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ARTICLE: The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies

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LEXISNEXIS SUMMARY:

... Indeed, Lani Guinier's advocacy of such alternative remedies in voting rights cases helped to abort her 1993 nomination to head the Clinton Justice Department's Civil Rights Division. ... Proponents of preference voting argue that although cumulative voting makes it about equally likely that a cohesive minority group will elect *one* candidate of choice, preference voting makes it easier for such a minority to elect a second or third candidate. ... In implementing the Voting Rights Act both before and after *Gingles*, federal courts used single-member districts as the sole remedy for vote dilution. ... Comparing districting and cumulative voting as remedial alternatives, the court noted that the former had these disadvantages: districts were susceptible to "capture by narrow local interests"; the votes of minority citizens outside the minority district are "effectively nullified," providing only "virtual representation"; district boundaries would have to be periodically adjusted by the court to account for population shifts; and raceconscious districting raised *Shaw* concerns. ... Because the threshold would be used to determine if there was *any* potential to elect, the threshold for a proposed limited voting remedy would assume only one vote per voter, the scenario which provides the best opportunity for a cohesive minority to elect a candidate of choice. ...

TEXT:

[*333] Only a few years ago, the use of "alternative electoral systems" n1 in the United States was considered a radical concept. Indeed, Lani Guinier's advocacy of such alternative remedies in voting rights cases n2 helped to abort her 1993 nomination to head the Clinton Justice Department's Civil Rights Division. Subsequently, the promise of alternative electoral systems as a solution to the perceived faults of the two-party-dominated, winner-take-all electoral model triggered a second look at these "radical" ideas. n3 In particular, the recent Supreme Court decisions invalidating certain minority congressional districts as "racial gerrymanders" -- the so-called "Shaw" cases n4 -- have significantly restricted the availability of single-member [*334] districts n5 as voting rights remedies, sparking renewed interest in alternative remedies among policymakers and the popular media. n6

Such a second look is timely and appropriate (and to some extent is already occurring) n7 among courts and legal scholars in light of recent case developments. In 1995, a Tennessee federal court ordered a Voting Rights Act remedy outside the context of a consent decree, the only such recent precedent. n8 Earlier this year, a D.C. federal court upheld the constitutionality of another alternative system, adopted as the result of a consent decree settling Voting Rights Act litigation, holding that such systems did not raise the constitutional concerns at issue in the *Shaw* cases. n9 This case was the first to address the validity of alternative electoral remedies in the [*335] context of the *Shaw* decisions. Litigation similar to the Tennessee and D.C. cases undoubtedly will develop in the next few years.

Many legal commentators n10 and social science scholars n11 have discussed the use of these alternatives to single-member districts to provide electoral opportunity to politically disadvantaged minority groups. Yet, no recent article has undertaken a detailed legal analysis of federal courts' authority to impose such electoral schemes in litigation under the Voting Rights Act, nor attempted to create workable judicial standards governing when courts could order such innovative remedies. To date, no court has undertaken such an analysis either. Nor have authors in the field fully explored the validity of alternative remedies in light of *Shaw* concerns.

This Article is a first attempt at such an analysis. Part I provides background on the workings of traditional and alternative electoral systems, the vote dilution jurisprudence of the Voting Rights Act, and recent developments regarding both. It argues that alternative systems are the way out of the dilemma posed by the race-conscious imperative of the Voting Rights Act and the race-neutral limits of *Shaw*. Election returns demonstrate that alternative systems have effectively enhanced minority representation without creating the "racial gerrymander" districts struck down in *Shaw*.

Part II argues that federal courts have the authority to order such alternative systems into effect, despite case law that arguably suggests that single-member districts may be the only available remedy. It also argues that Voting Rights Act liability may be established, and alternative remedies obtained, even where plaintiffs cannot show that they can draw a compact majority-minority district. In so doing, it suggests a new legal standard to apply in proving liability under the Voting Rights Act where a plaintiff seeks alternative electoral systems as remedies. Specifically, the normal requirement that the plaintiff be able to draw a compact single-member [*336] district should be discarded and replaced with the "threshold of exclusion" formula accepted in political science analysis for assessing the electoral viability of politically cohesive minority voting blocs under alternative electoral schemes. n12

I. Alternative Systems as the "Way Out" of the *Gingles-Shaw* "Dilemma"

A. A Taxonomy of Electoral Systems

1. "Winner-Take-All" At-Large Elections and Vote Dilution

To elect representatives, most jurisdictions in the United States use single-member districts, employ the traditional "winner-take-all" form of at-large elections, or use some combination of the two. n13 Under at-large electoral systems, a group of candidates is placed on the ballot to fill a designated number of seats, and voters from everywhere within the jurisdiction may vote to fill those seats. The traditional winner-take-all form of at-large elections allows each voter to cast only one vote for each candidate, up to the number of available seats. The top vote-getter(s) is (are) elected to fill the empty seats up for election. A related approach uses large districts to elect several representatives from within each

district. Within each "multimember" district, elections operate in a manner similar to at-large elections. n14

[*337] Many jurisdictions vary this system by requiring candidates to run for a specifically designated seat, thus competing only against a subset of all the candidates running in the election. Such variations are referred to as "numbered post" or "numbered place" at-large elections. Another way to divide the entire pool of candidates into subgroups is to require that a candidate run for a designated seat determined by his or her residence within the jurisdiction. Such elections are said to employ "residency districts." n15

Under any of these at-large scenarios, a jurisdiction might require that in order to win a seat, a candidate for that seat must garner over 50% of the votes cast to fill that seat. If no candidate did so, such a "majority vote requirement" or "runoff requirement" would trigger a runoff election between the top two vote-getters. n16

I will refer to all these variations as the "traditional" or "winner-take-all" at-large electoral method. Voting rights jurisprudence has long acknowledged, as an empirical matter, that wherever minority and majority groups have differing voting patterns, the winner-take-all at-large method tends to dilute minority voting strength, because the majority group tends to vote as a bloc to fill all the available seats. n17 This phenomenon is known as "vote dilution." Courts have also recognized that such features as [*338] numbered posts, staggered terms, and majority vote requirements can exacerbate the at-large method's dilutive effect. n18

A typical example is a five-member county commission in a county where black persons make up 40% of the population. Even though black voters may have candidate preferences distinct from whites, the white 60% majority can consistently outvote the black minority, shutting out the black voters and filling all five seats with white-preferred candidates. n19

It is this tendency to allow a majority group to achieve "overrepresentation" -- that is, representation significantly greater than its share of the population -- that earns the traditional at-large system the label "winner-take-all." Specifically, traditional systems allow a cohesive voting bloc with 51% of the vote to control 100% of the seats.

2. Single-Member Districts

The traditional remedy where at-large or multimember elections cause vote dilution has been to carve the jurisdiction into geographic subdistricts, each of which would elect just one representative. n20 The governing body of the jurisdiction would ordinarily draw these "single-member districts" to have roughly equal populations, consistent with the one-person, one-vote requirements of the Constitution. n21 Where plaintiffs had sued successfully under the Voting Rights Act, the court might adopt the districts, or the parties might agree to them through settlement. The district boundaries would be drawn to create one or more districts with minority persons making up a majority of the district population. The governing body would periodically redraw the boundaries (usually after each decennial Census) as population shifts triggered impermissible one-person, one-vote deviations.

Single-member districting requires the government of a jurisdiction to assign voters to districts. It thereby provides members of governing bodies substantial discretion to "gerrymander" in such a way as to determine the outcome of elections. For example, a district drawn to have an [*339] overwhelming percentage of Republican registered voters would almost certainly elect a Republican candidate.

3. alternative Electoral Systems

A number of electoral systems exist which use at-large elections without the winner-take-all aspect of traditional systems. They range from modest "limited voting" schemes, used in a number of local jurisdictions in Alabama, to "party-list proportional representation" schemes used in Western European democracies. n22 This Article uses "alternative electoral systems" to refer to three systems which have been used at the local level in the United States, and which I believe to be useful candidates for alternative Voting Rights Act remedies. n23 These three systems are "limited voting," "cumulative voting," and "preference voting." n24 All three of these methods mitigate the

winner-take-all aspect of traditional at-large voting schemes by enhancing the ability of cohesive electoral minorities to elect candidates of choice. n25 With all three, mathematical formulas exist which calculate the minimum percentage of the overall vote a minority group needs in order to ensure that it can elect a candidate of choice. This minimum voting percentage is called the "threshold of exclusion." n26

a. Limited Voting

In a limited voting system, the number of votes a voter may cast is lower than the number of seats to be filled in that election. n27 For example, a limited voting scheme might allow a voter 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." n28 Limited voting systems are used in numerous local [*340] jurisdictions in North Carolina, Alabama, Connecticut, and Pennsylvania. n29

As a mathematical matter, the smaller the ratio between the number of votes each voter can cast and the number of seats to be filled, the lower the threshold of exclusion. n30 The threshold of exclusion can be calculated using the following formula:

$$(\# \text{ of votes each voter has}) \text{ n31 } / ((\# \text{ of votes each voter has}) + (\# \text{ of seats to be filled}))$$

Thus, if five seats are up for election, and the limited voting scheme allows each voter four votes, a minority group must be at least 4/9 or 44% of the voters to assure themselves of electing at least one candidate. If the scheme allows each voter only two votes, a minority group that is only 28% of the voters on election day can assure itself representation.

b. Cumulative Voting

In a cumulative voting system, voters have X number of votes and can distribute them among the candidates any way they see fit. This number of votes is usually, but need not be, equal to the number of seats to be filled. n32 If a voter has five votes, he can cast one vote each for his top five preferred candidates, he can "plump" all five votes for one candidate for whom he has an especially strong preference, or he can divide his votes three-two between his top two choices, and so on. n33 Cumulative voting is used in scores of jurisdictions in Texas and Alabama, as well as [*341] in Peoria, Illinois. n34 Illinois used a form of cumulative voting to elect members of the Illinois House of Representatives from 1870 to 1980. n35

Mathematically, the ability of cohesive minorities to plump votes in favor of one or two representative candidates greatly enhances that minority's ability to elect candidates of choice. The formula for the threshold of exclusion in a cumulative voting system is:

$$1 \text{ n36 } / ((\# \text{ seats to be filled}) + 1)$$

This threshold of exclusion is lower than that of any limited voting system, as long as the number of votes allowed each voter under the limited voting system is greater than one. n37 Cumulative voting thus generally is a more effective tool for enhancing minority voting strength.

c. Preference Voting

Preference voting n38 is used in Ireland and Australia, among other countries. n39 In the United States, it is used in city council and school board elections in Cambridge, Massachusetts, and in local community school board elections in New York City. n40 Historically, approximately two dozen American cities throughout all regions of the United States have used [*342] preference voting schemes to elect city councils. n41 In preference voting, the voter ranks the candidates in his order of preference, putting beside each candidate's name a "1," "2," etc., for as many candidates as he wishes. The votes are counted in a series of rounds. In the first round, candidates netting more than a certain minimum

number of first-choice votes n42 are assigned a seat; their "excess" votes (i.e., 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. n43

This system minimizes the number of "wasted votes" -- that is, "surplus" votes of winning candidates above the minimum required to win or votes which indicate a preference for a losing candidate. n44 The threshold of exclusion is:

$$1 \text{ n45 } / ((\# \text{ seats to be filled}) + 1)$$

This threshold is identical to that of cumulative voting.

Proponents of preference voting argue that although cumulative voting makes it about equally likely that a cohesive minority group will elect *one* candidate of choice, preference voting makes it easier for such a minority to elect a second or third candidate. n46 Historically, its use in Ireland, Australia, Malta, and in American cities has resulted in rough proportionality between electoral outcomes and minority groups' shares of the population. n47 Courts have upheld the use of preference voting [*343] against claims that it denies equal protection and a republican form of government under the Constitution. n48

B. Section 2 and the Gingles Preconditions

1. Section 2

Section 2 of the Voting Rights Act prohibits states and political subdivisions from imposing any standards, practices, or procedures that abridge the right to vote of any member of a protected class of racial and language minorities. n49 Soon after the passage of the Act in 1965, court interpretations made clear that the Act applied not only to barriers to voter registration and the casting of ballots ("enfranchisement"), but also to the implementation of methods of election and redistricting schemes that "diluted" minority voting strength. n50

In 1982, Congress amended Section 2 to clarify that it intended to apply a "results test" in examining claims of minority vote dilution. The Supreme Court decision in *City of Mobile v. Bolden*, n51 in which the Court held that claims of vote dilution required proof of discriminatory intent, prompted the amendment. The amendment made clear that plaintiffs challenging electoral systems or redistricting plans need not prove that the relevant government authority adopted or implemented the plans with a discriminatory purpose. Rather, it suffices to show that "the totality of circumstances" reveal that "the political processes leading to nomination or election . . . are not equally open to participation" by members of the relevant minority group because those minority group members "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." n52 Borrowing from previous court decisions n53 that had adjudicated vote dilution claims, [*344] the legislative history sets out a lengthy, nonexhaustive list of factors to be considered under the "totality of the circumstances." n54

2. Gingles

The "results test," explicated through the so-called "Senate factors," allowed inconsistent implementation by courts because of its open-ended, unstructured nature. The Supreme Court provided more structure in *Thornburg v. Gingles*. n55 In *Gingles*, the Court considered a challenge under Section 2 to certain multimember districts making up part of North Carolina's state legislative redistricting plan. n56 In that context, the Court set out three "preconditions" for establishing liability under Section 2's "results test" as applied to "a claim of vote dilution through submergence." n57 Plaintiffs in Section 2 vote dilution cases must prove that (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 (i.e., its members tend to

vote alike); and (3) the white majority votes sufficiently as a bloc so as usually to defeat the minority's preferred candidate. n58 If plaintiffs could not establish these preconditions, courts foreclosed their claims. If they could, the court would then use the Senate factors and [*345] other evidence presented to determine whether, under the "totality of the circumstances," the challenged practice or procedure denied plaintiffs an equal opportunity to elect candidates of choice. n59

The utility of this revised "results test" was its ease of application. It was a relatively straightforward matter to present a map of an illustrative majority-minority district to demonstrate the first *Gingles* prong of "compactness." Because established statistical tests for legally significant "racial bloc voting" existed, plaintiffs could normally demonstrate the presence of the second and third prongs through expert analysis of election returns. n60 As a practical matter, the *Gingles* framework served as a useful "first approximation" to determine whether a claim of vote dilution was serious or frivolous. n61

3. Holder

The Supreme Court recently refined the *Gingles* analysis in *Holder v. Hall*, n62 a challenge to a county's use of a single county commissioner, elected countywide, rather than a number of county commissioners elected from districts. In holding that Section 2 did not apply to challenges involving single-member offices, the Court ruled that in a Section 2 suit, in addition to the *Gingles* preconditions and the Senate factors, a plaintiff must also supply "a reasonable alternative practice as a benchmark against which to measure the existing voting practice." n63 In a standard case challenging an at-large system and seeking a district remedy, the "benchmark" would be a district system. n64 Because no principled basis existed for deciding the "correct" number of members to make up a governing body, the Court held, Section 2 challenges to single-member offices failed for lack of a proper benchmark. n65

[*346] In implementing the Voting Rights Act both before and after *Gingles*, federal courts used single-member districts as the sole remedy for vote dilution. Courts recognized that single-member districts were preferable to at-large or multimember remedies, because they had less potential for diluting minority voting strength. n66 Litigants did not press for, and courts did not consider, alternative electoral remedies in the years following the passage of the Act and amendments to Section 2. When cases resulting in alternative remedies began slowly developing in the late 1980s, n67 the alternative electoral systems came into being as a result of settlement agreements between the parties. n68

C. Shaw, Miller, and the Backlash Against "Racial Gerrymanders"

For the seven years after *Gingles*, Voting Rights plaintiffs vigorously used the *Gingles* framework to obtain majority-minority voting districts through local, state, and congressional redistricting plans. In its 1993 decision in *Shaw v. Reno*, however, the Supreme Court recognized a new cause of action under the Fourteenth Amendment challenging a minority-majority district as an invalid "racial gerrymander." n69 *Shaw* and its progeny have vastly curtailed the ability to draw minority-majority districts.

I. Shaw

Shaw involved a constitutional challenge to North Carolina's Twelfth Congressional District, a narrow, oddly shaped majority-black district which snaked along Interstate 85. The Court held that a district is constitutionally invalid if it is so "irrational" as to be understood only as an "effort to segregate voters into separate voting districts because of their [*347] race," and if that separation lacks "sufficient justification" -- that is, if it is not "narrowly tailored to further a compelling governmental interest." n70

This new cause of action, held the Court, was "analytically distinct" from the traditional "vote dilution" claim and did not require proof that a particular group's vote was in fact diluted. n71 In other words, unlike a traditional vote dilution plaintiff, *Shaw* plaintiffs need not show that they are members of a politically cohesive group that has been (or will be) consistently underrepresented in light of their share of the jurisdiction's population. This was so because racial gerrymanders of this type caused two "special harms." n72 First, the Court stated, such districts "reinforce [] the

perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." n73 Second, such districts make elected officials more likely to believe that "their primary obligation is to represent only the members of that group, rather than their constituency as a whole." n74 Such an outcome threatens to "balkanize us into competing racial factions," undercutting the goal of a color-blind society. n75 The Court remanded the case for further proceedings on whether the district in question triggered strict scrutiny and, if so, whether it could withstand such scrutiny. n76

2. Miller

The Court provided a more concrete description of the standard for triggering strict scrutiny in *Miller v. Johnson*, n77 a Shaw-type challenge to Georgia's Eleventh Congressional District. The Court stated that to trigger strict scrutiny, a plaintiff must show that race was the "predominant factor" motivating the configuration of the district. n78 To do this, the plaintiff must show that the challenged redistricting plan "subordinated [to race] traditional race-neutral districting principles," such as "compactness, contiguity, respect for political subdivisions, or communities defined by actual shared interests." n79 The Court reaffirmed both the "racial stereotype" and "balkanization" rationales explained in *Shaw*. n80

[*348] 3. Other Cases

Subsequent cases confirmed the Court's hostility to race-focused district boundary manipulation. The Court rejected challenged minority districts in three further cases and provided details on the correct inquiry after "strict scrutiny" is triggered. n81 According to the Court, a "compelling state interest" to comply with Section 2 supports a district subject to strict scrutiny only if the district is sufficiently compact to satisfy the first *Gingles* precondition. n82 Further, a district cannot be narrowly tailored to further Section 2 if it subordinates to race other traditional districting principles (including compactness) substantially more than is reasonably necessary to avoid Section 2 liability. n83

The *Shaw/Miller* cases and their progeny (usually referred to simply as "*Shaw* cases," even though *Miller* is the more significant legal opinion) create a dilemma for anyone interested in drawing fair electoral districts. The Voting Rights Act requires that race be taken into account when drawing districts, but the *Shaw* cause of action requires that race not be used "too much." n84 The Act creates a floor, and the *Shaw/Miller* cause of action creates a ceiling. As the Supreme Court decides each post-*Shaw* case, it seems the ceiling is rapidly collapsing to the floor, allowing less [*349] and less discretion for drawers of redistricting plans to draw districts that provide minorities fair electoral opportunities without running afoul of the Constitution. For persons interested in ensuring that electoral systems fairly represent the voting preferences of politically cohesive minorities, this dilemma is of more than academic significance. Alternative systems are the way out of this dilemma. n85

D. Effectiveness of Alternative Systems at Enhancing Minority Representation

Limited, cumulative, and preference voting all substantially enhance the ability of cohesive racial and ethnic minorities to elect preferred candidates. The first round of limited voting elections held as part of the *Dillard* settlement in 1987 provides a good example. In the 14 municipalities where black candidates ran, black candidates won in 13, and the sole losing black candidate lost by only a single vote. n86 These black candidate victories were the first ever in 10 of the 13 municipalities. n87 Limited vote elections held at the local level in North Carolina and Georgia yielded similar results. n88

The track record of the first cumulative voting elections held (pursuant to settlements) in the late 1980s and early 1990s is just as impressive, if not more so, from the standpoint of racial and ethnic minority representation. Whenever minority candidates ran under a cumulative voting system, they won for the first time in decades (or for the first time ever). This result obtained in all regions of the country and for all minority groups: minority candidates won in Peoria (black candidate); Alamogordo, New Mexico (Hispanic candidate); Sisseton, South Dakota (Native American candidates); and several local jurisdictions in Alabama (black candidates). n89

[*350] Preference voting elections also increase the election of candidates preferred by racial and ethnic minorities. 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 dramatically jumped to levels approximating the black and Hispanic percentages of the New York's population. n90 Preference voting resulted in much more proportional results than did 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. n91

Other advantages of these systems are relevant to a "good government" type of policy analysis. As a mathematical matter, the elections tend to lead to results that are a more accurate reflection of the popular will. Finally, because these systems tend to allow less well-known candidates and parties to gain seats and prevent dominant groups from sweeping elections, electoral contests held under these systems tend to offer voters more choices and be more competitive, which in turn leads to higher participation rates. n92

E. Validity of Alternative Systems Under Shaw

1. Race-Neutrality

As a voting rights remedy, alternative electoral systems have clear advantages in the post-Shaw era. They enhance opportunities for cohesive minority groups traditionally underrepresented at the polls, but do so in a race-neutral manner. Because they are race-neutral, they do not run afoul of the constitutional prohibitions set out in *Shaw*, *Miller*, and their progeny.

A federal district court in the District of Columbia recently became the first court to examine whether an alternative scheme violated the *Shaw/Miller* precepts. n93 Judge Stanley Sporkin dismissed a *Miller* challenge to a limited voting system established by consent decree to settle a Section 2 challenge against the traditional at-large election system in Cleveland County, North Carolina. The court held that under *Shaw*, "it is the classification of individuals on the basis of race, not the mere motivation to facilitate equal opportunity for representatives of all races, that requires heightened scrutiny." n94 Because the limited voting scheme avoided any racial classification, did not separate voters, geographically [*351] or otherwise, and treated all voters alike, it could not trigger strict scrutiny under *Shaw*. n95

This decision seems correct. One could argue that the Supreme Court speaks in terms of odd-shaped *districts* and the subordination of "traditional *districting* principles" in its *Shaw* cases simply because they have arisen in the context of redistricting. Nothing, the argument would continue, precludes the expansion of *Shaw* to any race-driven electoral change, including nondistrict schemes like alternative electoral systems. But the heart of the Supreme Court's objection to racial gerrymanders in these cases seems to be that gerrymandered districts are the functional equivalent of "*racial classifications*," which have always been subject to strict scrutiny. n96 Since alternative systems do not classify anyone or benefit racial minorities in a way differing from political minorities, they are by their nature outside the analytical framework of *Shaw*.

Similarly, the touchstone for identifying constitutionally suspect state actions in this context is the subordination of "traditional principles" to race. This test logically presupposes that some tangible, objective feature of the challenged state action has a racial aspect; a motivation for racial or ethnic diversity in the minds of state actors alone would not suffice if the results of the state action (e.g., the districting plan itself) did not subordinate traditional principles. n97 In other words, although the racial motivations of state actors may be relevant, they alone would not be sufficient to trigger strict scrutiny under *Miller*. Instead, a *Miller* plaintiff must point to some way in which the challenged electoral system treats voters of one race differently from voters of another. Again, alternative electoral systems, by their very nature, fail this test. To say otherwise is to say that *any* attempt to change an electoral system to enhance electoral opportunities for cohesive racial or ethnic minorities is by definition subject to strict scrutiny under the Equal Protection Clause. Such a proposition is wholly unsupported by Supreme Court precedent, inconsistent with the *Shaw* rule affording states some "leeway" to draw race-conscious districts consistent with traditional districting principles, n98 and at fundamental [*352] cross-purposes with the race-conscious remedial goals of the Voting Rights Act.

Alternative systems are not simply immune to *Shaw* challenges as a technical, analytical matter. They also do not present the types of policy concerns expressed by the Supreme Court in *Shaw*, *Miller*, and *Hays*. Because they give no special favors to members of racial or ethnic minority groups and treat voters of all races alike, they do not "stigmatize individuals by reason of their [race or] . . . incite racial hostility." n99

Similarly, alternative systems do not seem to cause the "representational harm" envisioned by the Supreme Court in *Hays*. n100 Because these schemes do not create "safe" districts for any particular racial group, incumbents are not encouraged to "believe that their primary obligation is to represent only the members of that [racial] group, rather than their constituency as a whole." n101 Without either "stigmatic" or "representational" harms, a *Shaw* plaintiff lacks standing to bring a claim.

2. "Balkanization"

Perhaps the most troubling objection to the use of alternative systems is the "balkanization" argument. By encouraging racial and ethnic minority groups to field candidates when they might otherwise have backed a white major-party candidate, alternative systems arguably facilitate the fragmentation of the polity into numerous competing racial and ethnic factions. What results is the very "balkanization" feared by Justice O'Connor in *Shaw*, albeit by a different mechanism.

The danger of ethnic and racial divisiveness has certainly been behind much of the criticism of and opposition to alternative electoral systems. Earlier in this century, opponents of preference voting schemes in Cincinnati and New York argued that the schemes encouraged "ethnic voting." More recent legal scholarship has also asserted the superiority of winner-take-all systems as promoting pluralism. n102

While the "balkanization" argument is troubling, ultimately it is unpersuasive. First, no empirical evidence exists to show that racially polarized [*353] voting actually increases as a result of the adoption of alternative electoral systems. Indeed, "given the extreme bloc voting that now occurs . . . it is hard to imagine how any voting change could increase polarization." n103 To have legally significant racial bloc voting (and thus have the legal theory discussed herein apply), jurisdictions must usually average other-race "crossover voting" levels below 30%. n104 That is, more than 70% of white and black voters regularly must vote along racial lines. Many jurisdictions with successful Voting Rights Act challenges have racial bloc voting rates much more pronounced than that. There is little room for significant aggravation of racial polarization at these levels; at lower levels, no Voting Rights Act liability exists. Alternative systems, thus, do not "create conflict where none previously existed." n105 Instead, they recognize an underlying conflict and attempt to address it in a constructive way. n106

Second, the threshold-lowering aspect of alternative systems may give previously alienated minorities an incentive to work within the system, thus moderating their political behavior. n107 One manifestation of this moderation would likely be the formation of cross-racial coalitions. n108 Historically, that was the experience in Cincinnati and New York during their uses of preference voting. n109 Accordingly, supporters of alternative systems argue that "the best way to ease racial and ethnic tensions [is] . . . by including [racial and ethnic minorities] in the policy-making process." n110

[*354] This moderation may prevent minority grievances from erupting into disputes outside the political arena. Some scholars have argued, for example, that the single-member plurality system in Northern Ireland allowed the Protestant majority to dominate the Parliament, shutting out the Catholic minority from any meaningful role in the contentious issues dividing that region "until all too many Catholics replaced their meaningless ballots with bullets." n111 Another scholar posited a similar dynamic at work in all-white, at-large city councils in southern cities in the 1950s and 1960s, where substantial black minorities were shut out of the process, their grievances ignored until they erupted into massive protests or ugly riots. n112 Moreover, at least as compared with the traditional district [*355] remedy for vote dilution, alternative schemes have this advantage: because alternative systems treat voters of all races the same, without the appearance of providing any racial or ethnic group "special treatment," they are less likely to incur

white resentment than single-member districts, thus moderating *white* political behavior. n113

Finally, at least as compared to district systems (with or without minority districts), the flexibility afforded the voter in alternative systems creates less of a danger of "balkanization." Voters in such systems have complete freedom to identify what interests and issues are most germane to them, and vote accordingly for any candidate(s) (of any race), anywhere in the jurisdiction, perceived to represent those concerns. n114 This ability to "self-district" empowers not just ethnic and racial minorities, but ideological, partisan, and sexual orientation minorities as well. n115 Indeed, many 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. n116 A hypothetical black, female, lesbian, environmentalist, Perot-supporter could vote on the basis of any combination of personal characteristics she views as salient, or on some other basis entirely, while still enjoying relative confidence that her vote will not be consistently overwhelmed by a majority voting bloc. Rather than being forced into a race-dominated electoral contest, as are voters living in majority-minority districts, alternative electoral scheme voters are free to vote on racial or nonracial lines as they see fit, without forfeiting their chance of obtaining fair representation for nonmajority views. n117 If anything, such flexibility should make racial and ethnic bloc voting *less* likely. n118

Recognizing the advantages of alternative systems, Voting Rights Act litigants have adopted alternative systems through settlement in a number of cases. n119 Only three courts have ever ordered such remedies without the [*356] defendant jurisdiction's consent, and only one such alternative system still stands. n120 To date, no court has done so in circumstances where it was impossible to draw a reasonably compact single-member district -- a situation increasingly likely as the *Shaw/Miller* progeny restricts the scope of what type of districts meet the "compactness" standard.

II. Authority and Standards for "The Way Out"

A. Authority of Courts to Adopt Alternative Electoral Schemes

There is no federal constitutional or statutory provision banning the use of cumulative, limited, or preference voting schemes, or barring the adoption of such schemes by federal courts. n121 The constitutionality of these schemes has been upheld by a number of courts. n122 Federal courts may approve such alternatives to single-member districts as remedies in cases brought under Section 2 of the Voting Rights Act. n123 Indeed, federal [*357] courts may be *required* to adopt alternative voting systems to reconcile dilution remedies with the jurisdictions' policy choices. n124

1. General Sources of Authority

Authority to adopt alternative voting systems may be found in the extensive reach of Section 2's language, along with its legislative history. n125 Its authors aimed broadly, designing the statute to ensure that protected minority groups enjoy equal opportunity to "participate in the political process and to elect representatives of their choice." n126 Additionally, the Voting Rights Act protects the right "to vote," which the statute defines broadly to include "all action necessary to make a vote *effective* in any . . . election, including, but not limited to, *registration . . . and having such ballot counted properly*." n127 The legislative history also indicates a broad reach. The House Report on the 1982 amendments stated that Section 2 "[is] not limited to districting or at-large voting." n128 The broad reach of the Act supports a broad view of permissible remedies.

This authority can also be found in federal courts' general equitable powers, n129 which are particularly broad when confronted with a violation of the right to vote. After determining that a Voting Rights Act violation has occurred, district courts must first give the jurisdiction the opportunity to devise an acceptable remedial plan. n130 If the jurisdiction fails to respond with a legally acceptable remedy, the responsibility falls on the district court to exercise its discretion in fashioning a remedial plan. n131 Under the Voting Rights Act, the district court then has the broad discretionary authority necessary to fulfill its obligation to provide a *full and complete* remedy to the underlying violation. n132 After a finding of illegal vote dilution, [*358] therefore, a federal court's remedial authority is

open-ended: any remedial option which is not prohibited by federal law, including alternative electoral systems, is a viable option if it would serve to remedy fully the dilution.

2. Judicial Treatment of Alternative Systems

A number of courts have commented favorably on the use of these alternatives to single-member districts as voting rights remedies. n133 Notably, Judge Hatchett of the Eleventh Circuit has praised cumulative voting as a potential remedy in judicial election cases. n134 Despite such favorable comments, until recently courts had only adopted such systems by consent decree. A (short-lived) breakthrough occurred in *McGhee v. Granville County*, n135 a Section 2 challenge to the traditional at-large system for electing county commissioners in Granville County, North Carolina. After stipulating to liability, the County proposed a single-member district remedial plan that would have provided for one "safe" black-majority district and a second bare-majority district out of seven total districts. n136 Since blacks would control at most 28% of the seats under such a plan despite constituting over 40% of the population, the district court rejected this remedy as inadequate and imposed a modified version of plaintiffs' remedial proposal, a limited voting system. n137

The Fourth Circuit reversed and remanded, ruling that the district court should have deferred to the County's remedial choice because, contrary to the district court's findings, the districting plan was a "complete" remedy of the Section 2 violation. n138 The court made clear its view that once the jurisdiction submits a legally acceptable plan, the remedial inquiry ends. n139 It expressly disclaimed any intent to rule generally that limited voting schemes were unavailable as remedies, concluding that "the [*359] specific issue here is not the validity *vel non* of the [limited voting plan], but the prior adequacy of the County's plan." n140

By its terms, *McGhee*'s holding does not foreclose the imposition of an alternative electoral scheme as a remedy where the defendant jurisdiction had not previously proposed a different, legally adequate remedy. However, the opinion does contain some language casting doubt on such a remedial course. Citing *Gingles* and the language of the Voting Rights Act, the court articulated three general principles. First, a strict proportional representation standard, such as that used by the district court, may not be used in assessing the adequacy of a remedial plan. n141 Second, the appropriate remedy is to the specific practice challenged by plaintiffs, not some other practice "not actually challenged by the claim as made." n142 Since the language of the complaint challenged the at-large electoral method, the court continued, a district remedy was appropriate. n143 Finally, the court stated that the electoral practice "necessarily challenged" in a Section 2 vote dilution claim is the "districting system" which allegedly "submerges" minority voting strength. n144

While this third point may be read to say that dilution cases by their very nature are limited to districting remedies, there are several reasons to give this suggestion little weight. First, given the court's disclaimer of any ruling on the legitimacy of limited voting schemes and the existence of an alternative ground (the rejection of a right to proportional representation) more closely tied to the district court's opinion, it seems to be dicta. Second, the general suggestion (that vote dilution lawsuits inherently challenge only the at-large nature, thereby precluding an alternative remedy within an at-large framework) seems inconsistent with the court's emphasis on the exact wording of the complaint. If dilution lawsuits inherently called for only single-member district remedies, the wording of individual complaints would be irrelevant. Finally and most importantly, the Fourth Circuit's later opinion in *Cane v. Worcester County* supports a narrower reading of *McGhee*.

Cane involved a Section 2 challenge to the traditional at-large election method for county commission seats in Worcester County, Maryland. After a bench trial and liability finding, n145 the district court imposed a cumulative voting system as a remedy. n146 On appeal, the Fourth Circuit [*360] affirmed on liability and reversed and remanded on remedy. n147 Regarding remedy, the defendants had argued that *McGhee* stripped district courts in the Fourth Circuit of any authority to impose an alternative electoral system in a Section 2 case. Though the Fourth Circuit cited *McGhee* several times in its opinion, it did not endorse this interpretation of *McGhee*. Responding to the defendants' argument, the court quoted Justice Thomas's directly contradictory statement in his *Holder v. Hall*

concurrence. n148 It then held that it was unnecessary to outline generally whether cumulative voting could be ordered as a remedy, because under the "specific facts and circumstances presented here," the district court abused its discretion in ordering a cumulative voting remedy. n149 This was so, the court reasoned, because the lower court had ignored the county's stated policy preference for residency districts, which ensured that there would be at least one representative from each area within the county. In other words, the county preferred a districting remedy. n150 Moreover, the court held, the district court had simply not given the county a sufficient opportunity to devise a remedy in the remedial proceedings below. n151

More recently, another district court imposed cumulative voting in *Cousin v. Sundquist*, n152 producing the only court-imposed cumulative voting plan in existence today. *Cousin* involved a Section 2 challenge to the at-large method of electing judges in Hamilton County, Tennessee. After finding liability based on all the *Gingles* preconditions and an assessment [*361] of the Senate factors, n153 the court ordered into effect a cumulative voting plan in a separate remedy opinion. The court ruled that although it used a hypothetical district system as a "benchmark" for judging liability (and assessing the ability to meet the compactness prong), the court was not restricted to a district remedy. n154

Comparing districting and cumulative voting as remedial alternatives, the court noted that the former had these disadvantages: districts were susceptible to "capture by narrow local interests"; the votes of minority citizens outside the minority district are "effectively nullified," providing only "virtual representation"; district boundaries would have to be periodically adjusted by the court to account for population shifts; and raceconscious districting raised *Shaw* concerns. n155 Most important, the state attorney general had issued an opinion stating that districting of judicial offices would violate the state constitution. Cumulative voting, by contrast, presented none of these concerns. n156 Although the state law conflict presents a unique circumstance which may have driven the court's decision, the other districting disadvantages noted by the court apply generally to vote dilution cases. Some, like the *Shaw* and "virtual representation" concerns, are powerful arguments for alternative remedies in the post-*Shaw* era.

Where courts have criticized one or more of these alternative schemes, the criticism has often been a fact-specific one directed toward their appropriateness as a remedy for the particular voting rights violation alleged. For example, in *LULAC v. Clements*, n157 a vote dilution case challenging the method of electing state court judges in Texas, the Fifth Circuit rejected limited and cumulative voting as proposed remedies, reasoning that because plaintiffs had challenged the at-large feature of the current system (and asked for single-member districts as remedies), the court would not consider remedies that retained the very at-large feature attacked by plaintiffs. n158 In the *en banc* opinions in *Nipper v. Smith* n159 and *SCLC v. Sessions*, n160 Eleventh Circuit Chief Judge Tjoflat made very specific criticisms of cumulative voting as a remedy in *judicial election* [*362] cases. n161 In *LULAC*, *Nipper*, and *Sessions*, moreover, the criticisms may very well have been attributable simply to the courts' consistent overall hostility to Voting Rights Act liability in the *judicial elections* context. This evident hostility may have motivated the courts involved to reject any proposed voting scheme that, if found to be an appropriate remedy, would necessitate a finding of liability. n162

B. *Gingles* and the "Preference" for Single-Member Districts

1. Districts as "Preferred" Remedy

An oft-repeated principle in voting rights cases is that single-member districts are "strongly preferred" to at-large plans for court-ordered, as opposed to court-ratified, remedies. n163 That rule has on several occasions been invoked as a reason to reject remedial alternatives such as limited voting. n164 But that general rule applies to standard, "winner-take-all" at-large systems because of their dilutive effect. In fact, every such case reciting this familiar remedial rule involved such a "traditional," "winner-take-all" at-large system. The rule lacks force with respect to at-large schemes (such as cumulative voting schemes) designed to enhance minority political opportunity.

Explaining the development of the rule favoring single-member district remedies when ordered by federal courts, the Supreme Court stated, [*363] "criticism [of multimember districts] is rooted in their *winner-take-all aspects*, their

tendency to submerge minorities and to overrepresent the winning party" n165 Indeed, the Court in *Chapman* acknowledged that federal courts had discretion to adopt at-large remedies to address problems of underrepresentation and listed the jurisdiction's own policy preferences as a relevant factor in this decision. n166

2. The Gingles Compactness Requirement

The principle that single-member districts are the presumptive remedy for vote dilution also finds support in the first *Gingles* precondition of geographic compactness. By requiring plaintiffs to show they are numerous and compact enough to draw a single-member district as a threshold matter in order to find liability, *Gingles* arguably implies that the universe of Section 2 remedies is limited to single-member districts. Indeed, the Court notes that single-member district systems are "*generally* the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected." n167

In explaining the requirement, however, the Court repeatedly emphasized its narrow focus on the traditional form of at-large system, which was the method of election at issue in that case. The Court explained that under a traditional at-large system, the ability to draw a compact majority-minority district was necessary to demonstrate a "potential to elect" candidates of choice. n168 The clear rationale of the requirement is the "if-then" assertion made by the Court: if the first prong is not met, no remedy is possible. n169 But this assertion is only true with respect to winner-take-all at-large systems. Therefore, it seems clear that the Court [*364] was only considering such systems when it stated the rule. The other interpretation -- that the Court actively considered and rejected alternatives to single-member district remedies, but neglected to mention it -- seems implausible.

3. Availability of Alternative Remedies Where "Compactness" Prong Is Met

If the mere existence of the compactness requirement does not foreclose a judicially imposed nondistrict remedy, then a plaintiff meeting the first *Gingles* precondition may seek such a remedy, at least where special circumstances would argue against a district remedy. Judge Hatchett of the Eleventh Circuit articulated this concept persuasively in his dissent in *SCLC v. Sessions*. n170 Judge Hatchett explained that while the Supreme Court has required that the challenged electoral system be compared to a hypothetical "benchmark" to assess liability, that "benchmark" is distinct from the ultimate remedy: a court may consider and impose a remedy different from the "benchmark." n171

Under this analysis, a plaintiff who can satisfy the compactness requirement with an illustrative district (as well as the other *Gingles* preconditions and Senate factors) can potentially obtain an alternative system as relief. This is precisely the analysis the court applied in *Cousin v. Sundquist*, where the court used a districting benchmark to find liability and then imposed a cumulative voting system in the remedy phase of the litigation. n172

C. Section 2 Cases Without the "Compactness" Requirement

But does this mean that alternative remedies are available only when the compactness prong can be satisfied? Such a result would be of very little significance to cohesive minorities suffering from vote dilution: where the compactness prong can be met, a "traditional" district remedy is possible, and an alternative system remedy is not usually necessary. n173 [*365] Alternative systems are most needed precisely where the compactness standard cannot be met.

1. Gingles and "Potential to Elect"

Such a narrow view of the first *Gingles* prong is not justified. In *Gingles*, the Court explains that the first precondition is based on the fact that "unless minority voters possess the *potential* to elect representatives in the absence of the *challenged structure or practice*, they cannot claim to have been injured by that structure or practice." n174 This language suggests that the nature of the "challenged structure or practice" controls. Where the plaintiffs do not challenge the use of at-large elections per se, but instead some discrete feature of the particular at-large system being used, a different analysis obtains. This alternate analysis does not mechanically focus on an irrelevant ability to draw a district where neither side is interested in districts, but instead on what the Court called "the potential to elect."

2. Section 2 Challenges to Majority Vote and Numbered Post Requirements

Compactness thus should not be an irreducible sine qua non, applicable in any Section 2 challenge to an electoral system regardless of the electoral practice challenged or relief requested. n175 Section 2 does not appear to limit vote dilution claims to challenges to at-large electoral [*366] systems per se, but rather applies separately to such electoral features as majority vote (or "runoff") requirements, numbered posts, and staggered terms, which do not require the use of districts as remedies. Such claims have been advanced successfully at the circuit court level, and the Supreme Court, at least in dicta, appears to have accepted such a proposition. The viability of such Section 2 claims not resulting in single-member district remedies illustrates that the first *Gingles* prong does not bar cases to which, by their very nature, it clearly does not apply. n176

The Supreme Court has not had occasion to rule directly on the viability of such Section 2 challenges by themselves, without a challenge to the overall at-large system as well. However, several of the opinions in *Holder v. Hall* n177 contain language strongly suggesting that such claims are viable. Discussing the question of the proper "benchmark" for comparison in assessing vote dilution liability, Justice O'Connor wrote that

a court may assess the dilutive effect of majority vote requirements, numbered posts, staggered terms, residency requirements, or anti-single-shot rules by comparing the election results under a system with the challenged practice to the results under a system without the challenged practice. n178

Justice Kennedy made the identical point in his plurality opinion. n179 The language in both opinions refers to challenges to particular voting rules, without a broader challenge to the at-large nature of the system (which might raise districting concerns). Both justices contemplated a Section 2 lawsuit that seeks to replace, say, an at-large system using runoff requirements with an at-large system *not* using runoff requirements. If this type of "benchmark" is to be used *instead of* the standard district-plan benchmark, then the compactness prong of *Gingles* would not apply.

Several lower courts have allowed such Section 2 claims. Where they have addressed the question, they either have ignored the compactness [*367] prong or (in one instance) treated it in passing. n180 This treatment further supports the notion that the compactness precondition does not apply where nondistrict remedies are sought.

That Section 2 applies separately to these types of electoral features is clear from the Act's legislative history, from *Gingles* itself, and from Supreme Court interpretations of other parts of the Voting Rights Act. Congress specifically referred to these types of electoral features when it amended Section 2 in 1982. n181 In *Gingles*, the Supreme Court reiterated that amended Section 2 could apply to other types of "allegedly dilutive electoral mechanisms" besides a traditional at-large system, and specifically enumerated, as illustrative examples of "potentially dilutive electoral devices," the use of "majority vote requirements, designated posts, and prohibitions against bullet voting." n182

Similarly, in *City of Rome v. United States* n183 and *City of Port Arthur v. United States*, n184 the Supreme Court upheld legal challenges to numbered posts and majority vote requirements, respectively, under the "preclearance" provisions of Section 5 of the Voting Rights Act. n185 The operative [*368] language of Section 5 of the Act -- indicating that it applies to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" -- is virtually identical to Section 2. n186 There is no principled reason for saying that Section 5 of the Act, but not Section 2, reaches these electoral features.

Taken together, these authorities strongly suggest that districts are not the only remedies available under Section 2, even in the case of a vote dilution challenge to a traditional at-large electoral system. n187 A Section 2 plaintiff can challenge a majority vote requirement, by itself, as used in a traditional at-large system, asking that the voting rule be changed to allow for plurality victories (though the at-large nature of the system is retained).

If that is so, then what principled reason is there to prevent a Section 2 plaintiff from challenging the "one vote per candidate" rule of that same system, asking that the voting rule be changed to cumulative voting? Or to ask for limited

voting or preference voting, for that matter? I believe there is no principled distinction. Thus, the failure to meet the "compactness" prong of *Gingles* should not be fatal to an electoral challenge under Section 2 where the proposed remedy does not involve the drawing of districts. Alternative system remedies should be available even where, in light of *Shaw* or otherwise, this prong cannot be met.

D. A Compactness Substitute

If the "compactness" prong is not a sine qua non in Voting Rights Act electoral challenges, then what standard should be used in its place? [*369] *Gingles* provides the appropriate test for this compactness "substitute." The operative standard is a preliminary showing of a "potential to elect." n188 This "potential to elect" may be established in theory; it is not necessary, for example, that particular minority-preferred candidates would have won specific past elections if the challenged practice had not been in place, nor is it required that specific, identifiable minority-preferred candidates could definitely win a race in the future if the requested electoral relief is provided. n189 Even in the context of districting cases, commentators have argued persuasively that the "potential to elect" standard is the better measure of vote dilution. n190

1. "Quantifiability" and "Limits"

The articulation of this "potential to elect" standard in the context of alternative electoral systems raises the question of how, exactly, the "potential to elect" should be measured. I propose that the "threshold of exclusion" formula substitute for the compactness prong of *Gingles* where the plaintiff seeks an alternative electoral system rather than a district remedy. n191 Introduction of a substitute for compactness in turn raises two potential criticisms.

The first criticism involves the observation that the compactness requirement is an objective, easily quantifiable, "bright line" standard which allows for easy judicial implementation. A legal standard that omits the compactness requirement risks losing this certainty and quantifiability. n192

Second, an alternate standard also risks losing a principled limit on the reach of Section 2 which the compactness requirement currently provides. Admittedly, a principled limit of this type is crucial for a workable legal standard. Section 2 creates severe and legitimate concerns regarding both federalism and judicial power. A standard as vague and broad as the "results test," which merely refers to the minority group's equal ability to "participate in the political process and elect candidates of choice," n193 [*370] confers breathtaking discretion on courts. Without some principled limit on this authority, federal courts would have virtually unbridled power to make subjective judgments about state and federal electoral systems, substituting their judgment for that of the elected representatives of the people at the state and local level. n194

In theory at least, the *Gingles* preconditions provided an objective, easy-to-apply test, involving a limited number of factors for weeding out the obviously unmeritorious Section 2 complaints from those that deserved intensive scrutiny. They thus aided judicial economy while checking judicial activism. Any legal theory for using Section 2 to install alternative voting schemes must share these virtues of "quantifiability" and "principled limits."

2. Threshold of Exclusion

Fortunately, a suitable substitute for the first *Gingles* prong is available: the threshold of exclusion. For every type of alternative electoral system, there is a threshold of exclusion formula that can calculate for any minority bloc the minimum mathematical percentage of the voting electorate needed to ensure the election of at least one candidate of choice. If the population of the cohesive minority exceeds that minimum amount, the minority has a proven "potential to elect." Because the threshold would be used to determine if there was *any* potential to elect, the threshold for a proposed limited voting remedy would assume only one vote per voter, the scenario which provides the best opportunity for a cohesive minority to elect a candidate of choice. n195 The threshold formulae for limited, cumulative, and preference voting thus collapse to identity, and a single formula can be used, simplifying the analysis. That formula is

$1/(\text{number of seats to be filled}) + 1$ n196

This threshold of exclusion enjoys both the "quantifiability" and "limiting principle" virtues discussed above. All that is needed to be known is the minority's percentage of the jurisdiction's population, the number of seats on the governing body in question, n197 and the type of [*371] alternative electoral system requested in the plaintiffs' complaint. From these three facts one would be able to calculate whether the plaintiff can make out a prima facie case of "potential to elect," as understood in *Gingles*.

3. Threshold as More Objective than Compactness

Indeed, the threshold of exclusion is far superior in terms of quantifiability than the compactness criterion. "Compactness" is a relative term, highly subjective in application. Courts applying the compactness requirement in recent decades have varied widely in their interpretation of the term. Most courts required that the illustrative district itself be regular in shape and/or small in size. n198 A small minority of courts had at one time experimented with the concept of "functional compactness," rejecting any notion of aesthetics and holding that the prong was satisfied as long as the district was not too far-flung or convoluted to be effectively represented. n199 However, any validity this view may have had seems to have expired with the post-Shaw emphasis on regularity of shape as the measure of compactness.

Even defined simply as "regularity of shape," the notion of compactness is inherently subjective and evades ready quantification. As one state legislator testified in a recent *Shaw* trial, "If you feel your ox is being gored reapportionment wise, then you would say [a district is] ugly. If you find that your purposes are being met, you say this is my beautiful child." n200 While a number of different mathematical measures of compactness have been suggested in recent years, n201 there is no widespread agreement regarding which of these tests is best, or whether mathematical measurements are helpful at all. In contrast, it has long been recognized that the formulae for the threshold of exclusion utilize the proper mathematical [*372] measures for a minority group's potential to elect, use only objective criteria, and lack ambiguity.

4. Threshold as Better Test of "Potential to Elect"

The threshold of exclusion also outperforms compactness as a predictor of "potential to elect." Under a literal interpretation of the *Gingles* compactness precondition, a Section 2 plaintiff must show that the minority group can form over 50% of the population of a compact illustrative district. Where illustrative districts over 50% in minority population can be drawn, the minority is presumed to have the ability to elect candidates of choice. This approach is at once too demanding and too lax. Given a sufficient level of white "crossover" voting -- high enough to provide significant electoral support yet not high enough to undercut a finding of legally significant white bloc voting -- a cohesive minority that is under 50% of a district may still be able to elect candidates of choice. n202

Conversely, if socioeconomic impediments to political mobilization (recognized as relevant "totality of the circumstances" factors under *Gingles*) conspire to lower minority rates of registration and turnout compared to white voters, a district without a supermajority of minority voters may not be able to elect a minority candidate. n203 Thus, a district with a high minority population may or may not be "viable" for cohesive minority voters, depending on the level of minority cohesion, the rate of minority turnout, and the degree of white bloc voting. n204 As a predictor of minority voters' electoral efficacy, a "50% plus 1" district population requirement is a blunt instrument.

In contrast, the threshold of exclusion has a high degree of reliability. One recent study of cumulative voting elections in local Texas jurisdictions showed a high correlation between over-threshold minority populations and electoral success. Of fourteen jurisdictions where a Hispanic candidate ran who was the Hispanic community's candidate of choice, the Hispanic candidate won in eight and lost in six. In all six of the "losing" jurisdictions, Hispanic voters' percentage of the electorate (i.e., the percentage of those actually turning out to vote) was well below the threshold (ten percentage points or more). In all but one of the eight "winning" jurisdictions, Hispanic voters' percentage

of the electorate was above or just below (within two percentage points) of the threshold. n205

[*373] *5. Threshold as Limiting Principle*

The threshold of exclusion also serves as a valid limiting principle on Section 2 liability. As noted earlier, it would have no effect on the other two *Gingles* preconditions: plaintiffs would still have to prove racial bloc voting. Moreover, Section 2 plaintiffs would not be able to make out a prima facie case anywhere they can prove racial bloc voting simply by asking for alternative systems rather than district remedies in their complaint. Rather, a prima facie case is possible only where the minority group is sufficiently numerous to have a significant potential to elect under the proposed remedial system -- which is, after all, what the threshold of exclusion is designed to determine. This requirement not only is consistent with *Gingles*, but also makes intuitive sense as a matter of fairness: the larger the minority population that is being effectively disenfranchised through racial bloc voting and the legacies of voting discrimination, the greater their equitable argument for disturbing the existing form of government as a matter of federal right.

One initial objection to this argument is that it is contrary to the Section 2 "Dole proviso," or "Dole compromise." At the urging of then Senator Robert Dole, Congress added statutory language to the 1982 amendments to Section 2, providing 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.*" n206 This language has been interpreted to mean that statutorily protected minority groups are not entitled to "proportional representation." n207

This objection reflects terminological confusion. In the context of the Dole proviso, references to "proportional" representation should not be confused with alternative electoral systems, which are sometimes referred to (with varying degrees of accuracy) as "proportional representation" systems. As used in the Dole proviso, the term links the success rate of minority candidates to the minority group's share of the jurisdiction's population. n208 For example, if blacks make up 20% of the population of a county governed by a five-member commission, a consistent failure by black candidates to win one out of the five commissioners would not, in and of itself, entitle black voters to Section 2 relief. In this example, the "threshold of exclusion" approach would set the minimum minority population percentage even lower, at $[1/(5 + 1)]$ or 17%. However, this minority percentage would not *by itself* entitle plaintiffs to anything; plaintiffs [*374] would still have to prove racial bloc voting and the Senate factors -- a result entirely consistent with the Dole proviso and Section 2 as a whole. n209

The threshold of exclusion approach is a significant principled limit both empirically and theoretically. It would not "open the floodgates" and allow virtually every United States jurisdiction to be sued under Section 2. Of the local jurisdictions in the United States over 10,000 in population that use a "pure" at-large system (i.e., elect all members using the traditional at-large method), only about 18% contain a minority group covered by Section 2 large enough to meet the relevant threshold of exclusion. n210 Since not all of these jurisdictions have legally significant racial bloc voting, only some of them would face a potential prima facie Section 2 showing under the legal standard proposed. Even those jurisdictions may survive a hypothetical Section 2 challenge under the "totality of the circumstances" test if plaintiffs could not make the requisite showing regarding the Senate factors. n211 The test thus breaks a logjam without opening the floodgates.

6. Threshold's Intuitive Appeal

The threshold approach has more intuitive appeal than the compactness requirement, which makes relief from vote dilution depend on the demographic happenstance of whether a minority group is confined to a small area within a jurisdiction. Consider two hypothetical counties ruled [*375] by five-member governing bodies elected under a traditional at-large system. In County A, blacks constitute 18% of the population and are all confined to a single area in the southeast corner of the county. In County B, blacks make up 36% of the population, evenly divided into four widely dispersed ghettos at the north, south, east, and west corners of the county. In both counties, voting is racially polarized, and all the Senate factors are met. In County A, black plaintiffs could draw a black-majority district and would have a viable vote dilution claim. In County B, each separated black enclave (representing 9% of the county) is short of a

voting majority in any compact and contiguous district. Using the *Gingles* compactness requirement, black voters in County *B* are left without a remedy even though their share of the county's population is twice that of the black voters in County *A*. This difference in results is completely arbitrary. n212

The compactness requirement thus creates an odd dynamic between voting and housing discrimination. Throughout the United States, concentrations of minority population are usually attributable, in substantial degree, to the effects of housing discrimination. n213 Remedying that discrimination through housing integration would undercut a minority group's ability to remedy voting discrimination if Voting Rights Act remedies were limited to single-member districts. A view of the Voting Rights Act that allows suits for alternative, nondistrict electoral systems avoids this paradox.

E. A Substitute Methodological Approach

1. "Straight VAP" Approach

As an initial approach for this new legal standard, it would be sufficient to require the plaintiffs to show affirmatively that a statutorily protected minority group's percentage of jurisdiction-wide voting age population (VAP) n214 exceeded the threshold of exclusion, calculated using the [*376] $[1/(n + 1)]$ formula, where "n" equals the number of seats to be filled on the relevant legislative body in a single election. n215 This showing would be analogous to the presentation of an illustrative compact district with a minority population over 50% in a Section 2 case seeking a district remedy.

By using a straightforward, readily obtainable figure (minority group percentage of the voting age population) which is not subject to dispute, this approach has the additional virtues of ease and certainty. Moreover, because it measures the minority group's share of persons old enough to vote, it is a more accurate measure of the group's "potential to elect" than the minority percentage based on total population.

2. "Minority Turnout" Approach

A more sophisticated approach could achieve greater accuracy by substituting for voting age population the minority group's share of the electorate -- that is, the percentage of persons showing up to vote on election day who are members of the minority group. n216 This is the ideal number to have in analyzing the threshold of exclusion. Fortunately, an estimate of this ideal number is readily obtainable, without any additional effort or expense, in virtually every vote dilution case. The standard method of proving the second and third *Gingles* preconditions (minority political cohesion and white bloc voting) is to perform ecological regression [*377] analyses n217 of the precinct-by-precinct results of elections pitting minority candidates against white candidates. Natural statistical by-products of these regression analyses are turnout rates for the minority and white voters, that is, the separate percentages of whites and blacks who actually turned out to vote on election day. n218 These percentages are precisely the ones to be compared to the threshold of exclusion formula.

Although more accurate, this second methodological approach lacks the ease and certainty of the first "straight VAP" method. It also has two other disadvantages. First, adequate electoral data sufficient for a reliable estimate of minority and majority turnout on election day may not be available. Courts may have to make a factual finding to that effect in individual cases and resort to the first, "straight VAP" approach.

More fundamentally, the use of a depressed minority turnout rate in deciding whether the minority group meets the first *Gingles* precondition raises concerns about fairness. Arguably, it is unfair to use the minority group's lower political participation rate, itself a result of historical discrimination and socioeconomic disparities, n219 as an excuse to deny that group relief where other *Gingles* preconditions and Senate factors are present. The result may be a Catch-22: discrimination's legacy can disqualify a minority group from obtaining relief from discrimination's legacy. Similarly, some experts in the field contend that the minority participation rate will often rise in response to an ameliorative change in the electoral system once a perceived futility gives way to a perceived realistic opportunity. n220

[*378] *F. Alternative Schemes as Substitutes for Dilutive Districting Systems*

The legal theories and methodology discussed herein apply equally to a minority vote dilution challenge to a districting system, as to substitutes for traditional winner-take-all at-large systems.

1. Alternative Schemes Where No District Can Be Drawn

Alternative remedies are particularly necessary and appropriate where a district system contains no viable minority districts. There, the threshold of exclusion would substitute for the first *Gingles* prong, as described above, and the same analysis would apply.

Such a result does not inevitably follow from the legal theory advanced above regarding challenges to at-large systems. One could distinguish between the minor intrusion of federal courts simply modifying voting rules within an at-large framework, on the one hand, and the far greater intrusion of federal courts forcing local governments to abandon district systems in favor of at-large ones, on the other. This distinction has particular resonance in light of the long history of federal case law touting districts as the "preferred remedy" in vote dilution cases. n221 Indeed, many of the jurisdictions using district systems switched from at-large systems -- either as the result of litigation or to preempt litigation -- precisely because of this preference. It may seem odd to advocate a court-imposed switch in the opposite direction.

On balance, however, such a distinction is unjustified. As discussed above, historical lawsuits challenging traditional at-large systems led to district systems because the former system diluted, and the latter enhanced, minority voting strength. The case law stating that districts were the "preferred remedy" states only the obvious point that district systems are better remedies for vote dilution than the traditional, winner-take-all variety of at-large systems. If a district system can be shown to violate the Voting Rights Act under a traditional analysis (modified only by use of the threshold of exclusion as a substitute for the first *Gingles* prong), then plaintiffs ought not be limited to a district remedy.

2. Alternative Schemes Where Minority Districts Underrepresent Minority Strength

Proportional and semi-proportional schemes are slightly less necessary, but still appropriate, where one or two minority districts exist, but the cohesive minority group's share of the population greatly exceeds the [*379] share of the seats controlled by minority voters. As an example, imagine a five-member county board elected from single-member districts in a county that is 50% black. Because of the demographics of the county, only one compact, viable "black" district can be drawn. Cohesive black voters can fill only 20% of the seats (one out of five) with candidates of choice, even though they represent 50% of the population. In such a situation, an analysis building on the threshold of exclusion method might show that black voters are more likely to achieve near-proportional results under an alternative voting system. n222 Assuming that it does, and again assuming that all other *Gingles* preconditions and Senate factor evidence pointed toward liability, black voters ought to be able to sue under Section 2 to replace the county's district plan with an alternative system.

Liability would be much tougher to establish under this scenario. A theoretical possibility of increasing the number of seats filled with minority-preferred candidates from, say, seven to eight, would probably not be sufficient. As the Supreme Court put it in *Johnson v. DeGrandy*, "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." n223 This is particularly the case where the minority voters already have the ability to fill a near-proportional share of seats with preferred candidates. The *DeGrandy* Court overturned a finding of dilution on this very ground, where the share of Dade County-area state House seats controlled by Hispanic voters matched the percentage of Hispanic voters in the county's population. n224 Nonetheless, given a sufficiently large gap between the minority group's share of the population and its share of seats (and the presence of the other *Gingles* preconditions and Senate factors), a Section 2 claim may prevail. Severe underrepresentation, while not dispositive, is "always relevant" and "probative evidence of vote dilution." n225

Conclusion

Federal courts can and should adopt alternative electoral systems to remedy minority vote dilution. Both federal authority and workable judicial standards exist for the implementation of these remedies, which are [*380] the natural and logical solution to the Voting Rights Act-Shaw conundrum. The authority comes from the Voting Rights Act, *Gingles*, *Holder*, and the Section 2 cases challenging majority-vote requirements in at-large systems. The workable judicial standards are the same standards as those currently used in Section 2 cases, except that the "threshold of exclusion" formula replaces the *Gingles* "compactness" prong where nondistrict remedies are sought.

Voting rights litigants should look beyond the traditional district paradigm and push for these innovative remedies. Federal judges should overcome any hesitation they may have due to their relative unfamiliarity with these systems. Alternative systems are not "way out" ideas, but rather the way out of a troubling dilemma.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Rights Law Voting Rights Vote Dilution Governments Federal Government Elections Governments Local Governments Elections

FOOTNOTES:

n1 By "alternative electoral systems," I mean cumulative voting, limited voting, and preference voting (also known as the "single transferable vote"). These systems provide more opportunity for the electoral viability of voting minorities than the traditional, "winner-take-all" at-large method of election, but do not involve the use of single-member districts. Each such system features elections held jurisdiction-wide, without carving the jurisdiction into subdistricts. However, unlike the traditional at-large system, these three "alternative" systems employ special voting rules designed to enhance the abilities of minority voting blocs to obtain representation. See Edward Still, *Alternatives to Single-Member Districts*, in MINORITY VOTE DILUTION 249 (Chandler Davidson ed., 1989). For an explanation of the workings of these alternative systems, see *infra* Part I.A.3.

n2 See Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 *CARDOZO L. REV.* 1135, 1137 (1993); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 *VA. L. REV.* 1413 (1991) [hereinafter Guinier, *No Two Seats*]; Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 *MICH. L. REV.* 1077 (1991) [hereinafter Guinier, *The Triumph of Tokenism*].

n3 See, e.g., David Kaplan, *Alternative Election Methods: A Fix for a Besieged System?*, *CONG. Q.*, Apr. 2, 1994, at 812-13; *Better Politics from an Old Idea*, *CHI. TRIB.*, May 30, 1995, at 12; Steven Hill, *Lessons on the Mechanics of Democracy*, *L.A. TIMES*, Feb. 15, 1996, at 9.

n4 See *Abrams v. Johnson*, 117 *S. Ct.* 1925 (1997); *Shaw v. Hunt*, 116 *S. Ct.* 1894 (1996); *Bush v. Vera*, 116 *S. Ct.* 1941 (1996); *Miller v. Johnson*, 515 *U.S.* 900 (1995); *Shaw v. Reno*, 509 *U.S.* 630 (1993).

n5 "Single-member districts," the traditional voting rights remedy, carve a jurisdiction into geographic boundaries within which a single representative is elected by the voters within that geographic area to represent that area. They contrast with "multimember districts," geographic areas from which more than one representative is elected, and "at-large systems," in which no districts are used, and voters from all over the

jurisdiction may vote for multiple representatives. See discussion *infra* Part I.A.

n6 See, e.g., John Anderson, *Go Back to the Drawing Board to Make More Votes Count*, CHRISTIAN SCI. MONITOR, Jan. 12, 1996, at 18; Peter Applebome, *Guinier Ideas, Once Seen as Odd, Now Get Serious Study*, N.Y. TIMES, Apr. 3, 1994, at 9A; William Raspberry, *The Balkanization of America*, WASH. POST, July 7, 1995, at A21; *A Route to Fairer Voting*, USA TODAY, June 30, 1995, at 12A.

n7 See, e.g., *Holder v. Hall*, 512 U.S. 874, 910-12 (1994) (Thomas, J., concurring) ("Nothing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under § 2 . . ."); *SCLC v. Sessions*, 56 F.3d 1281, 1313 (11th Cir. 1995) (Hatchett, J., dissenting) (praising cumulative voting as possible method for electing local judges); T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 628 (finding "ironic" that *Shaw* may force reconsideration of Guinier's ideas); 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 (Anthony A. Peacock ed., 1997) (advocating renewed exploration of cumulative voting systems in light of *Shaw*).

n8 See *Cousin v. Sundquist*, No. 1:90-CV-339, slip op. at 8-9 (E.D. Tenn. July 3, 1996), *appeal docketed*, No. 96-6028 (6th Cir. Jan. 30, 1998) (granting stay of district court's order). Numerous jurisdictions have adopted alternative electoral remedies as Voting Rights Act remedies, but almost always as the product of settlement negotiations between the parties (as opposed to a court-ordered remedy imposed over the objection of the defendant jurisdiction). In the two other cases imposing an alternative electoral remedy outside the settlement context, the Fourth Circuit vacated the remedial orders on fact-specific grounds. See *Cane v. Worcester County*, 35 F.3d 921, 927-28 (4th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *McGhee v. Granville County*, 860 F.2d 110, 117-18 (4th Cir. 1988). Such a fate likely awaits the cumulative voting remedy in *Sundquist*. See *Cousin v. Sundquist*, No. 96-6028 at 2 (6th Cir. Jan. 30, 1998) (noting that cumulative voting remedy, which was not requested by the plaintiffs, was not "under active consideration"). Nonetheless, such a recent imposition of an alternative remedy by a federal court is significant.

n9 See *Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs*, 965 F. Supp. 72, 79-80 (D.D.C. 1997), *rev'd on other grounds*, 1998 WL 210591 (D.D.C. May 1, 1998).

n10 See, e.g., Shawn Fremstad, *State Judicial Elections and the Voting Rights Act: Defining the Proper Remedial Scheme*, 76 MINN. L. REV. 101, 114, 115 n.77 (1991); Pamela Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173 (1989); Robert McDuff, *Judicial Elections & the Voting Rights Act*, 38 LOY. L. REV. 931 (1993); Edward Still, *Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in Judicial Elections*, 9 YALE L. & POL. REV. 354 (1991); Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144 (1982).

n11 See, e.g., Richard L. Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution*, 21 STETSON L. REV. 743, 750 (1992); Bernard Grofman & Arend Lijphart, *Introduction to Part II*, in REPRESENTATION AND REDISTRICTING ISSUES 103-04 (Bernard Grofman et al. eds., 1984); Delbert A. Taebel et al., *Alternative Electoral Systems as Remedies for Minority Vote Dilution*, 11 HAMLIN J. PUB. L. & POL. 19 (1990); Leon Weaver, *Semi-Proportional and Proportional Representation Systems in the United*

States, in CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES 191 (Arend Lijphart & Bernard Grofman eds., 1984); Joseph Zimmerman, *The Federal Voting Rights Act & Alternative Electoral Systems*, 19 WM. & MARY L. REV. 621 (1978).

n12 Although the legal arguments advanced in Part II would apply to statewide as well as local electoral systems, I envision them being implemented initially at the local level only. This would fit the pattern of the original "vote dilution" cases under the Voting Rights Act, *see infra* Part I.B, and that of the cases to date that have dealt with alternative electoral systems. *See, e.g., Cousin*, No. 1:90-CV-399, at 8-9 (granting stay of district court's order) (discussed *infra* Part II.A.2). Alternative electoral systems are not a remedial option at the congressional level because seats for the United States House of Representatives must be elected from single-member districts. *See 2 U.S.C. § 2(c)* (1994). A bill currently pending in Congress would change that, however. *See H.R. 3068*, 105th Cong. (1998) ("the Voters' Choice Act"). Historically, from the late 18th century through 1967, a number of states elected representatives at large or from multi-seat districts. *See Kenneth C. Martis, Districts, in THE ENCYCLOPEDIA OF THE UNITED STATES CONGRESS* 651, 652-53 (Donald C. Bacon et al. eds., 1995). Indeed, except for a 10-year period starting in 1842, there was never any requirement that House of Representative seats be filled through single-member district elections prior to 1967. *See id.*

Similarly, the legal standard I propose would apply both to challenges to districting systems as well as to at-large electoral schemes -- indeed, to any voting case where the remedy sought is an alternative electoral system. For reasons of analytical simplicity and brevity, however, this Article focuses primarily on challenges to at-large schemes. *See infra* Part II.F.

n13 *See Still, supra* note 1, at 249; Heywood T. Sanders, *The Government of American Cities: Continuity and Change in Structure*, 1982 MUN. Y.B. 178, 179-80.

n14 In some vote dilution cases, courts use "at-large" and "multimember" interchangeably to contrast with "single-member districts." *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986).

n15 Residency districts should not be confused with single-member districts. A residency district places geographic constraints only on *candidates*: a voter residing in one district can still cast a vote to fill a seat for another district. Single-member districts place direct geographic constraints on both voters and candidates.

n16 An example can illustrate these variations on the traditional at-large election. Assume that fifteen candidates are on the ballot in an election to fill five seats on a city council in a traditional at-large election. Several options exist. First, all fifteen candidates can be placed on one plenary list on the ballot, and voters can cast one vote for each of their five preferred candidates, with the top five vote-getters taking office. Second, under a "numbered post" variation, the seats would be numbered 1-5, and candidates would be required to declare a candidacy for one of these five "numbered posts," creating five "mini-elections" in which, say, three candidates each vie for the top vote for Seat 1, for Seat 2, and so on. Rather than a plenary list of candidates, each group of three candidates would be placed on the ballot beneath the corresponding seat number. Voters would still be able to cast five votes (one for each seat to be filled) but would be required to vote for one candidate from within each of the five separate lists. Third, the jurisdiction could be carved into "residency districts" 1-5. The rules would require a candidate living in Residency District 1 to declare candidacy for Seat 1, and so on. This variation would again divide the election into five mini-elections, still allowing voters from all over the jurisdiction to cast votes for all five seats, one for a candidate located beneath each Residency District listing on the ballot. Finally, under either the "numbered post" or "residency district" variation, if a winning candidate in each mini-election is required to have a majority of the votes cast for that seat, then the jurisdiction

might have to stage a runoff election between the top two vote-getters if none of the three candidates vying for a seat got over 50% of the vote.

n17 See *Rogers v. Lodge*, 458 U.S. 613, 616 (1982); *Chapman v. Meier*, 420 U.S. 1, 17-18 (1975).

n18 See *City of Port Arthur v. United States*, 459 U.S. 159, 167 (1983) (discussing majority vote requirements); *City of Rome v. United States*, 446 U.S. 156, 184 n.19 (1980) (discussing numbered posts), *reh'g denied*, 447 U.S. 916 (1980); *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1357 (M.D. Ala. 1986); U.S. COMM'N ON CIVIL RIGHTS, TEN YEARS AFTER: UNFULFILLED GOALS (1981) (analyzing staggered terms).

n19 This situation occurred in Granville County, North Carolina, site of a vote dilution lawsuit under the Voting Rights Act. See *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988). Despite the fact that a number of black residents had run for election to the county's governing body, the county had never elected a black candidate. See *id.* at 113.

n20 See *Thornburg v. Gingles*, 478 U.S. 30 (1986) (affirming lower court ruling providing for single-member district remedy in Voting Rights Act challenge to North Carolina multimember state legislative districts).

n21 See *Reynolds v. Sims*, 377 U.S. 533, 559 (1964).

n22 See CENTER FOR VOTING AND DEMOCRACY, VOTING & DEMOCRACY REPORT, i (1995).

n23 European-style, party-based proportional representation systems are sufficiently outside the American experience to fall beyond the scope of this Article.

n24 For a fuller discussion of these systems and the philosophies behind them, see REIN TAAGEPERA & MATTHEW SOBERG SHUGART, SEATS AND VOTES: THE EFFECTS AND DETERMINANTS OF ELECTORAL SYSTEMS (1989).

n25 This Article focuses on the use of alternative systems to replace a dilutive, traditional at-large system. However, the legal analysis also applies to attempts to replace a dilutive, district-based system. See discussion *infra* Part II.F.

n26 The "threshold of exclusion" formulas make conservative assumptions about the voting behavior of the majority bloc. It assumes majority bloc voters cast all of their available ballots, they cast them all for candidates belonging to the majority bloc, and they divide up their votes evenly among a number of majority bloc candidates equal to the number of seats to be filled.

n27 See Still, *supra* note 1, at 253.

n28 *Id.*

n29 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 use in three county and two municipal elected bodies in North Carolina), *rev'd on other grounds*, 1998 WL 210591 (D.D.C. May 1, 1998); *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1460 (M.D. Ala. 1988) (describing the numerous Alabama counties and municipalities subject to the *Dillard* litigation and tracing the litigation's history); DOUGLAS AMY, REAL CHOICES, NEW VOICES 217, 233 (1993) (noting use in a "few cities and counties" in Connecticut and Pennsylvania).

n30 See Still, *supra* note 1, at 254. This can be seen by choosing a constant integer of, for example, three or more for the number of seats to be filled and calculating the threshold using "1," "2," "3," etc. for the number of votes each voter has.

n31 See *id.* at 254; Engstrom, *supra* note 11, at 758.

n32 See Note, *supra* note 10, at 153 n.40.

n33 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. Sanders*, 376 U.S. 1, 14 (1964)); see also Lani Guinier, *The Triumph of Tokenism*, *supra* note 2, at 1148 n.332.

n34 See Robert Brischetto & Richard Engstrom, *Cumulative Voting and Latino Representation: Exit Surveys in Fifteen Different Texas Communities*, 78 SOC. SCI. Q. 973 (1997) (describing the uses of cumulative voting in Texas by at least 15 municipalities and 26 school boards since 1991); Richard 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 in four municipalities in addition to the county commission and school board of a separate county since 1988); Engstrom, *supra* note 11, at 757 (describing use in Alabama and Peoria). In a 1996 referendum, voters suspended the use of cumulative voting in Alamogordo, effective the following year.

n35 See AMY, *supra* note 29, at 186. Illinois used a slightly different form of cumulative voting, allowing a voter to cast one vote per candidate up to three votes and allotting an equal share of the total number of votes each voter casts to the candidates selected. For example, if a voter places an "X" next to only two candidates, each candidate gets 1.5 votes (3/2); if the voter places an "X" next to only one candidate, the candidate would get three votes.

n36 See Engstrom, *supra* note 11, at 751; Still, *supra* note 1, at 256. This formula applies in the usual case where the number of votes each voter casts equals the number of seats to be filled.

n37 This can be seen by using a fixed number for "# of seats to be filled" in both formulas, and plugging in increasing integers for "# of votes each voter has."

n38 Preference voting is sometimes referred to as the "single transferable vote" or as the "Hare system," which is a particular methodology for counting preference vote ballots. See Still, *supra* note 1, at 259.

n39 See AMY, *supra* note 29, at 18.

n40 See *id.* at 18, 137-38; Engstrom, *supra* note 11, at 766-67.

n41 See Engstrom, *supra* note 11, at 766-67.

n42 This minimum 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 is the so-called "Droop quota." See Still, *supra* note 1, at 259. Thus, where voters vote to fill three seats, the minimum 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.

n43 See *id.* at 258-61. For more detailed explanations of the counting process, see AMY, *supra* note 29, at 230-31 & Appendix C; Engstrom, *supra* note 11, at 765-69. Engstrom provides a diagram that is particularly helpful.

n44 See Still, *supra* note 1, at 260; Note, *supra* note 10, at 150-51.

n45 See Still, *supra* note 1, at 260.

n46 See *id.*

n47 See AMY, *supra* note 29, at 137-38; ENID LEKMAN, HOW DEMOCRACIES VOTE, 231-69, 284-86 (1971).

n48 See *Campbell v. Board of Educ.*, 310 F. Supp. 94 (S.D.N.Y. 1970); *McSweeney v. City of Cambridge*, 665 N.E.2d 11 (Mass. 1996); *Moore v. Election Comm'rs*, 35 N.E.2d 222 (Mass. 1941); *Reutener v. City of Cleveland*, 141 N.E. 27 (Ohio 1923).

n49 The Act bars voting-related discrimination against persons on account of race, color, national origin, and membership in a "language minority group." See 42 U.S.C. §§ 1973, 1973b(f) (1994). The Act defines a "language minority group" to include Asian Americans, Hispanics, Native Americans, and Alaskan Natives. See 42 U.S.C. § 1973l(c) (1994). I often refer to "blacks" as victims of vote dilution in this Article; these references should be taken to refer to all minority groups covered under Section 2.

n50 The first such Supreme Court decision was *Allen v. State Bd. of Elections*, 393 U.S. 544, 548, 566-69 (1969), which adopted a broad, inclusive definition of the phrase "standard, practice or procedure with respect to voting" in a case involving the analogous provisions of Section 5 of the Act, 42 U.S.C. § 1973c (1994).

n51 446 U.S. 55 (1980).

n52 42 U.S.C. § 1973(b) (1994).

n53 The 1982 amendments reinstated the pre-Bolden "results test" used by the courts in *White v. Regester*, 412 U.S. 755 (1973) and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam).

n54 The Senate Judiciary Committee majority report on the Act lists the following factors, focused on the particular defendant 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.

n55 478 U.S. 30 (1986). The Supreme Court has noted the open-ended nature of the pre-Gingles "results test." See, e.g., *Johnson v. DeGrandy*, 513 U.S. 804, 1010 (1994) (the Gingles test "provided some structure to" the "totality of [the] circumstances" test).

n56 Although *Gingles* dealt with a challenge to multimember districts (i.e., districts from which several representatives are elected), lower courts have applied the *Gingles* analysis to vote dilution challenges to single-member districting schemes as well. The Court eventually clarified that this was the correct approach. See *Grove v. Emison*, 507 U.S. 25, 40-42 (1993).

n57 *Gingles*, 478 U.S. at 48-52. The Court used "submergence" to refer to a claim that a multimember (or at-large) system "dilutes [minority] votes by submerging them in a white majority." *Id.* at 46.

n58 See *id.* at 50-51. The first of these preconditions is often referred to simply as "compactness," and the second and third can be considered together as proof of "racial bloc voting." See *id.*, at 55; *Teague v. Attala County*, 92 F.3d 283, 287 (5th Cir. 1996) (making the same point, citing *Gingles*). The terms "racial bloc voting" and "racially polarized voting" are synonymous. See *Gingles*, 478 U.S. at 52 n.18.

n59 See *Gingles*, 478 U.S. at 43-52. Although recent Supreme Court decisions have cast doubt on some aspects of prior vote dilution jurisprudence, the Court continues to endorse the *Gingles* framework for assessing Section 2 vote dilution claims. See, e.g., *Abrams v. Johnson*, 117 S. Ct. 1925, 1935-36 (1997).

n60 See *Gingles*, 478 U.S. at 55-70.

n61 See, e.g., *Clark v. Calhoun County*, 21 F.3d 92, 97 (5th Cir. 1994) (noting that it will be "only the very unusual case" in which plaintiffs establish the *Gingles* preconditions but fail to establish liability under the totality of the circumstances (quoting *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993))); see also *United States v. Dallas County Comm'n*, 739 F.2d 1529, 1535 (11th Cir. 1984) (noting that proof of racial bloc voting "will ordinarily be the keystone of a dilution case" (quoting *United States v. Marengo County*, 731 F.2d 1546, 1566 (11th Cir. 1984), *cert. denied*, 469 U.S. 976 (1984))).

n62 512 U.S. 874 (1994).

n63 *Id. at 880* (Kennedy, J., plurality opinion); *see also id. at 887* (O'Connor, J., concurring).

n64 *See id. at 888* (O'Connor, J., concurring).

n65 *See id. at 881-85* (Kennedy, J., plurality opinion).

n66 *See Growe v. Emison, 507 U.S. 25, 40 (1993); Connor v. Finch, 431 U.S. 407, 415 (1977).*

n67 *See, e.g., Dillard v. Baldwin County Bd. of Educ., 686 F. Supp. 1459, 1461-62 (M.D. Ala. 1988)* (tracing the history of the *Dillard* series of Section 2 cases in Alabama, many of which parties resolved through consent decrees establishing alternative electoral systems); *Vega v. City of Alamogordo, No. 86-0061-C (D.N.M. Dec. 31, 1986)* (ordering cumulative voting into effect for Alamogordo, N.M.).

n68 The sole contemporaneous exception was short-lived: a federal district court's nonsettlement adoption of limited voting was overturned by the Fourth Circuit on fact-specific grounds. *See McGhee v. Granville County, 860 F.2d 110, 117-18 (4th Cir. 1988)*. A later attempt at imposing cumulative voting as a nonsettlement remedy met with a similar fate. *See Cane v. Worcester County, 35 F.3d 921 (4th Cir. 1994), cert. denied, 513 U.S. 1148 (1995)*. A recent case, also involving a court-imposed cumulative voting remedy, produced the only nonsettlement alternative remedy still in effect. *See Cousin v. Sundquist, No. 1:90-CV-339, slip op. at 8-9 (E.D. Tenn. July 3, 1996)* (imposing cumulative voting remedy where defendant, after finding of liability, took no position on remedy), *appeal docketed, No. 96-6028 (6th Cir. Jan. 30, 1998)* (granting stay of district court's order). *See infra* Part II.A.

n69 *Shaw v. Reno, 509 U.S. 630 (1993)* [hereinafter *Shaw I*].

n70 *Id. at 657-58*.

n71 *Id. at 650-53*.

n72 *Id. at 649-50*.

n73 *Id. at 647*.

n74 *Id. at 648*.

n75 *Id. at 657*.

n76 *See id. at 657-58*.

n77 *515 U.S. 900 (1995)*.

n78 *See id. at 915-16.*

n79 *Id. at 916.*

n80 *See id. at 911-12.* These two rationales have also been described in terms of the "stigmatic" and "representational" harms, respectively, which racial gerrymandering supposedly fosters. *See United States v. Hays, 515 U.S. 737, 744 (1995).*

n81 *See Bush v. Vera, 116 S. Ct. 1941 (1996)* (affirming district court order invalidating Texas congressional districts); *Shaw v. Hunt, 517 U.S. 899 (1996)* [hereinafter *Shaw II*] (reversing three-judge court ruling upholding original *Shaw* district in North Carolina); *see also Abrams v. Johnson, 117 S. Ct. 1925 (1997)* (upholding Georgia district court's rejection of minority remedial districts on *Shaw* grounds). To date, only one Supreme Court opinion has upheld a minority district against a *Shaw* challenge. *See Lawyer v. Department of Justice, 117 S. Ct. 2186 (1997)* (affirming lower court ruling upholding Florida Senate district). However, the Supreme Court has on several occasions summarily affirmed lower court opinions upholding districts against such challenges. *See King v. Illinois Bd. of Elections, 118 S. Ct. 877 (1998), summarily aff'g King v. State Bd. of Elections, 979 F. Supp. 619 (N.D. Ill. 1997)* (three-judge court); *Dewitt v. Wilson, 515 U.S. 1170 (1995), summarily aff'g 856 F. Supp. 1409 (E.D. Cal. 1994)* (three-judge court); *see also Meadows v. Moon, 117 S. Ct. 2501 (1997), summarily aff'g 952 F. Supp. 1141 (E.D. Va. 1997)* (three-judge court) (affirming invalidation of district).

n82 *Shaw II, 116 S. Ct. at 1905-06.*

n83 *See id. at 1961.*

n84 This dilemma is similar to the one faced by entities engaging in affirmative action programs who may be torn between compliance with federal anti-discrimination statutes and the prohibitions of the Constitution. *See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 291 (1986)* (O'Connor, J., concurring in part and concurring in the judgment) (state actors should not be "trapped between the competing hazards of liability" by the imposition of unattainable requirements under the rubric of strict scrutiny). The dilemma is more acute in the districting context, however, in that states may and do routinely consider race in drawing lines, consistent with federal law and without triggering strict scrutiny (as long as they do so consistently with traditional districting principles). The openly acknowledged use of race as a decisional factor in other contexts -- employment, education, and awarding government contracts, for example -- would immediately violate federal discrimination law or (in the case of an affirmative action plan) trigger strict scrutiny.

n85 Of course, another way out of the dilemma would be the invalidation of Section 2's "results test" under the Constitution. Although the Supreme Court has affirmed the constitutionality of Voting Rights Act provisions aimed at "discriminatory impact," *see Fullilove v. Klutznick, 448 U.S. 448, 477 (1980)*, the Supreme Court has never had occasion to rule specifically on the constitutionality of Section 2's results test. *See Bush v. Vera, 116 S. Ct. 1941, 1968 (1996)* (O'Connor, J., concurring). Instead, it has assumed its constitutionality and applied its terms on numerous occasions, and lower courts have unanimously affirmed its validity. *See id.* (citing cases and affirming that Section 2 compliance is a valid compelling state interest justifying a racial gerrymander under *Shaw*). For reasons outside the scope of this Article, I believe such an invalidation would be unwarranted.

n86 See Engstrom, *supra* note 11, at 758-60. In 6 of the 14 municipalities, the black candidates ran uncontested. See *id.*

n87 See *id.*

n88 See *id.* See also Karlan, *supra* note 10, at 227-29 (summarizing results in first round of limited voting elections in local jurisdictions in North Carolina and Alabama).

n89 See Engstrom, *supra* note 11, at 752-57.

n90 See AMY, *supra* note 29, at 138.

n91 See *id.*

n92 See *id.* at 144-48, and sources cited therein.

n93 See *Cleveland County Assoc. for Gov't by The People v. Cleveland County Bd. of Comm'rs*, 965 F. Supp. 72 (D.D.C. 1997).

n94 *Id.* at 80.

n95 See *id.*

n96 See *Shaw v. Reno*, 509 U.S. 630, 642-45, 649-51, 657 (1993) (referring repeatedly to the centrality of "classifications" in the rationale for the new *Shaw* cause of action).

n97 In *Bush v. Vera*, 116 S. Ct. 1941 (1996), seven of the nine Supreme Court justices indicated that the intentional creation of a minority district would not, by itself, necessarily trigger strict scrutiny. See *id.* at 1951 (opinion of O'Connor, J., joined by Rehnquist, C.J. and Kennedy, J.); *id.* at 1977 (Stevens, J., dissenting, joined by Ginsburg & Breyer, JJ.); *id.* at 2011 (Souter, J., dissenting, joined by Ginsburg & Breyer, JJ.); see also *Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2194-95 (1997) (upholding district court's refusal to apply strict scrutiny to a Florida Senate minority district that was clearly race-conscious in nature, because its characteristics were in line with those of other House and Senate districts in the state).

n98 See *Bush*, 116 S. Ct. at 1949.

n99 *United States v. Hays*, 515 U.S. 737, 744 (1995) (quoting *Shaw I*, 509 U.S. at 643). Of course, the imposition of a remedial alternative electoral scheme, as the result of a Section 2 suit, a voluntary adoption by a diversity-minded governing body, or otherwise may "incite racial hostility" in those who would oppose any diversity-oriented reform as illegitimate "special favors" for minorities. But this potential objection exists for all types of remedial voting plans, including districting plans which would be upheld under *Shaw*.

n100 See *Hays*, 515 U.S. at 744.

n101 *Id.* (quoting *Shaw I*, 509 U.S. at 648).

n102 See, e.g., Nicholas R. Miller, *Pluralism and Social Choice*, 77 AM. POL. SCI. REV. 734, 743 (1983); see also Karlan, *supra* note 10, at 230-31 (discussing "fragmentation" criticisms and responses thereto); Lani Guinier, *No Two Seats*, *supra* note 2, at 1489-94 (1991) (same).

n103 Karlan, *supra* note 10, at 231.

n104 See, e.g., *Abrams v. Johnson*, 117 S. Ct. 1925, 1936 (1997) (upholding 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 20% to 23%).

n105 Guinier, *No Two Seats*, *supra* note 2, at 1490.

n106 See Karlan, *supra* note 10, at 173, 231 n.244 (arguing that there is no evidence to show that "continuing to use election systems that totally shut out minorities does anything more than mask whatever bloc voting occurs; it certainly does nothing to reduce racial tension").

Defenders of New York City's historical preference voting system made this same argument, discussing studies showing ethnic voting to account for less than 30% of voting behavior under preference voting, and noting electoral results showing voters crossing ethnic lines due to partisan loyalty. See Belle Zeller & Hugh A. Bone, *The Repeal of Proportional Representation In New York City -- Ten Years In Retrospect*, 42 AM. POL. SCI. REV. 1127, 1139-42 (1948).

n107 See Guinier, *No Two Seats*, *supra* note 2, at 1490-91.

n108 See *id.*; Karlan, *supra* note 10, at 231 n.244; Note, *supra* note 10, at 154.

n109 See Robert A. Burnham, *Reform, Politics, and Race in Cincinnati: Proportional Representation and the City Charter Committee, 1924-1959*, 23 J. URB. HIST. 131, 138-40, 142-45 (1997) (describing black coalitions, first with Democrats, then with Republicans, under preference vote system in 1920s and 1930s); Zeller & Bone, *supra* note 106, at 1138 (describing multiracial coalition backing proportional representation in New York in the 1940s, as well as voter support crossing over ethnic lines); cf. Karlan, *supra* note 10, at 246-47 (noting that supermajority requirement on Mobile City Council "has distinctly improved political interaction between whites and blacks in Mobile").

n110 AMY, *supra* note 29, at 166. A similar criticism made, one not confined to the racial/ethnic context, is that alternative systems promote the election of "fringe" candidates. See *id.* at 174-76. A common example is a candidate representing the Ku Klux Klan. However, the election of such candidates depends entirely on how low the threshold of exclusion is under the particular electoral system. In countries like Israel, where the threshold was only one percent until recently, a number of nonmainstream parties considered to be radical obtained a significant share of seats. See *id.* at 170. Such problems are generally not considered to have been significant in

Germany, which uses an across-the-board threshold of five percent for all national elections. *See id.* at 170, 229. Presumably, there is some level at which a candidate's share of the vote is sufficiently high (say, 10, 20, or 30%) that he or she must be viewed as representing a significant part of the polity and therefore as deserving of recognition. In the local jurisdictions to which this legal theory would most likely be applied, the number of seats involved would be small enough so that the threshold of exclusion would be significantly higher than that used in either Israel or Germany: thresholds would usually be over 10% (i.e., with 9 seats or below), and often over 20% (4 or below). *See* Karlan, *supra* note 10, at 216 n.182 (citing 1980s sources to show that average number of city council seats is 6.5; county seats rarely more than 12 and often as low as 3); Letters from John Miller, Statistician, National League of Cities (June and July 1997) (on file with author) (containing 1990s data showing that in cities with "pure" at-large systems, the average number of city council seats is 6). There is no evidence that where alternative systems have been tried in the United States, there has been any marked increase in the number of candidates considered "radical" or "extremist."

Even where the number of seats is numerous enough to establish an uncomfortably low threshold of exclusion from the "fringe candidate" standpoint, courts and local governing bodies can simply fashion the system to raise the threshold to a comfortable level. This can be done most simply by using staggered terms to reduce the number of seats up for election in any given electoral contest. Alternative methods abound, however: the threshold can be raised by requiring an across-the-board minimum percentage of the vote to elect a candidate, as in Germany; by carving up the jurisdiction into multimember districts, each of which elects its multiple representatives using a proportional system, as in Japan; or by designating a certain number of seats to be elected from single-member districts, thus lowering the number of at-large seats, as in both Germany and Japan. *See* AMY, *supra* note 29, at 229 (describing German system); *Reform to Spell Major Changes*, JAPAN TIMES, Mar. 11, 1994, at 3 (describing Japan's system). Mixed single-member/cumulative systems are in modern use in the United States as well: Peoria and Alamogordo are examples.

n111 REIN TAAGEPERA & MATTHEW SHUGART, SEATS AND VOTES: THE EFFECTS AND DETERMINANTS OF ELECTORAL SYSTEMS 63 (1989).

n112 *See* AMY, *supra* note 29, at 165; *see id.* at 166 (quoting former Cambridge, Massachusetts school committee member as saying that "[proportional 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").

n113 *See Cane v. Worcester County*, 847 F. Supp. 369, 372-73 (D. Md. 1994); Guinier, *No Two Seats*, *supra* note 2, at 1491.

n114 *See* Guinier, *The Triumph of Tokenism*, *supra* note 2, at 1148-49, n.331; Karlan, *supra* note 10, at 231 n.244.

n115 *See* Darren Rosenblum, *Geographically Sexual?: Advancing Lesbian and Gay Interests Through Proportional Representation*, 31 HARV. C.R.-C.L. L. REV. 119 (1996) (arguing for use of proportional representation to advance gay and lesbian voting concerns).

n116 *See* Engstrom, *supra* note 7, at 285. As another example, a form of limited voting is used in the District of Columbia to prevent electoral sweeps by Democrats in City Council elections.

n117 By articulating this particular advantage of alternative systems over minority districts, I do not mean to suggest a wholesale rejection of the latter, which I consider to be preferable to dilutive at-large systems. Nor do I suggest an endorsement of the *Shaw* line of cases, which I believe to have been wrongly decided (for reasons outside the scope of this Article).

n118 See *Cane*, 847 F. Supp. at 373; Guinier, *The Triumph of Tokenism*, *supra* note 2, at 1141 n.304 (describing evolution of crossracial "self-defined voluntary constituencies").

n119 For cumulative voting, see, e.g., *Buckanaga v. Sisseton Indep. Sch. Dist.* No. 54-5, No. 84-1025 (D.S.D. 1988); *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870 (M.D. Ala. 1988); *Banks v. Peoria*, No. 87-2371 (C.D. Ill. 1987). For limited voting, see, e.g., *Hall v. Kennedy*, No. 88-117-Civ-3 (E.D.N.C. 1989); *United States v. Sampson County*, No. 88-121-Civ-3 (E.D.N.C. 1989); *Dillard v. Town of Cuba*, 708 F. Supp. 1244 (M.D. Ala. 1988); *United States v. City Council of Augusta*, No. CV 187-004 (S.D. Ga. July 22, 1988).

n120 See cases cited *supra* note 67. The judgment in that case -- *Cousin v. Sundquist* -- has been stayed on appeal.

n121 See *Holder v. Hall*, 512 U.S. 874, 896-99, 908-13 (1994) (Thomas, J., concurring); *LULAC v. Clements*, 986 F.2d 728, 814-15 (5th Cir. 1993), *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); *Cousin v. Sundquist*, No. 1:90-CV-399, slip op. at 8-9 (E.D. Tenn. July 3, 1996), *appeal docketed*, No. 96-6028 (6th Cir. Jan. 30, 1998) (granting stay of district court's order); *Dillard v. Town of Louisville*, 730 F. Supp. 1546, 1548 (M.D. Ala. 1990); *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870, 875 (M.D. Ala. 1988).

The *en banc* opinion in *LULAC* rejected the utility of cumulative voting to remedy the precise claim at issue. See *LULAC*, 999 F.2d at 875-76. However, it did not reject the appellate panel's underlying notion that courts are empowered to order such remedies in voting cases.

n122 See, e.g., *Cintron-Garcia v. Romero-Barcelo*, 671 F.2d 1, 6 (1st Cir. 1982) (finding that limited voting scheme for election of Commonwealth representative is "reasonable" and facilitates minority representation); *Orloski v. Davis*, 564 F. Supp. 526 (M.D. Pa. 1983) (limited voting for Commonwealth Court); *Hechinger v. Martin*, 411 F. Supp. 650 (D.D.C. 1976) (three-judge court) (upholding limited voting scheme for D.C. City Council elections); *LoFrisco v. Schaffer*, 341 F. Supp. 743 (D. Conn. 1972) (three-judge court) (limited voting for school boards); *Kaelin v. Warden*, 334 F. Supp. 602, 605 (E.D. Pa. 1971) (holding that limited voting does not violate Equal Protection Clause as long as each voter casts the same number of votes); *Blaikie v. Power*, 193 N.E.2d 55 (N.Y. 1963), *appeal dismissed*, 375 U.S. 439 (1964) (limited voting for New York City Council).

n123 See, for example, Judge Myron Thompson's decisions approving cumulative voting remedies as settlements to several of the related *Dillard* cases brought under the *Voting Rights Act*. *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1460 (M.D. Ala. 1988) (describing history of the *Dillard* litigation). The *Dillard* litigation also resulted in court-approved settlements providing for limited voting schemes. See, e.g., *Town of Cuba*, 708 F. Supp. at 1244 (approving limited voting scheme for towns of Cuba and Waldo); *id.* at 1246 n.3 (noting its previous approval of limited voting schemes in eleven different cases).

n124 See *LULAC*, 986 F.2d at 814-15.

n125 See Guinier, *No Two Seats*, *supra* note 2, at 1496-97.

n126 42 U.S.C. § 1973(b) (1994).

n127 42 U.S.C. § 1973(c) (1994) (emphasis added).

n128 H.R. REP. No. 97-227, at 31 (1981).

n129 See *United States v. Paradise*, 480 U.S. 149, 183-84 (1987) (discussing the breadth and flexibility of a federal court's equitable discretion regarding remedies, citing *Louisiana v. United States*, 380 U.S. 145, 154 (1965)). Federal courts are empowered and required to do whatever is necessary to cure the voting rights violation. See *Fullilove v. Klutznick*, 448 U.S. 448, 508 (1980) (Powell, J., concurring); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *Louisiana*, 380 U.S. at 154.

n130 See *Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2192-94 (1997) (citing *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978)); *White v. Weiser*, 412 U.S. 783, 794-95 (1973).

n131 See *Wise*, 437 U.S. at 540.

n132 See S. REP. No. 97-417, at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 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).

n133 See *supra* note 119.

n134 See *SCLC v. Sessions*, 56 F.3d 1281, 1313-15 (11th Cir. 1995) (Hatchett, J., dissenting); *see also* *Marshall v. Edwards*, 582 F.2d 927, 935 n.9 (5th Cir. 1978) (noting prevalence of "proportional representation" systems abroad, acknowledging use of "Hare system" in the United States, and quoting approvingly from John Stuart Mill's endorsement of proportional representation systems); *Latino Political Action Comm., Inc. v. City of Boston*, 609 F. Supp. 739, 744 (D. Mass. 1985) (describing the beneficial effect of limited voting on minority voters and relying on use of limited voting in the present system to reject vote dilution claim).

n135 860 F.2d 110 (4th Cir. 1988).

n136 See *id.* at 113.

n137 See *id.* at 114.

n138 *Id.* at 115.

n139 *See id. at 115, 118*. This is an uncontroversial proposition, in line with definitive Supreme Court authority on the subject. *See, e.g., Lawyer v. Department of Justice, 117 S. Ct. 2186, 2192-94 (1997)*.

n140 *McGhee, 860 F.2d at 120*.

n141 *See id. at 118*.

n142 *Id.*

n143 *See id.*

n144 *Id. at 117*. The court was apparently using "districting system" to refer to the use of at-large elections, multimember districts, or single-member district configurations, but not to the particular voting mechanisms allowed (such as traditional winner-take-all rules versus alternative schemes).

n145 *840 F. Supp. 1081 (D. Md. 1994)*.

n146 *847 F. Supp. 369 (D. Md. 1994)*.

n147 *See Cane v. Worcester County, 35 F.3d 921 (4th Cir. 1994), cert. denied, 115 S.Ct. 1097 (1995)*.

n148 *See id. at 927-28* (quoting *Holder v. Hall, 512 U.S. 87, 910-12 (1994)* (Thomas, J., concurring) ("Nothing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under § 2.")).

Justice Thomas's concurrence in *Holder v. Hall* argues for a much more narrow view of the Voting Rights Act, which would foreclose consideration of *any* sort of remedy for minority vote dilution. However, his opinion acknowledges that the Act is generally viewed to have broader remedial goals, suggests that alternative electoral systems are better vehicles for achieving those goals than single-member districts, and concludes that there is no federal law barring the use of such systems as remedies for federal courts.

n149 *See Cane, 35 F.3d, at 928*.

n150 *See id.*

n151 *See id. at 929*. On remand, the district court rejected the plaintiffs' two proposed single-member district alternatives, each featuring a single black-majority district, imposing instead a "mixed" plan using the defendant's proposed single-member district system (which had one black "influence" district but no black-majority district) for primary elections and cumulative voting for general elections. *See Cane v. Worcester County, 874 F. Supp. 687 (D. Md. 1994)*. After a cross-appeal, the Fourth Circuit vacated the district court's judgment and ordered one of the plaintiffs' single-member-district plans into effect. *See Cane v. Worcester County, 59 F.3d 165 (4th Cir. 1994)* (referenced in "Table Of Decisions Without Reported Opinions"). Since neither side argued for cumulative voting on this second round of appeal, the court did not discuss the

cumulative voting issue.

n152 No. 1:90-CV-339, slip op. at 8-9 (E.D. Tenn. July 3, 1996), *appeal docketed*, No. 96-6028 (6th Cir. Jan. 30, 1998) (granting stay of district court's order).

n153 *See Cousin v. McWherter*, 904 F. Supp. 686 (E.D. Tenn. 1995). The court expressly found that plaintiffs had met the compactness prong of *Gingles*. *See id.* at 688.

n154 *Sundquist*, No. 1:90-CV-339, slip op. at 8-9 (citing *SCLC v. Sessions*, 56 F.3d 1281, 1302 (11th Cir. 1995) (Hatchett, J., dissenting) (declaring that the illustrative "benchmark" used to measure vote dilution during the liability analysis need not be identical to the remedy ultimately implemented).

n155 *Id.* at 9-12. The court also noted several other disadvantages peculiar to judicial elections which are outside the scope of this Article.

n156 *See id.* at 11-12.

n157 999 F.2d 831 (5th Cir. 1993) (en banc).

n158 *See id.* at 876. *See also McGhee v. Granville County*, 860 F.2d 110, 117-18 (4th Cir. 1988) (rejecting limited voting remedy on similar grounds); discussion *supra* note 67.

n159 39 F.3d 1494 (11th Cir. 1994).

n160 56 F.3d 1281 (11th Cir. 1995).

n161 *See id.* at 1296 n.24 (suggesting that cumulative voting elections will disrupt collegiality among judges and discourage qualified attorneys from running for judicial office); *Nipper*, 39 F.3d at 1546.

While these assertions serve to cabin the circuit courts' criticisms of cumulative voting to the judicial election context, I believe them to be misguided. Because these same courts have emphasized the substantial state interest in keeping "linkage" between elected judges' jurisdictions and electoral territories, *see SCLC v. Sessions*, 56 F.3d 1281, 1296-97 (11th Cir. 1995); *Nipper*, 39 F.3d at 1542-44; *LULAC v. Clements*, 999 F.2d 831, 869 (5th Cir. 1993), alternative systems are particularly appropriate in the judicial election context by virtue of their at-large nature. *See McDuff, supra* note 10 at 988-89 (1993).

n162 *See Nipper*, 39 F.3d at 1541-47 (Tjoflat, J.) (finding *Gingles* preconditions and Senate factors met regarding liability, but rejecting claim because of unavailability of a remedy consistent with important state policies peculiar to judicial elections); *id.* at 1547 (Edmondson, J., concurring) (agreeing that liability cannot be found due to unique judicial election concerns foreclosing the availability of any appropriate remedy).

The same analysis may apply to two district court opinions rejecting limited voting as a relief in judicial election cases. *See Clark v. Roemer*, 777 F. Supp. 445 (M.D. La. 1990); *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988). Although these opinions contain broad criticisms of limited voting, rooted in suspicion of its

seeming exotic nature, the cases also contain more fact-specific grounds for the rejection. *See Clark*, 777 F. Supp. at 467 (recognizing explicitly the unique aspects of judicial election cases and state law restrictions). *See also Martin*, 700 F. Supp. at 327.

n163 *See Chapman v. Meier*, 420 U.S. 1, 17-18 (1975). *See also Growe v. Emison*, 507 U.S. 25, 39 (1993); *Connor v. Finch*, 431 U.S. 407, 415 (1977).

n164 *See, e.g., Martin*, 700 F. Supp. at 336.

n165 *Chapman*, 420 U.S. at 16 n.10 (emphasis added) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 158-59 (1971) (stating that at-large plans "generally pose greater threats to minority-voter participation . . . than do single-member districts -- which is why we have strongly preferred single-member districts" for federal court-ordered remedies) (emphasis added). *See also Growe*, 507 U.S. at 39.

n166 *See Chapman*, 420 U.S. at 16 n.10, 17; *see also LULAC v. Clements*, 986 F.2d 728, 814 (5th Cir. 1993) (holding that court may be required to adopt alternatives to single-member districts if the jurisdiction has strong policy in favor of retaining at-large feature).

n167 *Thornburg v. Gingles*, 478 U.S. 39, 50 n.17 (1986) (emphasis added).

n168 *Id.* at 50 n.17. *See also Growe*, 507 U.S. at 40 (1993) (noting that the first *Gingles* precondition is necessary to "establish that the minority has the *potential to elect* a representative of its own choice") (emphasis added).

n169 Immediately after stating the first precondition, the Court elaborates that unless it is satisfied, "the *multimember form* of the district cannot be responsible for minority voters' inability to elect its (sic) candidates." *Gingles*, 478 U.S. at 50 (emphasis in original). *See also id.* at 50-51 n.17 (reasoning that if condition not met, plaintiffs could not elect candidates "in the absence of the multimember electoral structure," and "the at-large district cannot be blamed for the defeat of minority-supported candidates").

n170 56 F.3d 1281 (11th Cir. 1995) (en banc).

n171 *Id.* at 1302 (Hatchett, J., dissenting) (citing *Holder v. Hall*, 512 U.S. 874, 880-81 (1994) (Kennedy, J., plurality opinion), 886-88 (O'Connor, J., concurring) and *Gingles*, 478 U.S. at 88 (1986) (O'Connor, J., concurring)).

n172 *See Cousin v. Sundquist*, No. 1:90-CV-339, slip op. at 8-9 (E.D. Tenn., July 3, 1996), *appeal docketed*, No. 96-6028 (6th Cir. Jan. 30, 1998) (granting stay of district court's order), discussed, *supra* text accompanying notes 152-156.

n173 However, in comparison with a "traditional" districting plan, an alternative remedy would increase the number of minority group members whose vote dilution is actually remedied. As a matter of demographic necessity, districting plans almost always leave some members of the minority group outside the remedial

minority districts. *See, e.g., Gomez v. City of Watsonville*, 863 F.2d 1407, 1414 (9th Cir. 1988) (noting that under remedial plan approved by the appellate court, approximately 60% of the city's Hispanics would live outside the two Hispanic remedial districts). This failure to remove the vote dilution of all victims in the jurisdiction, accepted (correctly) as a flaw inherent in districting remedies, *see Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (citing *Gingles*, 478 U.S. at 50), does not occur with respect to alternative remedies. *See Aleinikoff & Issacharoff, supra* note 7, at 601, 626-33 (discussing inevitable use in districting plans, but not alternative plans, of "filler people" who cannot elect preferred candidates); Note, *supra* note 10 (discussing notion of "virtual representation" inherent in district systems).

n174 478 U.S. at 50 n.17 (second emphasis added).

n175 Despite its centrality in vote dilution litigation, the concept of "compactness" as a districting criterion has no place in federal law outside the *Gingles/Shaw* context. The Constitution does not make compactness a requirement for any election district, *see Shaw v. Reno*, 509 U.S. 630, 646 (1993) (citing *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973)), and there is no federal statutory requirement of compactness in congressional districts (or state or local districts, for that matter). *See Wood v. Broom*, 287 U.S. 1 (1932) (interpreting the federal Reapportionment Act of 1929 to repeal compactness requirement); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 527 n.139 (1993) (discussing *Wood v. Broom* and the lack of a compactness requirement). Compactness was only legally required for congressional districts from 1901 through 1929. Kenneth C. Martis, *Districts*, in THE ENCYCLOPEDIA OF THE UNITED STATES CONGRESS 652-53 (Donald C. Bacon et al. eds., 1995).

n176 Similarly, although the Supreme Court has never ruled on the question of whether plaintiffs may seek so-called "influence districts" with minority percentages below 50%, it has recognized that if such claims are viable, the first *Gingles* prong (which requires districts to be both compact *and* majority-minority in population) would be modified for such cases. *See Voinovich v. Quilter*, 507 U.S. 146, 154, 158 (1993). Some lower courts have already modified the first *Gingles* prong in this manner. *See Garza v. County of Los Angeles*, 918 F.2d 763, 769 (9th Cir. 1990) (allowing influence district claim where challenged system adopted or maintained with discriminatory purpose); *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) (allowing influence claim); *Turner v. Arkansas*, 784 F. Supp. 553, 568 (E.D. Ark. 1991) (same), *aff'd*, 504 U.S. 952 (1992). *But see McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942 (7th Cir. 1988) (disallowing influence claim).

n177 512 U.S. 874 (1994).

n178 *Id.* at 888 (O'Connor, J., concurring).

n179 *See id.* at 880-81.

n180 *See Harvell v. Blytheville Sch. Dist. #5*, 71 F.3d 1382 (8th Cir. 1995) (en banc) (holding that majority vote runoff requirement violated Section 2); *Whitfield v. Democratic Party*, 890 F.2d 1423 (8th Cir. 1989) (same); *Muhammad v. City of Memphis*, No. 88-2899-TUV (W.D. Tenn. Jan. 30, 1997) (same); *cf. Butts v. City of New York*, 779 F.2d 141, 148 (2d Cir. 1985) (acknowledging 40%-minimum requirement's potential dilutive effect for multimember offices, but rejecting challenge to runoff requirement as applied to *single-member* offices). The circuit courts in *Whitfield* and *Butts* discussed the *Gingles* "results test" using a "totality of the circumstances" analysis, but without reference to the compactness criterion. In *Harvell*, the circuit court noted in

passing that the compactness prong could be met, but did not at all indicate that the failure to meet this (inapplicable) *Gingles* prong would have been outcome-determinative.

n181 *See, e.g.*, S. REP. No. 97-417, at 6 (1982) *reprinted in* 1982 U.S.C.C.A.N. 177, 183 (listing "majority runoffs" and "other sophisticated rules" as part of "a broad array of dilution schemes"); S. REP. NO. 97-417 at 10, 22, 29-30, *reprinted in* 1982 U.S.C.C.A.N. at 187, 199-200, 206-08 (providing further references to the dilutive impact of these electoral practices); H.R. REP. No. 97-227, at 18 (1981) (identifying "discriminatory elements of the elections process such as at-large elections . . . majority vote run-off requirements, numbered posts, staggered terms" as practices that "*individually or in combination* result in inhibiting or diluting minority political participation and voting strength") (emphasis added); *id.* at 31 (asserting that Section 2 is "not limited to districting or at-large voting").

n182 478 U.S. at 56; *see also Muhammad*, No. 88-2899-TUV (W.D. Tenn. Jan. 30, 1997). Section 2 also authorizes challenges to voter registration procedures, which by their nature do not involve district remedies. *See, e.g., Operation PUSH v. Allain*, 674 F. Supp. 1245, 1262-63 (N.D. Miss. 1987). These challenges are properly viewed as "disfranchisement" rather than "dilution" cases. None of the *Gingles* preconditions would apply to these cases, although the Senate factors would still be relevant.

n183 446 U.S. 156 (1980), *reh'g denied*, 447 U.S. 916 (1980).

n184 459 U.S. 159, 167 (1982).

n185 Section 5 of the Act, the "preclearance" provision, applies to certain "covered" jurisdictions with a history of voting discrimination. *See* 42 U.S.C. § 1973b(4)(b) (1994). Any change in voting procedures must be affirmatively precleared as nondiscriminatory in purpose and effect, either by the Attorney General or the District Court for the District of Columbia. *See* 42 U.S.C. § 1973c (1994).

n186 *Compare* 42 U.S.C. § 1973(a) (Section 2) (1994) *with* 42 U.S.C. § 1973c (Section 5) (1994).

However, in *Holder v. Hall*, 512 U.S. 874 (1994), Justice Kennedy listed reasons for interpreting Section 2 and Section 5 differently for certain purposes. His main point was that there is an obvious "benchmark" (i.e., the status quo ante) for Section 5, given that Section's purpose to ensure that no *change* in the status quo be "precleared" if it makes matters *worse* for minorities (i.e., if it constitutes impermissible "retrogression"). *Id.* at 883-84; *see also Reno v. Bossier Parish School Bd.*, 117 S. Ct. 1491, 1498 (1997) (stating that, unlike Section 2, the purpose of Section 5 is to prevent retrogression). Kennedy's distinction does not apply to Section 2 challenges to particular voting rules, such as majority vote requirements, where a clear benchmark exists; indeed, as noted above, Kennedy specifically mentioned such a challenge as an example of a Section 2 case *having* a nonarbitrary benchmark. *See Holder*, 512 U.S. at 880-81 (using example of challenge to "anti-single-shot voting rule").

n187 In a different era, the viability of such Section 2 claims would be clear based on the authority cited above. Recently, however, the Supreme Court has shown a marked skepticism toward voting rights advocacy. This skepticism may extend to a profound discomfort with the notion of federal supervision of state and local elections on behalf of minorities. Although it is impossible to predict with confidence what the Supreme Court will do, Justices O'Connor and Kennedy, whose opinions in *Holder* suggest an acceptance of a compactness-free "benchmark," would be the likely "swing votes" on this issue.

n188 *Thornberg v. Gingles*, 478 U.S. 39, 50 n.17.

n189 *See id.*; *see also Butts v. City of New York*, 779 F.2d 141, 149 n.5 (2d Cir. 1985); *Brief for the United States as Amicus Curiae at 15, Whitfield v. Clinton*, 498 U.S. 1126 (1991) (No. 90-383).

n190 *See Karlan, supra* note 10, at 199-213 (criticizing *Gingles's* compactness requirement); J. Gerald Hebert & Allan Lichtman, *A General Theory of Vote Dilution*, 6 *LA RAZA L.J.* 1 (1993) (arguing for a more flexible "potential to elect" standard in districting cases over a mechanical requirement that an illustrative district be more than 50% in minority population, and detailing a statistical method for applying this more flexible standard).

n191 Of course, the legal standard I endorse would still use the second and third *Gingles* preconditions. *See, e.g., Gingles*, 478 U.S. at 52-77 (discussing this methodology in detail).

n192 The degree to which the notion of "compactness" truly is objective and quantifiable is open to question. *See infra* Part II.D.3.

n193 42 U.S.C. § 1973(b) (1994).

n194 Courts have recognized this potentially unbridled discretion. *See McGhee v. Granville County*, 860 F.2d 110, 116-17 (4th Cir. 1988) (discussing need for principled limit on Section 2 liability); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988) (same), *cert. denied*, 490 U.S. 1031 (1989).

n195 *See Still, supra* note 1, at 254.

n196 *Id.* at 260.

n197 This number is fixed and not subject to change by virtue of the Section 2 litigation. 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 precisely because such a challenge would remove a principled limit on Section 2 liability. *See id.* at 885 (Kennedy, J., plurality opinion); *id.* at 891 (O'Connor, J., concurring).

n198 *See, e.g., Houston v. Lafayette County*, 56 F.3d 606, 611 (5th Cir. 1995); *Cane v. Worcester County*, 35 F.3d 921, 926-27 n.6 (4th Cir. 1994); *Jeffers v. Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1989), *aff'd*, 498 U.S. 1019 (1991).

n199 *See, e.g., Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1465-66 (M.D. Ala. 1988).

n200 *Hays v. Louisiana*, No. CV-92-1522S (W.D. La. 1994) (three-judge court), trial transcript July 22, 1994, at 43-44 (testimony of Sen. Armand Brinkhaus).

n201 *See Pildes & Niemi, supra* note 175, at 553-59; Richard G. Niemi et al., *Measuring Compactness and*

the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering, 52 J. POL. 1155, 1155-74 (1990); Peyton H. Young, *Measuring the Compactness of Legislative Districts*, 13 LEGIS. STUD. Q. 105-15 (1988). The latter article is particularly helpful in explaining the large number of competing compactness measures, and their potential to yield inconsistent and counterintuitive results.

n202 See Hebert & Lichtman, *supra* note 190, at 9-15; Karlan, *supra* note 10, at 203-06.

n203 See Hebert & Lichtman, *supra* note 190, at 9-15.

n204 See *id.* at 11-12. Courts have recognized the need for a "supermajority" remedial district under particular factual circumstances, even in the post-Shaw era. See, e.g., *Abrams v. Johnson*, 117 S. Ct. 1925, 1937 (1997) (upholding district court finding that black district must be at least 55% black in registered voters, if possible, because mere 50%-black district was not sufficiently likely to elect black voters' candidate of choice).

n205 See Brischetto & Engstrom, *supra* note 34, at tbl.4.

n206 42 U.S.C. § 1973(b) (1994) (emphasis added).

n207 See, e.g., *McGhee v. Granville County*, 860 F.2d 110, 117-18 (4th Cir. 1988).

n208 See *Johnson v. DeGrandy*, 512 U.S. 997, 1014 n.11 (1994). The "proportion" referenced in the Dole proviso should be distinguished further from the number of minority *districts* in proportion to the minority group's population percentage.

n209 See *id.* at 1013 n.11, 1017-18 (holding that neither proportionality nor lack of proportionality was dispositive because courts must always employ standard *Gingles* "totality of the circumstances" analysis and that such a result was consistent with the Dole proviso).

n210 This calculation is based on the self-reporting data collected in the National League of Cities' survey of city governments (city council size and election method), along with U.S. Census data (minority voting population percentages). The NLC database contains at least 85% of the municipalities listed in the Census as having more than 10,000 persons. See Letters from John Miller, *supra* note 110. The threshold of exclusion was compared to the percentage of the largest minority group. The calculation does not include Puerto Rican cities, for which minority percentage data is unavailable.

n211 The percentage of "eligible" cities may change somewhat if cities with "mixed" at-large/district systems are considered. They were excluded for simplicity and ease of calculation and also to avoid the issue of whether the proper "n" for the threshold of exclusion is the total number of seats (if the plaintiff seeks to switch to a "pure" at-large system) or merely the number of seats currently elected at large. If the latter, the percentage is likely to drop; if the former, it is likely to remain about the same or rise somewhat.

The percentage is likely to rise more significantly if the minority percentage of two or more statutorily protected groups were to be combined. Where *all* minority groups in the same "pure" at-large cities over 10,000 are combined, the percentage of cities meeting the threshold rises to 36%. However, Section 2 plaintiffs cannot

assume that minority groups can be aggregated in this manner. *See, e.g., Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988) (before different minority groups in jurisdiction can be aggregated, plaintiff bears burden of showing that the groups vote together cohesively).

n212 The arbitrariness is no less disturbing in a hypothetical County *C* where blacks constitute 36% of the population, but are dispersed into a checkerboard pattern. While one might suppose that blacks' geographical integration suggests political integration, the example assumes that the second and third *Gingles* preconditions (racial bloc voting) and Senate factors (including historical voting discrimination as well as racial disparities in political participation and socioeconomic status) are met. Where these conditions exist, no minority group, no matter how residentially integrated, can be said to be politically integrated.

n213 *See* DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE UNDERCLASS* (1993); Arnold R. Hirsch, *With or Without Jim Crow: Black Residential Segregation in the United States*, in *URBAN POLICY IN TWENTIETH CENTURY AMERICA* (Arnold R. Hirsch & Raymond A. Mohl eds., 1993).

n214 Courts generally use voting age population in determining 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), *cert. denied*, 498 U.S. 1023 (1991); *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) (use of total population may be sufficient). Empirically, a racial or ethnic minority group's percentage share of the voting age population is often lower than its share of the total population. *See DeGrandy v. Wetherell*, 815 F. Supp. 1550, 1563-64 (N.D. Fla. 1992). A related but distinct line of authority discussed the need, at the remedial phase of a vote dilution case, for a voting age supermajority in remedial minority districts. *See United Jewish Orgs. v. Carey*, 430 U.S. 144, 152 (1977); *Ketchum v. Byrne*, 740 F.2d 1398, 1413 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985).

n215 I qualify "seats to be filled" with "in a single election" to account for the use of staggered terms. To illustrate, if an eight-member city council employed staggered terms, with four seats to be filled in every biennial election, "n" would equal four. If a nine-member council staggered terms so that five seats were open in one election and four seats in the next, then "n" should equal five (instead of four). I choose the higher "n" (and thus the lower, more accessible threshold of exclusion) because the relevant test is a minority group's potential to elect at least one member of the governing body. Under existing law, there is no requirement that the minority group be able to prevail in *every election*.

As a practical matter, of course, a Section 2 plaintiff likely would challenge the use of staggered terms as well. In that case, the appropriate "n" would seem to be the total number of seats.

n216 This is the figure contemplated as a comparison for the threshold of exclusion. *See Engstrom, supra* note 11 at 758 (citing Douglas Rae et al., *Thresholds of Representation and Thresholds of Exclusion: An Analytic Note on Electoral Systems*, 3 COMP. POL. STUD. 479 (1971)); Still, *supra* note 1 at 256, 260.

n217 Ecological regression analysis is a statistical method for evaluating the correlation between two variables. In voting cases, the percentage of the vote received by the minority candidate in each voting precinct is "regressed" onto the minority percentage of the voting precincts. Using well-established statistical formulae, the results are analyzed to see how strong a correlation exists between the two variables. Correlation values below a certain level indicate an insufficient relationship between a voter's race and voting behavior, which

would be fatal to a Section 2 claim. *See Thornberg v. Gingles*, 478 U.S. 39, 52-53; Bernard Grofman, *The Use of Ecological Regression to Estimate Racial Bloc Voting*, 27 U.S.F.L. REV. 593 (1993).

n218 *See* BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 85-88, 146-47 nn.1-12 (1992).

n219 Where plaintiffs show racial disparities in both political participation rates and socioeconomic factors, a causal link between them is presumed. *See LULAC v. Clements*, 999 F.2d 831, 866-67 (5th Cir. 1993) (en banc). In amending Section 2, Congress presumed that both of these disparities were tied to historical discrimination.

n220 Telephone Interview with Dr. Richard Engstrom, Professor of Political Science, University of New Orleans (Sept. 1, 1997).

n221 *See supra* Part II.B.

n222 The exact statistical analyses to be used in making such a showing is a significant methodological question that is beyond the scope of this Article.

n223 512 U.S. 997, 1017 (1994). *See also id.* at 1012-13 (describing tougher legal question that arises when Section 2 plaintiff's claim is "not total submergence, but partial submergence; not the chance for some electoral success in place of none, but the chance for more success in place of some").

n224 The Court overturned a finding of dilution based on Florida's failure to draw 11 Hispanic House districts instead of 9. *See id.* at 1002, 1022.

n225 *Id.* at 1025-26 (O'Connor, J., concurring).