus, even when there is no way to ascertain the defendant

98. See *id.* at 374.

99. See *Cane*, 35 F.3d at 928. For another example of a district court interpretation of a defendant jurisdiction's silence on the question of remedy, see *infra* Part II.B (discussing *Cousin v. McWherter*, 904 F. Supp. 686 (E.D. Tenn. 1995), *rev'd and vacated sub nom. Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1026 (1999)).

100. See *McCoy v. Chicago Heights*, 6 F. Supp. 2d 973, 978 (N.D. Ill. 1998) (noting that City and Park Districts proposed different districting plans).

101. See *id.* at 979-81 (noting that the record showed that under a consent decree remedy, ties along racial lines among six councilmembers were frequent and that the white mayor elected at-large always voted with the white councilmembers to break the tie).

102. See *Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs*, 142 F.3d 468, 476 (D.C. Cir. 1998) (setting aside a voting rights consent decree on the grounds that its terms conflicted with state law, it was not approved or passed by the state legislature, and it was not strictly necessary to remedy a finding of liability regarding the deprivation of a federal statutory or constitutional right); *Perkins v. City of Chicago Heights*, 47 F.3d 212, 218 (7th Cir. 1995) (same); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 846-48 (5th Cir. 1993) (en banc) (same); *Brooks v. State Bd. of Elections*, 848 F. Supp. 1548, 1563-66 (S.D. Ga. 1994) (same). But see *Lawyer v. Department of Justice*, 521 U.S. 567, 578-79 (1997) (approving a statewide redistricting settlement that was not passed by the state legislature on the ground that, *inter alia*, the state attorney general had the authority under state law to enter into such a consent decree); *Armstrong v. Adams*, 869 F.2d 410, 414 (8th Cir. 1989) ("Any limitation of power imposed by state law on the Board of Election Commissioners is vitiated by the authority of the district court to remedy constitutional violations that may have occurred during the election."). The cases are somewhat mixed on the exact extent of courts' authority under the Supremacy Clause to impose or approve vote dilution remedies that may conflict with state law. Courts differ as to whether an

jurisdiction's preference regarding electoral remedies, state law restrictions on electoral systems may still provide guidance.

The concern for harmony with state law motivated the appellate court to set aside the limited voting consent decree in *Cleveland County Ass'n for Government by the People v. Cleveland County*.¹⁰³ In that case, the D.C. Circuit noted that North Carolina law provided that several electoral changes brought about by the Voting Rights Act consent decree at issue—an increase in the number of county commissioners, a change from a traditional at-large system to a limited voting system, and the temporary appointment of two commissioners who would be “representative of the black community”—could be effected only by a countywide referendum or an act of the state legislature.¹⁰⁴ The court reasoned that because this procedure was not followed, the district court needed either a finding or an admission of Voting Rights Act liability before approving the decree.¹⁰⁵

Notably, the court's opinion did *not* constitute an attack on the viability of limited voting or other alternative voting schemes as Voting Rights Act remedies. In fact, the court expressly stated:

We do not hold today that the limited voting scheme provided for in the consent decree is itself contrary to the “public policy” or even the law of North Carolina—indeed . . . it has been successfully implemented in several other jurisdictions in the state. . . . Rather, the consent decree fails because state law prevents the Board from unilaterally agreeing to *any* change in its structure or method of election.¹⁰⁶

admission or finding of liability is required, which public officials are empowered to enter into such settlements, and other details. See, e.g., *infra* note 98. Nonetheless, it is clear that courts make a serious effort to avoid conflicting with state law whenever possible.

103. 142 F.3d 468 (D.C. Cir. 1998).

104. *Id.* at 475-76.

105. See *id.* at 477-78 & n.18 (rejecting a contrary holding in *Armstrong*, 869 F.2d at 414). In stating this broad rule requiring either an adjudication or admission of liability on the underlying federal claim before a court can approve a consent decree inconsistent with state law, the *Cleveland County* appellate panel arguably misread the Supreme Court's opinion in *Lawyer*. In *Lawyer*, the State of Florida adopted a new redistricting plan through a consent decree without an admission or adjudication of liability, contrary to state law. The Court rejected arguments that such an admission or adjudication was necessary. See *Lawyer*, 521 U.S. at 575-80. The *Cleveland County* court distinguished *Lawyer* on the ground that the State had authority under state law to alter its own redistricting plan, whereas a county, as a subordinate government unit, could not act in a manner inconsistent with state law absent an adjudication or admission of a federal law violation. See *Cleveland County*, 142 F.3d at 476 n.15.

106. *Cleveland County*, 142 F.3d at 478.

In *Cousin v. Sundquist*,¹⁰⁷ Tennessee state law considerations pointed *away* from district remedies and *toward* alternative remedies. In response to the court's liability ruling,¹⁰⁸ the state legislature initially passed legislation providing for the election of county judicial posts through single-member districts, or in the alternative, by limited or cumulative voting.¹⁰⁹ The state attorney general issued an opinion concluding that a districting scheme would violate the state constitution, which required that the judges be elected from the same geographic area over which they exercised jurisdiction.¹¹⁰ The attorney general's opinion was silent on the question of limited or cumulative voting.¹¹¹ In response, the Tennessee House of Representatives incorporated an amendment to the proposed legislation establishing cumulative voting that would be effective two years from the date of enactment, but the proposed legislation did not pass the House.¹¹² In its pleadings, the State took no formal position on remedy.¹¹³ The court considered these actions to be indicia of state policy, and it also discussed policy considerations for and against cumulative voting over district remedies before deciding to adopt a cumulative voting remedy.¹¹⁴ This remedial judgment seems correct, particularly in light of the state's unicameral endorsement of a cumulative voting solution.

The Sixth Circuit reversed and remanded, however, criticizing the district court's opinion on a number of distinct grounds.¹¹⁵ Although the appellate court could have disposed of the entire case through its ruling that section 2 had not been violated, the court criticized both single-member districts and cumulative voting as remedies, particularly in judicial election cases.¹¹⁶

107. No. 1:90-CV-339 (E.D. Tenn. July 3, 1996), *rev'd and vacated*, 145 F.3d 818 (6th Cir. 1998), *and cert. denied*, 119 S. Ct. 1026 (1999).

108. *See* *Cousin v. McWherter*, 904 F. Supp. 686, 713-14 (E.D. Tenn. 1995), *rev'd and vacated sub nom. Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998), *and cert. denied*, 119 S. Ct. 1026 (1999). The Sixth Circuit reversed on both liability and remedy in *Sundquist*, vacating both the reported liability decision *McWherter* and the unreported remedy decision *Sundquist*. *See Sundquist*, 145 F.3d at 818.

109. *See Sundquist*, No. 1:90-CV-339, slip op. at 2-4.

110. *See* Op. Tenn. Att'y Gen. No. 96-023 (Feb. 22, 1996), at 1-2.

111. *See Sundquist*, No. 1:90-CV-339, slip op. at 4. The Attorney General opinion relied on article IV, sections 4 and 5 of the Tennessee Constitution. *See* Op. Tenn. Att'y Gen. No. 96-023, at 3.

112. *See Sundquist*, No. 1:90-CV-339, slip op. at 4-7.

113. *See id.* slip op. at 7.

114. *See id.* slip op. at 8-13.

115. *See Cousin v. Sundquist*, 145 F.3d 818, 828-31 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1026 (1999).

116. *See id.* at 829-31.

Finally, the court in *McCoy v. Chicago Heights*¹¹⁷ adopted a cumulative voting remedy while emphasizing that Illinois law explicitly authorized cumulative voting as a local electoral method.¹¹⁸ Citing its responsibility to avoid "intrud[ing] upon state policy any more than necessary,"¹¹⁹ the court also emphasized the long history of cumulative voting in Illinois, including its use in electing state legislators from 1870 to 1980.¹²⁰ To keep the number of councilmembers the same as under the existing system (and perhaps to ensure a sufficiently low threshold of exclusion), the court ordered seven-member cumulative voting elections, even though the relevant Illinois statute specifically authorized three-member cumulative voting elections.¹²¹ Interestingly, this remedial order modified a consent decree that mandated seven single-member districts, a plan that itself constituted a slight deviation from what was explicitly authorized under Illinois law.¹²²

Overall, the case law establishes that when a defendant jurisdiction does not present the district court with a remedial proposal adequate under the Voting Rights Act, the court has broad discretion to provide a full and complete remedy to the underlying violation.¹²³ Therefore, when the defendant jurisdiction's preference cannot be discerned with confidence and state law considerations do not dictate the outcome, a court may use policy considerations to inform its choice of competing remedies. Some useful policy considerations are discussed below.

C. General Preferability of Alternative Schemes

I recommend a general policy preference for alternative electoral schemes over district remedies. Alternative electoral methods possess the following virtues which commend their use: the ability to

117. 6 F. Supp. 2d 973 (N.D. Ill. 1998).

118. See *id.* at 984-85.

119. *Id.* at 984 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)).

120. See *id.* For a discussion of how Illinois ended its statewide use of cumulative voting in 1980, see *infra* note 212.

121. See *Chicago Heights*, 6 F. Supp. 2d at 985.

122. See *id.* at 976.

123. See *Louisiana v. United States*, 380 U.S. 145, 154 (1965) (discussing the breadth and flexibility of a federal court's equitable discretion regarding remedies). Federal courts are empowered and required to do whatever is necessary to cure voting rights violations. See *id.*; see also S. REP. NO. 97-417, at 31 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 208 ("The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." (emphasis added)).

remedy minority vote dilution without running afoul of *Shaw*; the promotion of ideological, partisan, and gender diversity as well as racial and ethnic diversity; a more accurate reflection of the popular will; and enhanced competitiveness, which in turn will lead to enhanced voter turnout. More fundamentally, alternative methods provide voters with "actual" rather than "virtual" representation and avoid the risk of sacrificing "substantive" representation for "descriptive" representation.

1. Diversity, Proportionality, Competition, and Turnout

Limited, cumulative, and preference voting all substantially enhance the ability of cohesive racial and ethnic minorities to elect preferred candidates.

a. Limited Voting

Some good examples of limited voting elections can be found in Alabama as a result of a section 2 challenge to at-large election schemes in nine Alabama counties.¹²⁴ In the fourteen municipalities in which black candidates ran, black candidates won in thirteen; the sole losing black candidate lost by only a single vote.¹²⁵ These black candidate victories were the first ever in ten of the thirteen municipalities.¹²⁶ Limited vote elections held at the local level in North Carolina and Georgia yielded similar results.¹²⁷

b. Cumulative Voting

The track record of the first cumulative voting elections held (pursuant to settlements) in the late 1980s and early 1990s is equally as impressive as limited voting from the standpoint of racial and ethnic minority empowerment. Whenever racial or ethnic minority candidates ran, cumulative voting resulted in the election of racial or ethnic minority candidates for the first time in decades (or ever).¹²⁸ This result occurred in various areas of the country and for various

124. See *Dillard v. Crenshaw County*, 748 F. Supp. 819, 824 n.9 (M.D. Ala. 1990); see also *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1461-62 (M.D. Ala. 1988) (tracing the history of the *Dillard* litigation).

125. See Engstrom, *supra* note 47, at 758-59. In seven of the 14 municipalities, the black candidates ran uncontested. See *id.* at 758.

126. See *id.* at 759.

127. See *id.*; see also 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, 227-30 (1989) (describing minority candidate victories in the first round of limited voting elections in local jurisdictions in North Carolina and Alabama).

128. See Engstrom, *supra* note 47, at 752-57.

statutorily protected minority groups: Peoria, Illinois (black candidate); Alamogordo, New Mexico (Hispanic candidate); Sisseton, South Dakota (Native American candidates); and local jurisdictions in Alabama (black candidates).¹²⁹ Moreover, analysis of the electoral returns and exit surveys indicated that racial and ethnic minority voters "plumped" their votes behind one candidate at a higher rate than other voters and that this strategic voting—allowable only under a cumulative voting system—was instrumental to the minority candidates' victories.¹³⁰

Even more striking are the results of a study done on the use of cumulative voting in local jurisdictions in Texas. In fourteen electoral contests pitting a white candidate against a Hispanic candidate preferred by Hispanic voters, the Hispanic candidates won eight and lost six.¹³¹ In all six losses, the Hispanic share of the electorate was well below the threshold of exclusion.¹³² In seven of the eight Hispanic candidate victories, Hispanic voters were above or near the threshold of exclusion.¹³³ This study not only suggests that cumulative voting can help significantly racial and ethnic minority voters, but also that the threshold of exclusion is an accurate predictor of their ability to elect their candidates of choice. Further, when the threshold does err, it tends to err on the side of conservatism in predicting minority voters' ability to elect preferred candidates. This finding probably can be explained by minority voters' tendency to vote strategically at a greater rate than whites.

Concerns have been raised that cumulative voting will not yield greater minority representation in areas where minority voters are insufficiently sophisticated or insufficiently politically mobilized to use their votes strategically. For example, the U.S. Department of

129. See *id.* This record of minority electoral success has continued to the present day. See, e.g., Brischetto & Engstrom, *supra* note 54, at 974 (describing the adoption and use of cumulative voting by at least 15 municipalities and 32 school boards in Texas since 1991); Engstrom et al., *supra* note 54, at 185 (describing Alabama's use of cumulative voting in four municipalities plus the county commission and school board of another county since 1988); Engstrom et al., *supra* note 6, at 297-301 (describing the 1992 elections for county commissioners in Chilton County, Alabama).

130. See Engstrom, *supra* note 47, at 753-55. For a more detailed discussion of the evidence linking the ability to "plump" with racial and ethnic minority candidates' victories, see Richard L. Engstrom et al., *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico*, 5 J.L. & POL. 469, 489-95 (1989), and Richard L. Engstrom & Charles J. Barrilleaux, *Native Americans and Cumulative Voting: The Sisseton-Wahpeton Sioux*, 72 SOC. SCI. Q. 388, 391-92 (1991).

131. See Brischetto & Engstrom, *supra* note 54, at 982-83.

132. See *id.* at 985.

133. See *id.* at 984.

Justice has denied administrative "preclearance" not only for cumulative voting plans, but also for more mundane new voting systems¹³⁴ when local authorities failed to explain adequately the new system to affected voters.¹³⁵ The Department has made clear, however, that this impediment is correctable with reasonable publicity and a voter education program.¹³⁶

c. Preference Voting

Preference voting elections also increase the election of candidates preferred by racial and ethnic minorities. For example, after the first preference vote election for New York City community school boards in 1970, the percentage of black and Hispanic community school board members jumped to levels close to the corresponding black and Hispanic percentages of the citywide population.¹³⁷ These percentages increased with the rising populations of blacks and Hispanics throughout the following decades. The use of preference voting resulted in much more proportional results than in the single-member district city council elections held during this period, despite the presence of a number of minority-oriented single-member districts in the city council districting plan.¹³⁸

These electoral results strongly suggest that alternative systems may play a useful role in countering vote dilution of racial and ethnic groups protected under the Voting Rights Act. Such systems also promote diversity in ways consistent with the inclusive spirit of the Act. For example, alternative systems tend to improve electoral chances for female candidates,¹³⁹ at least as compared to single-member district systems.¹⁴⁰ In Germany, which has a mixture of proportional representation and plurality-vote, single-member district elections, female candidates consistently perform better in the proportional representation races.¹⁴¹ A recent study of U.S. municipal and state legislative elections supports this conclusion by

134. For example, the use of more complicated voting machines.

135. See Steven J. Mulroy, *Limited, Cumulative Evidence: Divining Justice Department Positions on Alternative Electoral Schemes*, 84 NAT'L CIVIC REV. 66, 67-68 (1995); *supra* note 83.

136. See Mulroy, *supra* note 135, at 67-68.

137. See AMY, *supra* note 48, at 138.

138. See *id.*

139. See Engstrom et al., *supra* note 6, at 293-94.

140. See AMY, *supra* note 48, at 99-113. The Voting Rights Act does not forbid discrimination on the basis of gender.

141. See *id.* at 106-07.

suggesting that multimember elections afford a better opportunity for female candidates than do single-member elections.¹⁴²

Proponents of these systems also tout other advantages reflecting "good government." Mathematically, the elections tend to lead to results that more accurately reflect the entire electorate's preferences; indeed, they are designed to do precisely that. Because a lower threshold of exclusion allows less well-known candidates and parties to have a realistic chance of taking a seat, and because these systems also tend to prevent dominant groups from sweeping elections, electoral contests held under these systems tend to be more competitive and to offer voters more choices.¹⁴³ The extra competition and choice lead to higher participation rates.¹⁴⁴

The higher voter turnout rate expected from alternative electoral systems constitutes an independent reason for supporting their use, a particularly compelling one in light of the abysmal turnout rates currently exhibited in U.S. elections.¹⁴⁵ Much of the evidence for higher turnout comes from studies using similar proportional representation systems in other countries. One study has shown that turnout rates in Western industrialized democracies using proportional representation systems tend to be roughly ten percentage points higher on average than in countries using the

142. See R. DARCY ET AL., *WOMEN, ELECTIONS, & REPRESENTATION* 159-68 (2d ed. 1994). This result may occur because parties are more willing to nominate female candidates—to achieve gender balance or for other reasons—in multi-seat races. The nomination all-male slates of candidates may seem odd when three or more candidates are nominated in one multimember race. It may also be that voters are more willing to vote for one female candidate when they can also vote for one or more male candidates; when voters must select only one person, they may be more guided by the traditional American preference for male political leaders.

The "gender dimension" to the proportional representation debate has generated some recent attention in the popular media. See, e.g., Wilma Rule et al., *Voting for a Change*, Ms., Sept.-Oct. 1996, at 26.

143. See AMY, *supra* note 48, at 76-98 (citing additional sources).

144. See *id.* at 144-48 (citing additional sources). In winner-take-all elections, a 10% increase in voter turnout may mean only the difference between a narrow victory and a landslide for a majority party or voting bloc (or the difference between an honorable loss and a blowout for a minority party or bloc), with no actual difference in power after election day. In alternative elections, such a turnout increase may translate into 10% more power for a majority or minority group. Thus, political parties, minority groups, and other organized voters have a great incentive to increase get-out-the-vote efforts.

145. See *id.* at 140-43 (contrasting the U.S. election turnout rate of 50% in the 1988 presidential election with the rates in most other Western democracies, which usually experience roughly 70%-80% turnout); Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1, 5 (1997) (summarizing empirical research that makes a similar contrast and noting an average U.S. off-year turnout rate of 35% and a local election turnout rate of 25% in recent years).

traditional, winner-take-all electoral method.¹⁴⁶ If the “outlier” result of New Zealand—with a turnout rate twelve percentage points higher than any other winner-take-all country—is excluded, the turnout advantage rises to fifteen percentage points.¹⁴⁷ Recent comparative studies that control for other factors arguably affecting turnout have estimated that using these systems boosts turnout somewhere between 9% and 12%.¹⁴⁸

2. “Actual” Rather than “Virtual” Representation

In any districting scheme, with or without minority districts, some voters will always be “left out.” That is, there will always be Democrats in Republican districts, blacks in white districts, conservatives in liberal districts, and so forth. It is impossible to design a districting system in which every individual is satisfied with where she is placed. Instead, voters must rely on “virtual representation”¹⁴⁹—the notion that as long as groups have fairly apportioned control over districts, the effective disenfranchisement of, say, individual Hispanics stuck in an overwhelmingly Anglo district does not matter.¹⁵⁰ In theory, such Hispanic voters will be “virtually represented” by the Hispanic-preferred candidates in other Hispanic-majority districts throughout the jurisdiction. Courts have recognized this phenomenon and have correctly considered virtual representation an acceptable part of districting.¹⁵¹

146. See AMY, *supra* note 48, at 140-41.

147. See *id.*

148. See Lijphart, *supra* note 145, at 7. Lijphart cites four recent studies: Andre Blais & R.K. Carty, *Does Proportional Representation Foster Voter Turnout?*, 18 EUR. J. POL. RES. 167, 174 (1990); Walter Dean Burnham, *The Turnout Problem*, in ELECTIONS AMERICAN STYLE 97, 106-07 (A. James Reichley ed., 1987); Mark N. Franklin, *Electoral Participation*, in COMPARING DEMOCRACIES: ELECTIONS AND VOTING IN GLOBAL PERSPECTIVE 216, 226 (Laurence LeDuc et al. eds., 1996); Arend Lijphart, *Democracies: Forms, Performance, and Constitutional Engineering*, 25 EUR. J. POL. RES. 1, 5-7 (1994).

149. See Note, *supra* note 52, at 147 n.120 (discussing the origin of the term).

150. Some commentators have referred to those persons forced to rely on virtual representation as “filler people.” See, e.g., Aleinikoff & Issacharoff, *supra* note 6, at 630-31. The term reflects the reality that persons drawing districting plans will create, say, a “safe” Democratic district, but, lest Democratic strength be wasted by unduly “packing” a district with Democratic voters, the district will be drawn to include a 40% or so complement of Republicans as “filler.” The process is reversed when drawing districts designed to be “safe” for Republicans. As another example, whites may be used as “filler people” when drawing minority-majority districts. See *id.* at 633. This practice, inherent in any districting system, does not occur within alternative systems.

151. See, e.g., *Gomez v. City of Watsonville*, 863 F.2d 1407, 1414 (9th Cir. 1988) (approving a remedial districting plan in which approximately 60% of the city’s Hispanics would live outside the two Hispanic remedial districts); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (citing *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), and

Virtual representation, however, is not truly necessary. Voters in alternative systems have the opportunity to "self-district." They may, in effect, place themselves in whichever "district" they want by casting their votes on whatever racial, ethnic, partisan, gender, or ideological basis they choose. These systems are designed to minimize the number of "wasted" votes¹⁵² by reducing voter frustration caused by the inability to elect any candidates of choice. As an empirical matter, almost all voters are able to point to at least one incumbent and say, "I voted for that person."¹⁵³ In this way, these systems promote actual representation and do not rely on virtual representation.

Similarly, alternative systems provide more opportunities for gradations of difference. "Virtual representation" means not only that Democrats in a Republican district have to "feel represented" by a Democrat elsewhere, but also that many liberal Democrats will have to feel represented by a moderate Democrat and vice versa, creating even more dimensions in which voters in traditional systems feel unrepresented. For example, the Georgia congressional delegation currently consists of eight conservative white Republicans and three liberal black Democrats.¹⁵⁴ Undoubtedly, many moderate white voters of both parties do not feel represented by *anyone* in the delegation. By fostering a wider, more evenly spaced ideological distribution in the set of elected legislators, alternative systems ameliorate this additional sense of disenfranchisement.

noting that the fact that some members of a protected minority group live outside the minority district does not defeat a section 2 claim).

152. See AMY, *supra* note 48, at 24-26.

153. See Engstrom, *supra* note 47, at 762. In preference voting, the percentage of ballots cast for at least some winning candidates rises with the number of seats to be filled: at least 5/6 for an election to fill five seats, for example. See Edward Still & Robert Richie, *Alternative Electoral Systems as Voting Rights Remedies*, 1997 FED. ELECTIONS COMM'N J. ELECTIONS ADMIN. 18, 22. In practice, the percentage can be higher: One study of preference voting in Cambridge, Massachusetts showed that 96% of the electorate voted for at least one winning candidate, with 80% seeing their first or second choice elected. See AMY, *supra* note 48, at 26. An empirical study of limited and cumulative voting elections in Alabama found that at least 73% of the voters in limited voting and at least 61% of the voters in cumulative voting jurisdictions have voted for winning candidates. See Edward Still, *Cumulative Voting and Limited Voting in Alabama*, in UNITED STATES ELECTORAL SYSTEMS: THEIR IMPACT ON WOMEN AND MINORITIES 183, 191 (Wilma Rule & Joseph F. Zimmerman eds., 1992). These results contrast with winner-take-all systems when, in close two-candidate races, the percentage voting for a winning candidate can be as low as 51%, and in plurality elections even smaller.

154. See Jeffrey Rosen, *Southern Comfort*, NEW REPUBLIC, Jan. 8-15, 1996, at 4, 4 (indicating that after the 1996 election, the Georgia congressional delegation consisted of eight white Republicans and three black Democrats).

These differences in alternative systems have both practical and psychological advantages. As a practical matter, electoral results tend to mirror more closely popular preference. Equally important is the psychological benefit. With more voters feeling as though they have at least one representative to call "their own," satisfaction with the electoral system rises while cynicism and apathy fall. Because each voter feels as though she has less of a chance of suffering a "shutout" at the polls, voter participation increases.

3. Elimination of Any Conflict Between "Descriptive" and "Substantive" Representation

Another advantage of alternative systems is that they avoid a tradeoff, or the perception of a tradeoff, between the election of candidates of choice on the one hand and overall influence on legislative outcomes on the other. Some critics of majority-minority districts argue that such districts actually *reduce* minority voters' ability to influence legislative outcomes by lowering the total number of representatives elected from *all* districts who are responsive to minority voters' concerns.¹⁵⁵ Drawing black-majority districts, for example, "bleaches" neighboring districts, making them more conservative and Republican, resulting in an overall legislative delegation that votes less favorably from black voters' perspective on issues.¹⁵⁶ One commonly cited example is the 1990s congressional redistricting in Georgia, which went from having nine Democratic representatives (one of whom was black) and one Republican representative (white) to only three Democratic representatives (all black) and eight Republican representatives (all white).¹⁵⁷ As a result, black voters may have improved their "descriptive representation" (that is, the extent to which they are represented by candidates of choice), but only at the expense of their "substantive representation" (that is, the extent to which their substantive preferences on the issues are reflected in legislative policy

155. See Michael Kelly, *Segregation Anxiety*, NEW YORKER, Nov. 20, 1995, at 43, 48, 53; Rosen, *supra* note 154, at 49.

156. The liberal, Democratic voting tendencies of black voters are well documented. See, e.g., DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 57-59, 73-78 (1997).

157. See Rosen, *supra* note 154, at 4. But see Laughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 MISS. L.J. 271, 295-96 & n.113 (1995) (describing this argument but arguing that the causal link between minority districts and Democratic losses is exaggerated, and using Georgia as an example of how the trade-offs "between creating majority black districts and electing more Democrats" can often be "minimized").

outcomes).¹⁵⁸

While this point has some merit, it can easily be overstated. For example, the "bleaching" effect has been credited (or blamed) for the Democrats' loss of the U.S. House of Representatives in 1994.¹⁵⁹ Most studies, however, show that the drawing of minority-majority districts played only a small role in that loss and that the actual number of Democratic seats lost due to minority-majority districts was smaller than generally supposed.¹⁶⁰

Moreover, this "tradeoff" between descriptive and substantive representation¹⁶¹ may result more from inartful district drawing than from an inherent flaw in race-conscious districting. A recent empirical study of congressional elections indicated that for minority voters, such a tradeoff occurs only in the South and only where the drawing of majority-minority districts reduces the total number of districts in the state that are more than 40% black in population (largely because such districting reduces the total number of Democrats).¹⁶² Because districts around 40% in minority population frequently can elect minority voters' candidates of choice,¹⁶³ it might often be possible to draw districts that elect candidates of choice

158. See LUBLIN, *supra* note 156, at 36-37, 57-97.

159. See, e.g., Kelly, *supra* note 155, at 46; Rosen, *supra* note 154, at 4.

160. See LUBLIN, *supra* note 156, at 123 (noting that new majority-minority districts cost Democrats only nine seats in 1992 and 1994, compared to 54 total seats lost in 1994 when the Democrats lost control of the House of Representatives); David A. Bositis, *The Future of Majority-Minority Districts and Black and Hispanic Legislative Representation*, in REDISTRICTING AND MINORITY REPRESENTATION 9, 19 (David A. Bositis ed., 1998) (estimating that minority districting cost eight to 13 Democratic seats); see also Allan J. Lichtman, *Quotas Aren't the Issue*, N.Y. TIMES, Dec. 10, 1994, at A23 (finding that equally significant Democratic losses in non-district, at-large races and an overall decline in Democratic support were more important reasons for the Democrats's loss of control of the House of Representatives).

161. Choosing between such representative goals is not as easy as it may first appear. Although maximizing the number of times the legislature votes the way a minority group prefers would seem to be a universal priority, minority voters might be willing to settle for a slightly lower batting average at the end of a legislative session if they know they have a representative who can be counted on to vote the right way (or vigorously advocate the right approach) on a few core issues. Alternatively, minority voters might place a high value on having an incumbent who shares their background and thus is viewed as accessible to pleas for constituent service.

162. See LUBLIN, *supra* note 156, at 89-90, 92-93, 99-102. Lublin conducted statistical regression analyses of more than 5000 congressional elections between 1972 and 1994. In 3800 of them, he compared district characteristics to the voting records of the representatives elected, scored along an ideological scale developed previously by other political scientists. See *id.* at 41, 68, 82, 89-90, 92-93.

163. See Allan J. Lichtman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 LA RAZA L.J. 1, 11-16 (1993) (explaining how minority districts below 50% in minority population may still elect minority candidates of choice).

without unduly diminishing the influence of those voters on legislative outcomes. Thus, the districting dilemma for minority voters, while real, is not as common as one might think and may often be avoidable with more informed plan-drawing.

Whether this tradeoff is real or imagined, common or rare, avoidable or inevitable, it applies only to district remedies. Alternative remedies allow minority groups to elect a number of representatives proportional to their share of the electorate while simultaneously permitting and encouraging coalitions with other-race candidates who share their views. The ability of alternative remedies to avoid the dilemma described above is a strong argument in their favor.

4. Criticisms of Alternative Systems

As a preliminary matter, one threshold legal argument against the use of alternative systems must be addressed. Alternative systems have been criticized precisely because they are designed to achieve or approximate "proportional representation," a result that is arguably forbidden by the language of section 2 of the Voting Rights Act.¹⁶⁴ This criticism refers to the "proviso" of section 2, which states that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."¹⁶⁵ This language has been interpreted to mean that statutorily protected minority groups are not *entitled* to "proportional representation."¹⁶⁶

The section 2 proviso does not refer to "proportionality" in the political science sense of classifying electoral systems. Instead, the proviso's language merely links the success rate of minority candidates to the minority group's share of the population.¹⁶⁷ Thus, if blacks make up 40% of a jurisdiction's population, the section 2 proviso makes clear that a consistent failure by black candidates to win 40% of the governing body's seats would not, *by itself*, constitute a section 2 violation. Instead, plaintiffs still would have to prove—regardless of whether they seek district or "alternative" relief—racial bloc voting, historical discrimination, socioeconomic disadvantage,

164. See, e.g., *Cousin v. Sundquist*, 145 F.3d 818, 829-30 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1026 (1999). This argument is discussed in Mulroy, *supra* note 8, at 373-74.

165. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(b)) (amending section 2 of the Voting Rights Act of 1965).

166. See, e.g., *McGhee v. Granville County*, 860 F.2d 110, 116-17, 120 (4th Cir. 1988).

167. See *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994) (explaining the proviso in this manner).

and all the other applicable *Gingles* factors. If they make this showing, however, the fact that their relief would enable them to approach, equal, or even exceed "proportionality" would not be fatal to their claim. This result is entirely consistent with the section 2 proviso and the Voting Rights Act as a whole.¹⁶⁸

Another, more fundamental policy argument against alternative systems is that they do away with the geographic basis of representation. This argument is based on two assumptions: First, geography is a useful proxy for a community of interest on the part of voters; second, geography is a better proxy than the self-selected preferences of voters themselves, whether these preferences derive from racial identity, partisan affiliation, ideological leanings, or any other basis. As an empirical matter, I believe the first proposition is becoming increasingly dubious in the era of the Internet, telecommuting, and "narrowcasting"¹⁶⁹ as physical location becomes a less determinative factor in one's modern life. I consider the second proposition to be almost self-evidently false. Voters in a particular neighborhood may indeed have common issues regarding traffic, garbage pick-up, or opposition to the siting of a hazardous waste dump. Many neighbors, however, may be dissimilar in their political or issue-based outlooks. The "self-districting" of alternative systems allows voters to align themselves with their neighbors if neighborhood issues are important to them, while simultaneously allowing them to unite with like-minded individuals across town as well. Alternative systems thus enhance, rather than replace, geography-based interests as a possible basis for voting.¹⁷⁰

Critics also contend that regardless of the alleged advantages above, alternative systems are unsatisfactory because they make

168. See *id.* at 1017-18 (holding that proportionality is not a "safe harbor" for defendant jurisdictions and that such a result is consistent with the section 2 proviso); see also *id.* at 1025 (O'Connor, J., concurring) (noting that representation lower than a proportional share of a minority group's population is "always relevant" and is "probative evidence of vote dilution" (emphasis added)). This result is consistent with lower court decisions facing this issue. See, e.g., *Williams v. City of Texarkana*, 861 F. Supp. 756, 764 (W.D. Ark. 1992) ("[P]roportional representation is a factor that may be considered in determining whether a violation of § 2 has occurred."), *aff'd*, 32 F.3d 1265 (8th Cir. 1994).

169. "Narrowcasting" refers to the tendency in recent years for television and radio stations to switch from programs designed to appeal to the general public to specialized, non-mainstream programs targeting specific demographic niches. See, e.g., David Waterman, "Narrowcasting" and "Broadcasting" on Nonbroadcast Media: A Program Choice Model, COMM. RES., Feb. 1992, at 3, 4-5.

170. To be sure, neighborhood-based voting in a given jurisdiction would likely be greater in a district system than an alternative system. This, however, merely reflects the fact that district voters have less opportunity to vote in ways not influenced by geography.

constituent-incumbent interaction more problematic. According to this argument, when incumbents are not tied to a discrete geographic area but instead have a jurisdiction-wide constituency, they have less incentive to perform constituent service and less patience for the constituent who drops in at the neighborhood district office. In addition, a voter would feel less of a connection to "her" representative when the voter selects five different people rather than one person. Alternative schemes would thus do away with the connection between a constituent and her "neighborhood representative."

This argument lacks merit at the local level, at least with respect to small jurisdictions. Most local jurisdictions to which the legal theory advanced in this Article would be applied are small enough that in-person constituent-incumbent contact is feasible even if incumbents have jurisdiction-wide constituencies.¹⁷¹ Constituents able to contact a representative conveniently will not be shy about requesting constituent service, and good politicians will know it is in their interest to accede to such requests whenever possible. Indeed, most local jurisdictions used to employ traditional, winner-take-all systems before Voting Right Act concerns prompted them to switch to districting.¹⁷² Thus, this "constituent-incumbent interaction" concern must not have meant much to these local jurisdictions.

Where the jurisdiction is larger, the desire for a truly "local" representative could be satisfied by combining district and alternative systems. Presumably, a larger population might allow for a larger number of representatives in the governing body. For example, the City Council of New York has fifty-one seats.¹⁷³ A large number of seats allows for a sufficient number of district representatives to be elected from relatively small, "intimate" districts, while still leaving available a suitable number of at-large seats to bring the threshold of exclusion down low enough to provide access for cohesive minorities.¹⁷⁴ Such a mixed system is also used in Peoria, Illinois, and

171. For example, the City of Chicago Heights, where a district court recently imposed a cumulative voting remedy, has a total population of only 33,072. *See McCoy v. Chicago Heights*, 6 F. Supp. 2d 973, 976 (N.D. Ill. 1998).

172. *See, e.g., Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1109 (5th Cir. 1991) (holding that the city's at-large method of electing aldermen diluted the voting strength of black citizens).

173. *See Brooklyn Heights Ass'n v. Macchiarola*, 623 N.E.2d 1140, 1140 (N.Y. 1993) (per curiam).

174. Again, historical usage is instructive. Prior to the expansion to 51 seats, the New York City Council had only 35 seats. *See id.* In a city as large as New York, a mere 35 seats must naturally make constituent-incumbent interaction unwieldy, yet that system

until recently, in Alamogordo, New Mexico,¹⁷⁵ as well as in Germany and Japan.¹⁷⁶ An alternative solution would be to divide the jurisdiction into multimember districts and permit each district to use limited, cumulative, or preference voting to elect representatives. As long as each multimember district is small enough to facilitate constituent-incumbent contact, such an approach would satisfy this concern.

Another common criticism of alternative systems is that alternative systems fuel racial bloc voting and fragment the polity into competing racial and ethnic factions, creating the very "balkanization" feared by Justice O'Connor in *Shaw*.¹⁷⁷ This argument is troubling but ultimately unpersuasive. No empirical evidence exists to show that racially polarized voting actually increases as a result of the adoption of alternative electoral systems. Indeed, one argues just as easily that to allow minority candidates to be elected and to show white voters that they can function effectively, the use of alternative systems, like the use of any vote dilution remedy, might have the long-term effect of *reducing* racial bloc voting.¹⁷⁸ To have legally significant racial bloc voting, jurisdictions

continued until 1991. See *id.*

175. See Mulroy, *supra* note 8, at 346 n.67 (discussing Alamogordo's system).

176. See AMY, *supra* note 48, at 229 (describing the German system); *Reform to Spell Major Changes*, JAPAN TIMES, Mar. 11, 1994, at 3 (describing Japan's system).

177. See *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (discussing concerns regarding "balkanization" underlying the *Shaw* cause of action). For examples of this criticism of alternative electoral systems, see *Cousin v. Sundquist*, 145 F.3d 818, 830 (6th Cir. 1998) (citing *Nipper v. Smith*, 39 F.3d 1494, 1546 (11th Cir. 1994) (en banc)), *cert. denied*, 119 S. Ct. 1026 (1999); Nicholas R. Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734, 743 (1983). For a discussion of "fragmentation" criticisms and responses thereto, see Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1489-94 (1991); Karlan, *supra* note 127, at 230-31.

178. Some commentators have argued that racial bloc voting is on the decline in this country, citing the electoral victories of several black congressional candidates from majority-white districts. See, e.g., Charles Krauthammer, *Who Needs Racial Gerrymanders?*, WASH. POST, Nov. 15, 1996, at A31. However, most of the candidates in question were incumbents of previous minority-oriented districts that were then redrawn after *Shaw* challenges. See Michael A. Fletcher, *New Tolerance in the Old South or Old Power of Incumbency?*, WASH. POST, Nov. 23, 1996, at A1. At least some of these candidates credit their incumbency and the Voting Rights Act for their electoral success in their new majority-white venues. See, e.g., Cynthia A. McKinney, Editorial, *A Product of the Voting Rights Act*, WASH. POST, Nov. 26, 1996, at A15. Recent empirical studies do not support the notion that racial considerations are diminishing in relevance. See, e.g., LUBLIN, *supra* note 156, at 3-4, 41-48 (describing statistical analysis of over 5000 congressional election contests between 1972 and 1994 and concluding, after controlling for other factors, that "race overwhelms all other factors" in explaining electoral outcomes and that districts under 45% in black population "almost never elect black representatives").

usually must average other-race "crossover voting" levels below 30%¹⁷⁹—that is, more than 70% of white and black voters regularly must vote along racial lines. Most jurisdictions with successful section 2 challenges have much more pronounced racial bloc voting rates.¹⁸⁰ There is very little room for voting to get more polarized at these levels. At less polarized levels, no section 2 liability exists, and no court can impose alternative electoral systems. This fear that alternative systems would aggravate racial bloc voting seems unwarranted.

On the contrary, evidence in some communities suggests alternative systems encourage not only the formation of cross-racial coalitions but also representatives of different racial and ethnic groups to work together. That was the experience in Cincinnati and New York City during their use of preference voting earlier this century,¹⁸¹ as well as the more recent experience with the use of preference voting in Cambridge, Massachusetts.¹⁸² Indeed, proportional representation systems are widely seen as the solution to the problem of politics divided bitterly among entrenched ethnic groups.¹⁸³ For example, it is no accident that preference voting is a key component of the recent peace plan in Northern Ireland.¹⁸⁴ It has

The exact extent (or lack thereof) of recent improvement in cross-racial voting is irrelevant to the inquiry of this Article, however. Levels of polarization vary from jurisdiction to jurisdiction. In jurisdictions with legally significant racial bloc voting, plaintiffs can make a section 2 claim and, if successful, trigger the remedial analysis explained here. Where they cannot prove legally significant racial bloc voting, their section 2 claim fails, and this Article's remedial analysis is never reached.

179. See, e.g., *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (upholding the district court's finding of no racially polarized voting, based in part on white crossover levels ranging from 22% to 38% and black crossover levels from 20% to 23%).

180. See, e.g., *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1118 (5th Cir. 1991) (citing black and white bloc voting levels of 89% and 84%, respectively); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987) (citing black bloc voting levels over 95%).

181. See Burnham, *supra* note 61, at 142-45 (describing black coalitions with white Democrats and white Republicans in the 1920s and 1930s); Zeller & Bone, *supra* note 61, at 1139-42 (describing a multiracial coalition backing proportional representation in New York in the 1940s, as well as voter support crossing over ethnic lines); cf. Karlan, *supra* note 127, at 247 (noting that the supermajority requirement on the Mobile City Council—another vote dilution remedy—"has distinctly improved political interaction between whites and blacks in Mobile").

182. See AMY, *supra* note 48, at 166-67 (quoting a former Cambridge school committee member as saying that "[p]roportional representation is the reason Cambridge didn't burn during the years of demonstrations, the reason desegregation of the schools was achieved without any significant disruption").

183. See *id.*; Arend Lijphart, *Constitutional Choices for New Democracies*, 2 J. DEMOCRACY 72, 81 (1991).

184. See Deaglan de Breadun, *News Features*, IRISH TIMES, May 30, 1998, at 10

fostered religious harmony in the Irish Republic, while the single-member plurality system formerly used in Northern Ireland has been blamed for inflaming religious tensions by shutting out the Catholic minority.¹⁸⁵

At least as compared to district systems, the flexibility enjoyed under alternative systems creates less of a danger of "balkanization." Voters are free to identify the characteristics or positions that are most important to them and then vote for a like candidate anywhere in the system without being trapped into a partisan or racial face-off within a single district. This ability to "self-district" empowers not just ethnic and racial minorities, but ideological, partisan, and sexual orientation minorities as well.¹⁸⁶ Indeed, some of the local Alabama cumulative voting elections held pursuant to the *Dillard* litigation resulted in the election of a *Republican* candidate for the first time in modern history.¹⁸⁷ A hypothetical black, female, lesbian, environmentalist, Perot-supporter could vote on the basis of any combination of personal characteristics she views as salient or not and still enjoy relative confidence that her vote will not be consistently overwhelmed by some majority voting bloc. If anything, such flexibility should make racial and ethnic bloc voting *less* likely.¹⁸⁸

A related criticism of alternative systems is that they allow the election of "radical" or "fringe" candidates.¹⁸⁹ A commonly cited

(discussing the proportionality electoral features of the new governing body in Ireland and its role in ensuring cooperation in the "divided society" of Northern Ireland).

185. See REIN TAAGEPERA & MATTHEW S. SHUGART, SEATS AND VOTES: THE EFFECTS AND DETERMINANTS OF ELECTORAL SYSTEMS 63 (1989) (noting that the Protestant domination of Parliament excluded Catholics from participation in contentious issues "until all too many Catholics replaced their meaningless ballots with bullets"). For further discussion of preference voting's tendency to foster "crossover" voting for "outsiders," see *infra* note 20 and accompanying text.

186. See Engstrom et al., *supra* note 6, at 293 ("Other voters [besides minorities] that share interests and candidate preferences can employ the cumulative options to help elect candidates of their choice [P]olitical parties that do not attract a plurality of the votes[] and women[] are commonly identified as likely beneficiaries"); Darren Rosenblum, *Geographically Sexual?: Advancing Lesbian and Gay Interests Through Proportional Representation*, 31 HARV. C.R.-C.L. L. REV. 119 (1996) (arguing for the use of proportional representation to advance gay and lesbian voting concerns).

187. See Engstrom et al., *supra* note 6, at 297.

188. By making this comparison to district systems, I do not mean to indicate a rejection of minority districts, which I believe have their place in a court's remedial arsenal; nor do I mean to imply acceptance of the argument that minority districting fuels racial bloc voting or racial separatism. At most, minority districting brings out into the open racial divisions that already exist. By allowing alienated minorities a role in the process, minority districts and alternative systems have an ameliorative effect on racial and ethnic tensions.

189. See AMY, *supra* note 48, at 172-77.

example is the prominence of religious extremist parties in Israel.¹⁹⁰ The response to this criticism is that political access by fringe groups occurs only when the threshold of exclusion is set to very low levels. Until recently, in the Israeli Knesset, the threshold was only 1% of the national vote.¹⁹¹ Contrast post-war Germany, which has seen a relatively stable and moderate series of governments in a system employing an across-the-board requirement of 5% of the vote for all national elections.¹⁹²

Fairness requires that there be some level of support at which a candidate's share of the vote is high enough—say, 10%, 20%, or 30%—that he or she must be viewed as deserving a seat at the table. While individuals may differ about what that minimum is, voters can collectively decide what the threshold ought to be and set it accordingly.¹⁹³ In the local jurisdictions where such systems might be imposed by court order under section 2, the number of seats is low enough, and therefore the threshold of exclusion high enough, to satisfy this concern as a practical matter. Thresholds will usually be more than 10% with nine seats or less and often more than 20% with four seats or less.¹⁹⁴

Once liability is established using the threshold of exclusion/*Gingles* analysis advocated in this Article, the actual minimum vote percentage required of a candidate can be adjusted to account for any “fringe candidate” concerns. If a threshold “naturally” derived from the number of existing seats¹⁹⁵ were deemed too low, a flat requirement for a minimum share of the vote could be imposed, triggering runoff elections among the “losers” when an insufficient number of candidates exceeds the cutoff.¹⁹⁶ Such an adjustment should be permissible as long as it is not motivated by an

190. *See id.* at 169.

191. *See id.* at 170.

192. *See id.* at 170, 229.

193. The threshold can be raised by a number of different mechanisms. Most simply, a flat minimum can be established, as in Germany. Alternatively, the number of at-large seats to be filled using an alternative system in any given election can be reduced through the use of staggered terms, multimember districts, or a mixed system of single-member district and at-large seats.

194. *See* Mulroy, *supra* note 8, at 380 n.110.

195. In *Holder v. Hall*, 512 U.S. 874 (1994), the Supreme Court held that the size of a governing body is not subject to a section 2 challenge. *See id.* at 885. Thus, it seems that the total number of seats on a governing body cannot be changed by court order under section 2.

196. The discussion of the “balkanization” and “fringe” arguments set out above is taken from Mulroy, *supra* note 8, at 352-55. For a discussion of the additional criticism that preference voting systems are too confusing, see *infra* 221-24 and accompanying text.

unconstitutional purpose and does not have the effect of excluding a statutorily protected minority group.

Although opponents of alternative systems may overstate the extent to which extremist candidates would be elected and may pay too little heed to the possibility that winner-take-all systems could sometimes fuel extremism by shutting out and radicalizing a minority bloc, they are right about the inherent moderating effect of the current system. It is undeniable that winner-take-all systems tend to elect more politically moderate candidates and force parties to hover around the political "center."¹⁹⁷ Defenders of the winner-take-all system argue that this moderation reflects the inherent middle-of-the-road nature of the American electorate and favors a healthy stability.¹⁹⁸ But the moderation involved here is merely a reflection of the narrow range of choices voters have under winner-take-all systems. The will of the people should not be thwarted to promote an artificial stasis: If greater ideological diversity is a truer reflection of the electorate's overall preferences, then such diversity ought to be allowed to exist. If, on the other hand, ideological moderation truly results from the inherent middle-of-the road nature of the electorate, then adopting a system which more accurately measures that nature should not unduly change political results.

III. CHOOSING AMONG ALTERNATIVE REMEDIES

Once a court opts for a non-district remedy, which of the three alternative systems should it choose? Each system has advantages and disadvantages, but grounds exist for a clear preference among the three.¹⁹⁹

A. *Limited Voting*

Of the three types of alternative systems discussed in this Article, limited voting is the least helpful alternative to districts. The most compelling reason for this conclusion is the threshold of exclusion

197. This moderating, centrist effect of the winner-take-all system is not in serious dispute among political scientists. See, e.g., ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 114-41 (1957); THEODORE LOWI & BENJAMIN GINSBERG, AMERICAN GOVERNMENT: FREEDOM AND POWER 498 (1990); ALAN STONE & RICHARD BARKE, GOVERNING THE AMERICAN REPUBLIC: ECONOMICS, LAW, AND POLICIES 121 (1985).

198. See AMY, *supra* note 48, at 80, 170-71 (describing this argument); see also *id.* at 26-27 (describing in greater detail the winner-take-all systems' tendency to overrepresent the leading voting bloc).

199. For an explanation of each of these three systems, see *supra* notes 46-61 and accompanying text.

formula.²⁰⁰ This formula consistently yields a higher threshold of exclusion for a given number of seats with limited voting as opposed to either cumulative or preference voting.²⁰¹ Limited voting is thus a less powerful tool for enhancing minority voting strength and less effective at remedying minority vote dilution. Given the small size of local governments in the United States, limited voting would normally yield a high threshold of exclusion—too high for the relevant minority group in many cases.

For example, the limited voting plan at issue in *Cleveland County* allowed each voter to cast four votes to fill seven seats,²⁰² yielding a threshold of exclusion of 36.6%. Because blacks constituted only 18.8% of the county's voting age population,²⁰³ this system by no means assured that black voters would have a realistic opportunity to elect candidates of their choice. In order for the threshold to approach closely the black voters' share of the population, each voter would have to be further limited to casting two votes, which would yield a threshold of 22%.²⁰⁴ Even that figure leaves the threshold slightly higher than what would be needed under the "potential-to-elect" standard I propose.²⁰⁵

The *Cleveland County* scenario is fairly typical and illustrates the sharp reductions in the number of votes available to voters to make limited voting a truly effective vote dilution remedy. For limited voting to match the remedial power of cumulative or preference voting, of course, the number of votes would have to be limited to one per voter,²⁰⁶ even though the election was to fill several open seats. Such a stark limitation on the voter's potential ability to influence the electoral outcome is an unsatisfactory result for a lawsuit designed to strengthen voting rights.²⁰⁷

200. The formula is expressed as:

$$(\# \text{ votes each voter has}) / [(\# \text{ votes each voter has}) + (\# \text{ seats open})] = \text{threshold of exclusion.}$$

201. The one exception is when each voter is allowed only one vote, in which case the limited voting threshold reduces to the same as that for cumulative and preference voting.

202. See *Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs*, 965 F. Supp. 72, 75 (D.D.C.), *rev'd*, 142 F.3d 468 (D.C. Cir. 1998).

203. See *id.* at 74.

204. The mathematical expression is $(2 / (2+7))$.

205. The "potential-to-elect" standard for liability would require section 2 plaintiffs to make a *prima facie* showing that the relevant minority group's population would meet or surpass the formula-derived threshold of exclusion for the electoral scheme sought as the section 2 remedy. See *supra* notes 74-76 and accompanying text.

206. See *supra* text accompanying note 65.

207. To take one concrete example, it would probably frustrate the white majority if it were necessary to limit the number of votes to be cast to less than half the open seats to be filled. In such an instance, it would be difficult for the majority bloc voters to know how to

Limited voting's greatest advantage is its simplicity. A voter need not decide how to distribute multiple votes among candidates, as in cumulative voting, or rank them in order of preference, as in preference voting. The voter must cast only one vote per preferred candidate, as is customary in the United States. It is therefore the system to which the typical voter could adapt most easily.

This advantage is also limited voting's worst flaw, however. This system is the simplest of the three because it provides the least flexibility for the voter. The voter has neither the opportunity to express the intensity of his preference, as in cumulative voting, nor to indicate which candidates are the most and least preferred, as in preference voting. Moreover, the total number of votes the voter gets to cast is lowest in this system. In both of the other two systems, a voter customarily has at least as many votes as there are seats to be filled.²⁰⁸ If a voter likes a number of candidates, it is harder to choose in limited voting because there are fewer votes to go around. In cumulative voting, a voter has at least a theoretical chance of casting all the votes for all the candidates who win. Limited voting, however, is designed to ensure that a voter cannot choose all representatives to fill the seats. The system is truly "limited" in more ways than one.

B. Cumulative Voting

For the reasons discussed above, cumulative voting is substantially superior to limited voting as a remedy for minority vote dilution. Except for the rare—and unsatisfactory—case where each voter is restricted to one vote, minority voters have a lower threshold of exclusion, and thus more electoral access, under cumulative voting. In addition, the flexibility provided by allowing voters to express the intensity of their preferences has strong intuitive appeal.

Cumulative voting, however, does have serious disadvantages. It places a premium on political organization. To succeed at electing candidates of choice, a cohesive minority voting bloc must be: (1) sufficiently sophisticated and politically mobilized to engage in

vote so as to elect a majority of the seats.

208. See *supra* text accompanying note 52 (noting that a voter in a cumulative voting system usually has a number of votes equal to the number of seats to be filled). In preference voting, a voter is said to have *one* vote which is "transferred" from first-choice to second-choice and then third-choice candidates. See *supra* notes 56-61 and accompanying text. By being able to rank each candidate individually, a voter has, by definition, a number of differentially weighted votes equal to the number of candidates running. Because the number of candidates running must exceed the number of open seats if the election is to have any meaning, one can speak of a preference voting system voter as having a number of votes equal to or greater than the number of available seats.

“strategic voting”; and (2) sufficiently disciplined to limit the number of minority candidates so as to avoid “intra-group competition.”²⁰⁹ Each of these attributes comes with its own complexities.

Regarding strategic voting, the minority voters need to be aware of and be prepared to employ the mathematical advantage of “plumping” votes. When the minority’s share of the electorate is only large enough to provide a realistic chance of electing one candidate of choice, the voting strategy is simple: All minority voters should plump all their votes for the minority candidate.²¹⁰ When the minority’s population is large enough to consider electing more than one candidate of choice, the task of the minority group’s leaders becomes a bit more complicated. They must ensure that their group’s voters distribute their votes roughly equally among the minority candidates.²¹¹ Otherwise, excess votes for one minority candidate may be “wasted,” resulting in another minority candidate garnering too few votes to be elected.

One modification of the usual form of cumulative voting may alleviate this concern. From 1880 to 1980, the Illinois House of Representatives used the “fractional” form of cumulative voting.²¹²

209. See Robert B. McDuff, *Judicial Elections and the Voting Rights Act*, 38 LOY. L. REV. 931, 989 (1993); Still, *supra* note 12, at 256-57; Note, *supra* note 52, at 153 n.44.

210. The actual electoral experience under cumulative voting suggests that minority voters appreciate this strategic fact and do indeed vote accordingly. Electoral returns and exit surveys in local jurisdictions using cumulative voting indicate that racial and ethnic minority voters “plumped” their votes behind one candidate at a higher rate than other voters and that this strategic voting was instrumental to the minority candidates’ victories. See Engstrom, *supra* note 47, at 753-55. For a more detailed discussion of the evidence linking the ability to “plump” with racial and ethnic minority candidates’ victories, see Engstrom et al., *supra* note 130, at 489-95, and Engstrom & Barrilleaux, *supra* note 130, at 391-92. A more recent article by Brishchetto and Engstrom is particularly informative and illustrates examples in which higher strategic voting rates among minority voters allowed electoral victories even when the minority’s share of the electorate was slightly lower than the threshold of exclusion. See Brishchetto & Engstrom, *supra* note 54, at 978-89.

211. For the purpose of this discussion of “strategic voting,” it is assumed that there is no “intra-group competition.” That is, it is assumed that the number of minority candidates fielded always equals the number of seats the minority is likely to fill given the threshold of exclusion. If the minority population is such that only one minority-preferred candidate can realistically be elected under the threshold of exclusion analysis, the minority community fields only one candidate; if the threshold of exclusion analysis suggests that minority voters can elect two candidates of choice, only two minority candidates run, and so on. In practice, minority voters in cumulative voting jurisdictions will likely have to deal simultaneously with both the problems of “strategic voting” and “intra-group competition.”

212. A 1980 referendum amending the state constitution to reduce the size of the Illinois House of Representatives by one-third and establish a single-member district system eliminated the Illinois cumulative voting system. Citizens took the initiative and placed the referendum on the ballot after legislators provided themselves a 40% pay

In this form (also called "equal and even"), voters simply place an "X" next to one or more names of candidates, and each candidate receiving an "X" gets an equal share of that voter's total number of votes. If a voter may cast three votes, for example, but marks only two candidates, each candidate is automatically assigned one and one-half votes. As long as the number of minority candidates does not exceed the number of seats the minority group will be expected to obtain based on the threshold of exclusion, this variety would eliminate the "strategic voting" problem. It would do so, however, by sacrificing voter flexibility in distributing votes to signal intensity of preference among candidates.

Such a "fractional" scheme of cumulative voting also would not alleviate the separate problem of "intra-group competition." To elect candidates of choice under a cumulative voting system, the minority group's members not only must vote strategically, but also must show sufficient restraint to avoid fielding too many candidates. If the threshold of exclusion analysis suggests that the minority group may realistically expect to fill two seats, only two minority candidates should run. If more than two candidates run, they potentially split the minority group, jeopardizing the minority's chances of electing *any* candidate. In practice, of course, voters of any given group do not split their votes equally among candidates from that group. Therefore, even if three minority candidates ran instead of two in the example above, the votes may be sufficiently concentrated on the two most popular candidates that one or both of them will still get elected. It is unlikely that the votes will be split evenly enough to deny all of the three minority candidates a seat. But as the number of minority candidates grows beyond three, the minority group's hopes of electing any candidates of choice fade. This problem of intra-group competition arises frequently in many types of electoral settings and is a significant electoral factor in cumulative and limited voting systems.²¹³

increase, and the changes in the voting method reportedly "had little or nothing to do with support/opposition to cumulative voting." Engstrom, *supra* note 47, at 752 n.26 (quoting Bernard Grofman, *Alternatives to Single-Member Plurality Districts: Legal and Empirical Issues*, in REPRESENTATION AND REDISTRICTING ISSUES 107, 121 (Bernard Grofman et al. eds., 1982)).

213. See Engstrom, *supra* note 47, at 767; Still, *supra* note 12, at 255-57. Of course, this dynamic can work in reverse: Too many white candidates can run, splitting the white vote and allowing the election of minority candidates. Intra-group competition, however, is more of a danger for minority voters because a minority group's position is inherently more tenuous. A majority voting bloc (i.e., a bloc with more than 50% of the vote voting cohesively) bears no risk of being entirely shut out, for example, and usually will elect at

Because of the problems of strategic voting, intra-group competition, and the general novelty of cumulative voting to many voters, the U.S. Department of Justice looks carefully at the sophistication and mobilization level of minority voters when making administrative "preclearance" determinations of proposed cumulative voting schemes under section 5 of the Voting Rights Act.²¹⁴ Because cumulative voting differs greatly from present systems in the United States, an important consideration is the extent to which the jurisdiction adopting cumulative voting will educate voters on the new system.²¹⁵

C. Preference Voting

For the reasons outlined below, preference voting is the best potential vote dilution remedy of the three alternative systems currently used in the United States. Preference voting has several key advantages over limited and cumulative voting. First, unlike cumulative and limited voting, preference voting is a true "proportional" system. Cumulative and limited voting are referred to as "semi-proportional" systems because they achieve more proportionality than single-member or traditional at-large elections, but they do not achieve complete proportionality.²¹⁶ Preference voting can achieve true proportionality between votes cast and electoral outcomes: A cohesive racial, partisan, ideological, or other group that casts 37% of the votes will elect very close to 37% of the seats. Thus, preference voting is a more accurate reflection of the popular will than either cumulative or limited voting. This greater proportionality stems from the multiple rounds of ballot-counting in which "surplus" votes of winners and "wasted" votes of losers are "transferred" to the voters' next-ranked candidates. This mechanism of multiple iterations is sometimes referred to as the "Hare system."²¹⁷

Second, intra-group competition is not a problem under

least a majority of the representatives. See AMY, *supra* note 48, at 161; Still & Richie, *supra* note 153, at 21-22.

214. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c (1994)).

215. See Mulroy, *supra* note 135, at 67-69.

216. See AMY, *supra* note 48, at 186; Still, *supra* note 12, at 258.

217. See Doron, *supra* note 56, at 918-20 (discussing "Hare system"). The system is named after its inventor, Thomas Hare. See Alexander Athan Yanos, Note, *Reconciling the Right to Vote with the Voting Rights Act*, 92 COLUM. L. REV. 1810, 1859 (1992). Variations of Hare's original mathematical algorithm exist and are prevalent today. These algorithms are usually referred to as the Hare system as well.

preference voting because votes are "transferred" from one candidate to another in multiple rounds of counting based on the ranking given to candidates.²¹⁸ For example, if a cohesive minority realistically can expect to fill only two seats, and seven minority candidates run, minority voters do not need to decide in advance which two candidates are the "favored" minority candidates. As long as minority voters generally rank the minority candidates above the non-minority candidates, the relative ranking of minority candidates is irrelevant. The minority voters' votes will all be transferred from minority candidate to minority candidate until the two seats are filled. Thus, preference voting does not encourage or require cohesive minorities to try to limit the field of citizens wishing to run for office and participate in the political process.²¹⁹

Third, strategic voting is not a problem in a preference voting system. A voter need not worry about the strategic, mathematical side effects of his or her allocation of votes. All a voter must do is follow the instructions on the ballot and rank the candidates in order of preference—the Hare system will take care of the rest. Thus, preference voting has the advantage that the intuitively obvious thing to do is also the strategically smart thing to do.

Likewise, because voters rank candidates, they may express support for an "outsider" candidate from another party, race, gender, ethnicity, or ideological persuasion without sacrificing support for "insider" candidates of that relevant group. This feature allows the creation of cross-racial coalitions, and other sorts of coalitions, which act as "anti-balkanizers." For example, a black voter may choose to rank a black candidate first, but then rank a white candidate who generally holds similar views second. This voting pattern increases the incentive for candidates—even candidates associated with a particular race, party, ideological persuasion, or other cohesive voting bloc—to reach out to members of other constituencies for "crossover" votes. Cumulative voting has also been said—in my view, correctly—to foster such "crossover" coalitions.²²⁰ In cumulative voting, however, every vote cast for such an "outsider" candidate is one less vote available for an "insider" candidate. Preference voting poses no such dilemmas, thus alleviating the problem of inter-group as well as intra-group competition.

218. See Richard L. Engstrom, *The Single Transferable Vote: An Alternative Remedy for Minority Vote Dilution*, 27 U.S.F. L. REV. 781, 791 (1993).

219. See Engstrom, *supra* note 47, at 767.

220. See, e.g., Guinier, *supra* note 53, at 1141 n.304 (describing the evolution of crossracial "self-defined voluntary constituencies" under cumulative voting).

The ranking mechanism also allows voters to take chances on less well-known candidates or non-mainstream candidates who may be perceived as "long-shots." Again, in cumulative and limited voting (and even more so in district or traditional at-large voting), every vote cast for such a "long-shot" candidate is one less vote available for a more "electable" candidate and thus is arguably a "wasted" vote. In preference voting, however, a voter can take a chance and indulge her quixotic impulses, safe in the knowledge that if the underdog does not garner enough votes to win a seat, the voter's second choice vote for a more mainstream candidate will be duly recorded and effectuated.

This dynamic gives a small minority group well below the threshold of exclusion (for example, the Asian community in Detroit, Michigan) an opportunity to run a candidate anyway. The candidate can generate attention, articulate the minority's concerns, and help the community either by winning a seat or by causing rival candidates to compete for the minority group's second choice votes.

Several arguments against preference voting bear discussion. First, some critics argue that the system is too complex.²²¹ It is true that the mathematical iterations involved in the ballot-counting process are very complex.²²² The voter, however, need not understand the intricacies of the Hare system in order for the system to work—just as voters need not understand how the voting machine works or exactly how their presidential votes affect the Electoral College count. The voter only needs to understand how to cast a ballot. To follow an instruction such as "Please rank the candidates in order of preference by placing a '1,' '2,' and so on next to the candidate's name" seems like a pretty straightforward task. In the first year that preference voting was used in Northern Ireland's national elections in 1921, only 1% of the ballots were invalidated in an election with 89% turnout.²²³ In Cambridge, Massachusetts, where preference voting has been used for years, invalid ballots have remained at a constant 2% rate.²²⁴

221. See, e.g., AMY, *supra* note 48, at 155. This criticism applies to cumulative voting as well. See Engstrom et al., *supra* note 6, at 294-95.

222. For detailed descriptions of the mathematical steps needed to complete the multiple rounds of elimination involved in the Hare system, see AMY, *supra* note 48, at 237-38 app. C, and Engstrom, *supra* note 47, at 765-69. Engstrom provides a diagram that is particularly helpful. See Engstrom, *supra* note 47, at 766.

223. See JENIFER HART, *PROPORTIONAL REPRESENTATION: CRITICS OF THE BRITISH ELECTORAL SYSTEM, 1820-1945*, at 202-05 (1992) (outlining the use of proportional representation in the United Kingdom).

224. See AMY, *supra* note 48, at 156. Similarly, empirical studies of the use of cumulative voting in recent elections have shown that voter confusion is not a significant

A related objection is that preference voting elections are costly and burdensome to administer.²²⁵ Local election officials would either need a computer to calculate the vote-transfer iterations, or several staff members to perform these transfers by hand over several days.²²⁶ Initially, a wait of several days to tabulate election results does not seem fatal for a local jurisdiction—winning candidates do not usually take office immediately after an election. Such a wait is not necessary, however, because computer software is now available that can perform the vote count within minutes on any standard personal computer,²²⁷ an item within the budgetary reach of most local jurisdictions.

In the long run, preference voting elections can be *cheaper* to administer because the jurisdiction can dispense with a primary election. By automatically sorting voter preferences among candidates within particular parties, preference voting produces what can be called an “instant primary.” Thus, the jurisdiction would have one less election to administer (or two less elections, if a runoff primary were required)—a savings that, over the course of a few election cycles, would pay for a personal computer and all requisite software.

Opponents of preference voting have also critiqued the system on technical grounds. With the right combination of votes, preference voting can cause the outcome to depend upon voters’ preferences among losing candidates and in some cases can even cause a candidate to lose because she has “too many” first place votes.²²⁸ The former “anomalous”²²⁹ possibility, however, also exists

problem. See Brischetto & Engstrom, *supra* note 54, at 978-79 (outlining exit poll data from a first-time cumulative voting election in Texas indicating 90% of voters understood the system); Engstrom et al., *supra* note 6, at 293-95 (relaying exit poll data of cumulative voting elections in New Mexico and South Dakota indicating that 90% of voters understood the system and did not find it any more difficult to use than other voting systems); Engstrom & Barrilleaux, *supra* note 130, at 391 (finding that both Native American and Anglo voters understood the cumulative voting system); Richard L. Engstrom & Robert R. Brischetto, *Is Cumulative Voting Too Complex?: Evidence From Exit Polls*, 27 STETSON L. REV. 813, 821-27 (1998) (noting that exit poll data showed no significant voter confusion and that when asked to compare it to other election methods they had experienced, more voters found cumulative voting relatively easier).

225. Telephone interview with Dr. Richard Engstrom, Department of Political Science, University of New Orleans (Apr. 19, 1999); see also AMY, *supra* note 48, at 157 (discussing the criticism that vote counts under preference voting systems create administrative burdens).

226. In past Cambridge, Massachusetts, elections using preference voting, hand counts took about five days. See Still & Richie, *supra* note 153, at 24.

227. See *id.*

228. See, e.g., Doron, *supra* note 56, at 920-21 (showing how an outcome can be

in cumulative and limited voting.²³⁰ Nor is there any evidence to suggest that such outcomes will tend to occur to the benefit of any particular *type* of candidate—that is, it is not a substantive bias present in the system. It is impossible for a candidate or party to manipulate this phenomenon in advance of the election in her or its favor.²³¹ These technical criticisms do not argue for any one alternative system over another, and they are outweighed by other advantages in any comparison with district or at-large systems.²³²

A more significant criticism is that, unlike cumulative voting, preference voting does not allow the voter to express the *intensity* of his preference for particular candidates. At first glance, it may seem that preference voting allows for such expression by allowing for the ranking of candidates. It is not necessarily the case, however, that the incremental degree of preference between the candidate ranked 2 and the candidate ranked 3 is the same as the degree of preference between the candidate marked 3 and the one marked 4. For example, it might be the case that candidates ranked 1, 2, and 3 are virtually interchangeable for the voter, but they are all vastly preferable to the

determined by preference among losing candidates); Gideon Doron & Richard Kronick, *Single Transferable Vote: An Example of a Perverse Social Choice Function*, 21 AM. J. POL. SCI. 303, 307-09 (1977) (giving a hypothetical example of a candidate losing because of increased first-choice support).

229. Rather than being anomalous, voter preference among losing candidates may in fact be a perfectly appropriate determinant of electoral outcomes. An analogous situation can occur during multiple rounds of balloting at political conventions when an eliminated candidate determined the outcome by throwing his support behind one of the remaining candidates. In effect, the multiple rounds of vote-counting in preference voting serve this function.

230. When elections turn on voter preferences among losing candidates, there is a violation of the so-called “reduction principle.” This phenomena can occur in limited, cumulative, and preference voting. For an illustration of how it can happen, see Still, *supra* note 12, at 260.

Of course, more severe anomalies can occur in traditional at-large or single-member district elections. In both, 51% of the electorate can obtain 100% of the representation, and, in multiple-candidate races, a slender plurality can elect a slightly preferred candidate despite intense opposition by the overwhelming majority, beating out a candidate who was the close second choice of 100% of the voters. In district elections, gerrymandering can ensure that a small minority party maintains firm majority control over the legislative body.

231. See Letter from Robert Richie to author, *supra* note 6.

232. These criticisms are also somewhat theoretical. There is nothing about preference voting that makes such outcomes likely as a general rule. Thus, for example, there is no upper limit on the amount of first-place votes a candidate should want to receive in a preference voting election. Instead, it is merely the case that one can imagine two sets of voter rankings, *A* and *B*, in which a particular candidate achieves worse results in *A* despite having more first-place votes. See Still, *supra* note 12, at 261 (explaining the election dynamic through one hypothetical scenario).

candidate ranked 4. One can argue that preference voting allows for no such subtleties, forcing all voters into a one-size-fits-all construct in which the intensity of voters' preferences is spaced arbitrarily and evenly along a number line.

This objection, while valid, is simply outweighed by the advantages of preference voting. Moreover, no electoral system is perfect: One can always point to a particular hypothetical in which an electoral system would perform "better" than another. Ultimately, one must pick one's preferred electoral evils. As sins go, the "uniform gradations of preference" and theoretical violation of the "reduction principle" seem more venal than mortal.

IV. THE SPECIAL CASE OF JUDICIAL ELECTIONS

Vote dilution challenges to an at-large method of electing judges have one unique aspect distinguishing them from vote dilution challenges to electoral systems in other contexts: Courts have determined that as a matter of law, jurisdictions have a substantial interest in maintaining "linkage" between the electoral bases of a judge and the area over which the judge exercises jurisdiction.²³³ Courts, therefore, have determined that single-member districts were inappropriate remedies in judicial election cases because they make judges electorally accountable to a small subset of their courts' overall jurisdiction, potentially upsetting both the fact and appearance of impartiality.²³⁴

Alternative electoral systems would thus serve as an ideal remedy in judicial election cases. Because such a remedy would retain the at-large nature of the election, the correspondence between a judge's jurisdictional and electoral areas would be maintained. Commentators have recognized the special propriety of alternative remedies in this context.²³⁵ Unfortunately, courts that have dealt with

233. See *Cousin v. Sundquist*, 145 F.3d 818, 827-28 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1026 (1999); *Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1296-97 (11th Cir. 1995) (en banc); *Nipper v. Smith*, 39 F.3d 1494, 1542-44 (11th Cir. 1994); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 869 (5th Cir. 1993) (en banc); see also *Houston Lawyers' Ass'n v. Attorney Gen.*, 501 U.S. 419, 426 (1991) (determining that a linkage interest is a relevant consideration under the "totality of the circumstances" analysis and at the remedial phase).

234. See *Sessions*, 56 F.3d at 1296-97; *Nipper*, 39 F.3d at 1542-44; *League of United Latin Am. Citizens*, 999 F.2d at 869. Given that litigants can regularly come from outside the jurisdiction entirely—from across the state, nation, and even the world—the importance of this "linkage" interest is open to question. States—and courts—claim to take it seriously, however.

235. See, e.g., McDuff, *supra* note 209, at 988-89; Edward Still, *Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in*

this argument have not seen it this way. Instead, courts have criticized the appropriateness of alternative electoral schemes, particularly cumulative voting, as remedies in judicial elections. Judge Tjoflat, Chief Judge of the U.S. Court of Appeals for the Eleventh Circuit, outlined these arguments in his en banc opinions in *Southern Christian Leadership Conference v. Sessions*²³⁶ and *Nipper v. Smith*.²³⁷ In both cases, Judge Tjoflat stated that cumulative voting would increase the competitiveness of judicial elections, thus interfering with the need for collegiality peculiar to the judicial context.²³⁸ The increased competitiveness would also dissuade qualified lawyers from considering judicial careers because they would have to run against multiple incumbent judges and because it would remove the current expectation that competent incumbent judges, once elected, would be assured retention.²³⁹

These criticisms are unfounded. First, the criticisms distinguish judicial elections, for which cumulative voting is purportedly inappropriate, from legislative elections, for which cumulative voting presumably is permissible. This distinction relies on a supposed special need for collegiality peculiar to, or more important to, judges. But if "collegiality" among judges is important so that they can work together harmoniously, it is hard to see why there would be less need for collegiality among legislative officials, who must work together on a far more intimate and daily basis than do most judges. This fact is particularly true when the elections involve (as they so often do in vote dilution cases) trial judges who do not normally work as part of multimember judicial panels.²⁴⁰

Judicial Elections, 9 YALE L. & POL'Y REV. 354, 366-69 (1991).

236. 56 F.3d 1281 (11th Cir. 1995) (en banc).

237. 39 F.3d 1494 (11th Cir. 1994).

238. See *Sessions*, 56 F.3d at 1296 n.24; *Nipper*, 39 F.3d at 1546.

239. See *Cousin v. Sundquist*, 145 F.3d 818, 830-31 (6th Cir. 1998), cert. denied, 119 S. Ct. 1026 (1999); *Sessions*, 56 F.3d at 1296 n.24; *Nipper*, 39 F.3d at 1546; see also *Clark v. Roemer*, 777 F. Supp. 445, 468 (M.D. La. 1990) (preferring a single-member district plan to a limited voting scheme as a remedy in a judicial election challenge because limited voting made judicial re-election races more likely and noting that "[a]t present, a competent judge frequently has no opposition for his re-election and no election is held, rewarding the judge for his service").

240. See *Sessions*, 56 F.3d at 1314 (Hatchett, J., dissenting). In *League of United Latin American Citizens, Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), rev'd sub nom. *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991), Judge Patrick Higgenbotham drew a different conclusion about the trial judge's sole, non-collegial decisionmaking, stating that it made the state's linkage interest stronger and that trial judges were thus legally immune from vote dilution challenges as a general matter. See *id.* at 650-51 (Higgenbotham, J., concurring in the judgment). The Supreme Court reversed. Chief Judge Higgenbotham later wrote the en banc decision in *League of United*

Second, there is no reason to think that cumulative voting would actually change the dynamics of the election in such a way as to threaten significantly the collegiality of judges. If the system being challenged is a traditional at-large system without numbered places or similar devices, then all candidates would already be running against each other. Cumulative voting would not change that fact.

If the system being challenged does use numbered places, residency districts, or even single-member districts, then a change to a cumulative voting system would indeed make all incumbents run in the same electoral contest where they did not do so before.²⁴¹ The pool of competing candidates, however, would be large enough to render unnecessary the prospect of direct, head-to-head competition between sitting judges. Candidates would not need to defeat all of their opponents to win office. This increase in the pool of competing candidates encourages a campaign strategy of self-promotion and discourages negative campaigning,²⁴² which in turn tends to *enhance* collegiality. Support for this notion comes from the cumulative voting experience in Illinois, where representatives from the same three-seat districts seemed to get along well, even when they were from different parties.²⁴³ At any rate, an increase in the competitiveness of elections seems a salutary advantage of cumulative voting rather than a fatal flaw.²⁴⁴

Latin American Citizens, Council No. 4434 v. Clements, 999 F.2d 831 (5th Cir. 1994) (en banc), that foreclosed the specific vote dilution claims brought against the election of trial judges, in part on the basis of the linkage interest. *See id.* at 868-76.

241. Traditional, winner-take-all systems using numbered places, residency districts, and single-member districts would therefore be more likely to have head-to-head electoral contests pitting a challenger against an incumbent. Thus, a switch away from one of these systems to cumulative voting (which does not force such direct challenger-incumbent face-offs) would tend to advantage challengers and disadvantage incumbents. Judge Tjoflat cites this potential weakening of incumbent job security as a factor that would make judicial positions less attractive and thus potentially discourage lawyers from running for judicial office. *See Nipper*, 39 F.3d at 1546. He also suggests, however, that lawyers would be discouraged from running under cumulative voting because they would have to run against multiple incumbents. *See id.* This suggestion is a contradiction: Incumbents will either be relatively weak, in which case few challengers would be deterred, or relatively strong, in which case lawyers would be attracted to the position. *See Sessions*, 56 F.3d at 1314-15 (Hatchett, J., dissenting) (noting this contradiction). In either case, the concern is speculative.

242. *See* Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1137 (1993).

243. *See Better Politics*, *supra* note 4, at 12 (advocating a return to cumulative voting for the state legislature).

244. *See Sessions*, 56 F.3d at 1314 (Hatchett, J., dissenting). It may be argued that judicial elections require extra solicitousness for incumbent protection lest a judge be influenced by popular opinion, but this risk of influence is inherent in an elected judiciary.

Even if the adoption of cumulative voting results in increased competition among incumbent judges, and even if that were for some reason a result to be avoided, these problems can be solved with the use of preference voting. When voters need not choose only one or a few candidates, but can instead rank all candidates or as many as they please in order of preference, incumbents do not have to compete directly against each other, and thus collegiality is not disrupted. Instead, each incumbent will be drawing on his own base of support, whether such support derives from geography, race, or shades of ideological difference. At the same time, no challenger has to campaign directly against a specific incumbent in a head-to-head contest. She merely has to say, "You may like some of the incumbent judges, and they are indeed worthy jurists, but I'm a worthy candidate. You should rank me above at least some of the incumbents." This feature avoids any undue discouragement of promising lawyers on the verge of entering the electoral fray. Further, because preference voting allows better odds for "longshot" or "underdog" candidates,²⁴⁵ its use may actually encourage candidates to step forward.

Although I believe preference voting is the best solution to minority vote dilution both generally and in the specific context of judicial election cases, I recognize that it may not work in all jurisdictions. In some jurisdictions, state law may bar its consideration as a vote dilution remedy.²⁴⁶ In other jurisdictions, preference voting's relative novelty as compared with cumulative voting may cause a presiding federal judge or a defendant jurisdiction to view this proposed remedy with suspicion. In such instances, it might be possible to modify the cumulative voting system to accommodate the concerns raised by the Eleventh and Fifth Circuits in *Nipper, Sessions*, and *League of United Latin American Citizens v. Clements*.²⁴⁷

The modification in question is the use of numbered posts or

We should either trust judges to be ethical and have open and competitive elections, or we should appoint judges with or without retention elections. Holding elections while trying to stifle competition risks the worst of both worlds.

245. See *supra* text accompanying notes 220-21.

246. For example, Illinois statutes present a number of different options from which local governments may choose in adopting an electoral system, including single-member districts and cumulative voting, but preference voting is not among them. See 65 ILL. COMP. STAT. ANN. 5/5-2-1, 5/5-2-12 (West 1993). This seemingly exhaustive list of options might be read to state that preference voting is not authorized by Illinois law.

247. 999 F.2d 831 (5th Cir. 1993) (en banc).

residency districts.²⁴⁸ Instead of all incumbents and challengers running against each other in one plenary pool of candidates, each incumbent would hold a numbered seat (for example, judicial posts 1, 2, and 3), and each challenger would have to declare a candidacy for one seat only. The result would be a series of separate “mini-elections” in which each incumbent faces challengers, but no incumbent would have to campaign against a fellow incumbent.²⁴⁹ Voters would still be able to “plump” their votes for favored candidates running for any numbered post, or distribute their votes among various candidates in different posts as they see fit, thus enhancing minority voting strength. Although cumulative voting is normally thought of as being employed in a “pure” at-large setting, it is possible to implement it with numbered posts or residency districts.²⁵⁰

Such a numbered post scheme would satisfy the “collegiality” concerns discussed in Eleventh and Fifth Circuit cases. To the extent such a scheme made matters safer or more pleasant for incumbents, of course, it could arguably discourage lawyers from entering judicial election contests as challengers. However, this “problem”—if it is indeed a problem—stems directly from the contradictory complaints of Judge Tjoflat in *Sessions* and *Nipper* regarding cumulative voting

248. A residency district feature would require each candidate to declare for a numbered seat, determined by the geographic location within the jurisdiction where that candidate happens to reside. Unlike with a single-member district, however, voters from all over the jurisdiction would be able to cast ballots for candidates from that residency district. The residency district thus constricts the candidate's options more than the voter's. If it were considered important to ensure that all the judges from a jurisdiction did not come from the same small area within the jurisdiction, but rather came from all areas within the jurisdiction, residency districts would be preferable to numbered posts. For example, the defendant jurisdiction in *Cane v. Worcester County*, 35 F.3d 921 (4th Cir. 1994), considered such geographic diversity to be important in its county commission electoral scheme, which featured residency districts. See *id.* at 928. If such geographic diversity were *not* considered important, numbered posts would be equally desirable to residency districts. Because candidates placed on the ballot according to residency districts would still have to appeal to voters from all over the jurisdiction, the “linkage” interest discussed above would not be disrupted.

249. It is true that this system would still allow incumbent judges to “compete” against each other in the limited sense that an incumbent could ask voters to “plump” all of their votes for that incumbent and not provide any votes to any other incumbent (or any other challenger, for that matter). While a numbered post system still *allows* for competition among incumbents, however, it makes it easy for incumbents to run together and win together—or, at least, to stay out of each other's way.

250. Indeed, the jurisdiction of Andrews, Texas, adopted such a numbered post cumulative voting system and obtained preclearance of it under section 5 of the Voting Rights Act. See *City of Andrews v. Reno*, No. 1:95CV01477 (D.D.C. Jan. 29, 1996) (three-judge court) (consent decree).

in judicial elections: Advantages to incumbents are necessarily disadvantages to challengers, and vice versa.²⁵¹

Valid criticisms do exist to the numbered post variation of the cumulative voting method, however. One criticism is that the use of numbered posts robs the system of its minority-enhancing effects. As a theoretical matter, the threshold of exclusion for any given numbered post would rise to 50%.²⁵² A white majority could always “plump” votes against a minority-backed candidate in a given post to ensure the minority candidate’s defeat. Such voting profligacy, however, seems unlikely, as it would sacrifice the white majority’s ability to influence the outcome of electoral races in the other numbered posts. This “spoiler” strategy becomes difficult or impossible for the majority voting bloc when more than one minority candidate runs in more than one numbered post. As a practical matter, therefore, the minority-enhancing effects of cumulative voting under a numbered post system would still be considerable, though not as great as under a “pure” at-large cumulative voting system. The election of a minority candidate without opposition in Andrews, Texas, where such a system is in use, demonstrates this point.²⁵³

A second criticism of this scheme is that it is more likely than “pure” cumulative voting to allow for the election of a, “stealth” extremist candidate. One can imagine a scenario in which the voters’ attention is focused on one or two high-profile races in two numbered posts—a white-black race, for example, or the reelection campaign of a controversial jurist. If many voters “plump” their votes to influence the outcome in those races, it might allow an extremist candidate with a small but devoted following to obtain a narrow victory in a numbered post with a lower-profile race. In “pure” cumulative voting, the argument goes, such an extremist would have to obtain

251. See *supra* note 241.

252. By definition, within each numbered post race, there can only be one winner. In such a winner-take-all contest, a candidate needs at least 50% of the vote (plus one vote) to be assured of victory.

253. Telephone Interview with J. Gerald Hebert, Attorney, City of Andrews (Aug. 16, 1998) (regarding the city’s successful effort to obtain “preclearance” under section 5 of the Voting Rights Act).

Arguably, a white majority’s “spoiler” strategy might be more plausible in judicial elections, where voter interest is generally lower. For example, some white voters may come to the polls only to defeat a single black candidate in a single numbered post and may not care about sacrificing their ability to vote for low-profile judicial elections in other numbered posts. But given the overall track record of minority voters disproportionately using strategic voting to elect candidates of choice even when they are below the threshold of exclusion, see *supra* text accompanying notes 129-33, I do not consider this a very likely scenario.

close to the overall threshold of exclusion to get elected.

As with the "spoiler" scenario discussed above, this outcome is possible, though its likelihood is hard to estimate. First, candidates sometimes win with shares of the vote far below the threshold of exclusion even in "pure" cumulative voting elections.²⁵⁴ This outcome becomes more likely and more pronounced as the number of seats to be filled increases.²⁵⁵ Thus, the marginal increase in risk may be overstated. Another problem with this scenario is that the more extremist the candidate in question is, the more likely his candidacy will draw attention, making the race in *his* numbered post one of the high-profile races in which voters will "plump."

While both of these criticisms are valid, electoral system flaws are all relative. Although a preference voting or "pure" cumulative voting system would be a preferable remedy for a dilutive judicial election system, a modified cumulative voting plan is preferable to a dilutive winner-take-all system.

These criticisms of cumulative voting are likely rooted in the courts' overall hostility to the idea of section 2 liability of *any kind* in the context of judicial elections. Although the Supreme Court has clearly held that section 2 applies to state judicial elections,²⁵⁶ lower courts have been extremely reluctant to allow a section 2 claim to succeed.²⁵⁷ Because a key liability issue has been whether a remedy exists that is compatible with the state's peculiar governmental interests regarding judicial elections,²⁵⁸ courts have had an incentive to devise reasons why alternative electoral schemes fail this test.²⁵⁹

254. Telephone Interview with Robert Richie, Executive Director, Center for Voting & Democracy (Aug. 15, 1998).

255. *Id.*

256. See *Houston Lawyers' Ass'n v. Attorney Gen.*, 501 U.S. 419, 425-26 (1991); *Chisom v. Roemer*, 501 U.S. 380, 404 (1991).

257. See *Davis v. Chiles*, 139 F.3d 1414, 1423-24 (11th Cir. 1998) (stating that the court was "troubled" by prior Eleventh Circuit decisions that have placed "an insurmountable weight" on the linkage interest and that have categorically rejected every conceivable form of remedial plan, such that section 2 "frankly cannot be said to apply, in any meaningful way, to at-large judicial elections"), *cert. denied*, 119 S. Ct. 1139 (1999); *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1200 (7th Cir. 1997) (describing the law of the Fifth, Sixth, Seventh, and Eleventh Circuits as stating that the "powerful" linkage interest consideration would almost always be "dispositive" of a section 2 claim "unless the plaintiffs show gross racial vote dilution"), *cert. denied*, 118 S. Ct. 853 (1998).

258. See, e.g., *Nipper v. Smith*, 39 F.3d 1494, 1547 (11th Cir. 1994) (en banc) (Edmondson, J., concurring) (agreeing that liability cannot be found due to unique judicial election concerns foreclosing the availability of any appropriate remedy).

259. See *Davis*, 139 F.3d at 1423 (describing systematic disallowal in the various Eleventh Circuit cases of "redistricting, subdistricting, modified subdistricting, cumulative

Criticisms of alternative remedies that appear in judicial election cases, even when such criticism might apply by their terms outside the judicial election context, should be viewed against the backdrop of this special hostility to section 2 liability.

The discussion in *Cousin v. Sundquist*²⁶⁰ rejecting cumulative voting is perhaps the best example of this perspective. Like some opinions from other circuits, the opinion of the court in *Sundquist* goes beyond the “collegiality” issue to raise more general, fundamental concerns. Specifically, the court noted that cumulative voting, like districting, would fuel the perception that racial considerations influenced the administration of justice.²⁶¹ Similarly, the court confessed to be troubled by the idea that the absence of black judges on the bench was necessarily a problem in the first place, emphasizing that “judges are not representatives who can or should solicit votes to further their political aims.”²⁶² In sum, the court seemed more concerned with the fact that judges are elected rather than appointed and that section 2 even applies to such electoral contests. Cumulative voting appears to be mere collateral damage in the carpet bombing of this judicial opinion.

CONCLUSION

Alternative electoral systems are not simply possible remedies for minority vote dilution—they are preferable remedies. Litigants and courts should use them not only when district remedies are demographically impossible, but also—absent special circumstances—whenever state law concerns allow them and the defendant jurisdiction’s clearly stated policy preferences do not forbid them. Such remedies are particularly appropriate in judicial election cases, in which they can serve the jurisdiction’s “linkage” interest. The alternative electoral schemes can be fine-tuned to address any concerns courts or others may have regarding collegiality among judges, the encouragement or discouragement of qualified candidates, and the danger of electing “fringe” candidates.

voting, limited voting, special nomination, and any conceivable variant thereof”).

260. 145 F.3d 818 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 1026 (1999). For further discussion of *Sundquist*, see *supra* notes 107-16 and accompanying text.

261. See *Davis*, 139 F.3d at 830 (quoting *Nipper*, 39 F.3d at 1546). In the *Shaw* line of cases, of course, courts—including the Supreme Court—have expressed exactly the same concern regarding the influence of race on legislative decisionmaking. Nonetheless, courts have not foreclosed the use of minority districts, as has been done in the judicial election context.

262. *Id.* at 831.

Although the consideration of any of the three alternative electoral systems would be a dramatic step in the right direction, I believe that the best system of the three used in the United States is preference voting. It maximizes proportionality of representation and the incentive for cross-racial and other coalitions while minimizing the problems of strategic voting and intra-group competition. Just as workable legal standards likewise exist to establish liability when non-district remedies are sought for minority vote dilution, workable legal standards exist to guide courts as they craft remedies in response to such claims. The existence of such legal standards buttresses the policy arguments favoring the use of such systems. The policy arguments against their use often are rooted merely in unfamiliarity with these systems or in simple resistance to change.

As we enter a new round of census-triggered redistricting, courts, litigants, commentators, and policymakers should adopt these new approaches to the old problems of majority tyranny and electoral gerrymandering. In doing so, they could provide both a badly needed solution to minority vote dilution and a badly needed revitalization of American democracy.