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WHEN REFORMED LOCAL GOVERNMENT DOESN'T WORK: CINCINNATI CITIZENS DEFEND THE SYSTEM

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NATIONAL CIVIC REVIEW

THE VOTING RIGHTS ACT AT THIRTY

CONTENTS

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THE VOTING RIGHTS ACT AT THIRTY

Long considered the most successful civil rights reform legislation of the 1960s, the Voting Rights Act faces an uncertain future as it enters its fourth decade. The principal assault involves challenges to outcome-based enforcement of the Act intended to ensure minority representation in addition to electoral access.

SYMPOSIUM

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THE NATIONAL CIVIC LEAGUE, founded in 1894 as the National Municipal League, advocates a new civic agenda to create communities that work for everyone. The League is a 501(c)(3) nonprofit, nonpartisan educational association of individuals and organizations. League members have access to the information and services necessary to improve community life. For complete information, contact: June Angole, (303) 571-4343.

Featured Authors

ROBERT BRISCHETTO ("Cumulative Voting as an Alternative to Districting") is a sociologist in Lakehills, Texas. His article is based on a study conducted by the Hispanic Research Center of the University of Texas at San Antonio with support from the Murray and Agnes Seasongood Good Government Foundation of Cincinnati, Ohio, The Center for Voting and Democracy, San Antonio attorney José Garza, the Poverty and Race Research Action Council, and the Mexican American Legal Defense and Education Fund. The project co-investigator was Richard L. Engstrom, professor of Political Science at the University of New Orleans.

OLETHIA DAVIS ("Tenuous Interpretation: Sections 2 and 5 of the Voting Rights Act") is an assistant professor of Political Science at Southern University, Baton Rouge, Louisiana.

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GERALD E. NEWFARMER ("What Do You Do When Reformed Government Doesn't Work? The Cincinnati Experience") is the past city manager of Cincinnati, Ohio, and Fresno and San Jose, California. He is founder, chariman and chief executive officer of Management Partners, Inc., Cincinnati, Ohio.

WILMA RULE ("Why Women Should Be Included in the Voting Rights Act") is an adjunct professor of Political Science at the University of Nevada at Reno. The figures appearing in her article were first published in Wilma Rule, "Women's Underrepresentation and Electoral Systems," PS: Political Science and Politics, December 1994, pp. 689-692. The author expresses her gratitude to Judith Baer for supplying her book, Equality Under the Constitution, and Gayle Binion for her helpful comments.

EDWARD STILL ("Cumulative Voting as a Remedy in Voting Rights Cases") is a voting rights attorney practicing in Birmingham, Alabama. PAMELA KARLAN is a professor of Law at the University of Virginia, Charlottesville, Virginia.

JOSEPH F. ZIMMERMAN ("Electoral Systems and Representative Democracy: Reflections on the Voting Rights Act") is a professor of Political Science at the State University of New York at Albany and a member of the editorial board of the NATIONAL CIVIC REVIEW.

PUBLISHER'S NOTE

The National Civic League has long taken the position that self-education on political issues and regular participation in elections constitute minimal compliance with the responsibilities of citizenship in a democracy. The richer rewards of citizenship, we have consistently stated, flow from such activities as public and community service through organized groups, neighborhood activism, volunteering, and serving in public office. Until 1965, however, that fundamental act of citizenship — exercising the franchise — was routinely denied to millions of Americans on the basis of race.

When the Voting Rights Act was passed in 1965, only two African-Americans were serving as state legislators or members of Congress in the Southern United States; by 1990, that number had risen to 160. The increase has been similarly dramatic at the local level. The ability of minorities of every background to participate meaningfully in the electoral process is principally the result of the Voting Rights Act and its various amendments (1970, 1975 and 1982).

That the Act is now under serious review (many would call it an attack) is partly an indication of its extraordinary success; but the ease with which the civil rights gains of the last three decades have been threatened in recent years should be a cause for concern among Americans committed to a pluralistic democratic process.

In observance of the 30th anniversary of the passage of the Voting Rights Act, this issue of the NATIONAL CIVIC REVIEW acknowledges the changed climate of voting rights in the United States, analyzes the implications of recent Supreme Court opinions involving the Act, and suggests future steps for the electoral empowerment movement. Throughout, our authors have been informed by the notion that the fullest exercise of citizenship will not be realized when the most basic act of citizenship has little or no practical effect.

Christopher T. Gates
Publisher

EDITOR'S COMMENT

Often hailed as the most effective and successful piece of civil rights legislation of the 1960s, the Voting Rights Act has figured centrally in the extension of full citizenship to racial, ethnic and foreign language minorities in the United States.

Signed by President Lyndon B. Johnson in August of 1965, the Act incorporates permanent provisions that apply to the entire nation and temporary provisions affecting specific jurisdictions, principally the Southern states of the former Confederacy and their political subdivisions. The widespread use of literacy tests, the poll tax and other discriminatory practices and devices in these states and localities necessitated a national statute to ensure and enforce the right to vote of black citizens, as guaranteed by the Fifteenth Amendment to the U.S. Constitution. As initially framed, the Voting Rights Act, in essence, assured the right of eligible citizens to register to vote and participate in federal, state and local elections. Through judicial interpretation and various amendments, the scope of the Act has gradually come to protect the right to representation itself, albeit not necessarily in proportion to a protected minority's presence in the population.

While the right to register and vote may no longer stimulate great controversy, the guarantee of representation has, in recent years, become the object of several legal challenges brought on behalf of majority-group voters. Indeed, the plaintiffs in *Shaw v. Reno* (1993) and *Miller v. Johnson* (1995) claimed that the imposition of district boundaries that virtually assure the election of minority candidates violates the equal protection clause of the Fourteenth Amendment. Thus, as the Voting Rights Act enters its fourth decade, its future is by no means secure, and the hard-won electoral empowerment gains of racial and ethnic minorities seems seriously imperiled. The symposium articles appearing in this issue of the NATIONAL CIVIC REVIEW examine this emerging controversy, serving as a supplement to the National Civic League's Voting Rights Act in Local Governance Project. Funded by the Ford Foundation, that project will produce a Voting Rights Act compliance handbook for local government officials, to be released in late 1995.

Joseph F. Zimmerman of the State University of New York at Albany, a frequent contributor to the NATIONAL CIVIC REVIEW, opens the symposium section of this issue with a chronicle of the history of suffrage laws in the United States. Tracing the gradual extension of voting rights from property-owning males to virtually universal suffrage, Zimmerman sets the stage for the passage of the Voting Rights Act and explains its key provisions. Referencing key recent Supreme Court decisions, he also hints at the future of single-member districts as the standard remedy in voting rights litigation. Zimmerman concludes with an assessment of the prospects of alternative electoral systems, such as proportional representation, for ensuring equitable representation without "segregating" voters.

Olethia Davis of Southern Univer-

sity (Baton Rouge, Louisiana) focuses on Sections 2 and 5 of the Voting Rights Act, which contain the principal enforcement provisions of the statute. Observing that the gradual extension of the Act's scope to ensure representative electoral outcomes has been by no means uniform and linear, Davis argues that there is no clear consensus among the Supreme Court's current members regarding voting rights. Moreover, with congressional action needed to clarify the ambiguity recently introduced by the Court, she predicts a dismal future for the electoral empowerment movement.

Expanding upon the theme of ambiguity, Richard Engstrom of the University of New Orleans characterizes the current legal environment in which legislative districts must be drawn as a dense and confusing "thicket." Introducing the traditional criteria of electoral boundary drawing, Engstrom underscores that while the Supreme Court has rejected race as a principal guide in defining legislative districts, it has failed to elevate any others to primary status. Districting in today's volatile racial and political climate is, and likely will remain, an almost impossible task, with jurisdictions attempting to hit a constantly moving target.

Unlike other federal civil rights laws, the Voting Rights Act protects minorities without mandating non-discriminatory behavior on the part of the majority population. That is, according to voting rights experts Edward Still and Pamela Karlan, the Act assumes discriminatory behavior on the part of white voters (i.e., a tendency to prefer white candidates over minority candidates) and protects the electoral interests of minorities in that hostile context. But what remedies may be introduced where minorities can neither succeed in electing candidates of their choice nor constitute a majority in a single-member district? Still and Karlan offer up the increasingly attractive alternative of cumulative voting, using Worcester County, Maryland — where this electoral scheme was recently imposed by a district court judge in a voting rights lawsuit — as a point of departure.

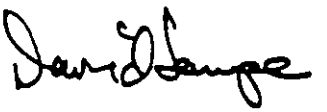
Robert Brischetto of the University of Texas at San Antonio strengthens the arguments advanced by Still and Karlan with an analysis of election results and exit-poll survey data from 16 local jurisdictions in Texas utilizing cumulative voting. According to Brischetto, citizens participating in cumulative voting elections generally agree the system is fair, permitting all groups an opportunity to elect representatives of their choice. But no electoral reform, he warns, can take the place of effective voter education and mobilization.

What group of Americans enjoys the least equitable representation in U.S. governing institutions? Wilma Rule of the University of Nevada at Reno declares unequivocally that women of all races and ethnicities face the greatest discrimination in the American winner-take-all system. Backing up her claim with longitudinal data from federal and state elections — as well as the record of other nations that don't use single-member dis-

tricts — Rule urges a movement to secure full protection of women in the Voting Rights Act. Redress of this long-neglected oversight, she insists, must be accompanied by reforms in electoral structure and campaign-finance laws that favor incumbents, most of whom are male.

In an article unrelated to this voting rights symposium, Gerald Newfarmer, immediate-past city manager of Cincinnati, Ohio, discusses a recent unsuccessful attempt to abandon the council-manager plan in that city. Lauding the citizens of Cincinnati for their ongoing commitment to the crowning achievement of Progressive municipal reformers, Newfarmer emphasizes the fundamental, custodial role of the elected city council in ensuring the success of council-manager government. When councils pursue multiple personal agendas and neglect city-wide interests and concerns, they do harm to both local governance and the council-manager plan.

The feature and symposium articles introduced above are followed by a News in REVIEW department contributed by Joseph Zimmerman. Special thanks go to Joseph Zimmerman, both for his written contributions to this issue of the NATIONAL CIVIC REVIEW and his thoughtful assistance in assembling the other symposium articles.



David Lampe
Editor

ELECTION SYSTEMS AND REPRESENTATIVE DEMOCRACY

REFLECTIONS ON THE VOTING RIGHTS ACT OF 1965

The Voting Rights Act, as orginally conceived and through its various amendments, has proved an extraordinarily effective tool for eliminating the most egregious barriers to, and abuses of, minorities' rights to register and vote. But access to the process and guaranteed representation are two fundamentally different concepts. Repeated recent legal challenge to the single-member district remedy should occasion a fresh look at means of reforming representative government.

JOSEPH F. ZIMMERMAN

Democratic theory is premised upon representative law-making bodies, yet members of many of these bodies have been elected by systems that exclude or dilute the votes cast by members of certain racial and ethnic groups. Constructing an electoral system that will produce fair representation is a difficult task, and must commence with the removal of legal impediments to voting and replacement of electoral systems that discriminate against members of minority groups. The Voting Rights Act of 1965 as amended was designed to remedy discrimination in electoral systems and practices against blacks and members of four "foreign language minorities."

The Act is a permanent statute that also contains temporary, nationally suspensive provisions applicable to states and/or their political subdivisions if certain conditions (known informally as "triggers") are present. The "trigger pro-

visions" originally were limited to six Southern states and were designed to protect the voting rights of only blacks. Today, these provisions apply to many jurisdictions outside the South because of amendments enacted in 1975, which extend the Act's reach to jurisdictions where voter participation is low and the concentration of "protected" minorities high.

This article presents 1) a historical overview of the gradual liberalization of suffrage laws in the United States, 2) describes the Voting Rights Act's major provisions and their interpretation by the United States Supreme Court, and 3) examines the single-member district system, which has been promoted by implementation of the Act, vis-a-vis alternative electoral systems.

A historical review of suffrage requirements will help explain why Congress decided in 1965 to enact a statute guaranteeing the voting rights of blacks. When the United States Constitution was ratified in 1788, voting in states was confined to male property owners or taxpayers. All other persons — women, blacks (most were slaves), indentured servants, and Native Americans — lacked the right to vote.

Vermont was the first state to provide for universal male suffrage for those of "quiet and peaceable behavior."[1] A year later, the new State of Kentucky allowed suffrage for men who met a two-year residency requirement.[2] New Hampshire and Georgia abolished their constitutional taxpaying requirements in 1792 and 1798, respectively.[3] In 1809, Maryland passed a statute granting manhood suffrage without property-owning or taxpaying qualifications.

In 1821, New York enfranchised all white male residents of one year who had paid taxes and served in the State Militia, and all others who had lived in the state for three years.[4] New York, however, retained property qualifications for blacks. Thereafter, the movement for full manhood suffrage made rapid progress, and by 1860 property-owning requirements had disappeared and taxpayer prerequisites were negligible.

Before white manhood suffrage became a nationwide reality, however, a reaction set in. Alarmed at the rapid increase in the number of illiterate immigrants, particularly Irish immigrants, Connecticut in 1855 and Massachusetts in 1857 amended their constitutions to require that all voters be able to read.[5]

BLACK SUFFRAGE

Few blacks were enfranchised prior to the Civil War. Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont had granted suffrage to blacks, and in New York a black could vote if he possessed a freehold. The original North Carolina Constitution permitted free blacks who met other requirements to vote, but it was amended in 1835 to provide that "no free Negro, free Mulatto, or free person of mixed blood, descended from Negro ancestors to the fourth generation inclusive ... shall vote for members of the Senate or House of Commons."[6]

Immediately after the Civil War, the movement to extend the franchise to blacks gathered momentum and led to two amendments to the United States Constitution. The Fourteenth Amendment, ratified in 1868, provides that a state's representation in the U.S. House of Representatives could be reduced in the proportion that the state denied the suffrage of male citizens 21 years of age or older. The Fifteenth Amendment, ratified in 1870, prohibits the United States or any state from denying suffrage on account of race, color or previous condition of servitude.

In 1870, Congress enacted a statute, based on the Fifteenth Amendment, making private or public obstruction of the right to vote in an election a misdemeanor punishable by imprisonment of one month to one year.[7] The law was amended the following year to authorize federal oversight of the election of United States Representatives in any local government with a population exceeding 20,000 "whenever ... there shall be two citizens thereof who ... shall make known in writing, to the Judge of the Circuit Court of the United States for the Circuit wherein such city or town shall be, their desire to have said registration, or said election, or both, guarded and scrutinized."[8]

The United States Supreme Court in 1875 invalidated sections of the 1870 Act that guaranteed the voting rights of white citizens and provided for punishment of persons interfering with the voting rights of whites, holding that the Fifteenth Amendment authorized Congress to protect only the voting rights of black citizens.[9] This opinion remains in effect today. The most important remaining sections of the two statutes were repealed by Congress in 1894, thereby freeing states of direct supervision of elections by federal officials for 63 years.

With Southern states in the control of whites by 1890, their state constitutions and statutes were amended to exclude most blacks from the franchise. For example, Southern state legislatures revived the taxpayer qualification requiring a person to present poll tax receipts, sometimes for many years, before a person would be allowed to vote in an election, lengthened the residency requirements to debar transient blacks, and introduced the literacy test to assure the ability of voters to read or at least "understand" the Constitution. To preserve the suffrage of illiterate whites, Southerners invented the notorious "grandfather clause," which permitted the permanent registration of all persons who had served in the the United States Army or the Confederate Army, or were descendents of veterans. The clause was declared unconstitutional by the United States Supreme

Blacks effectively were excluded from the nominating process in Southern states by the "white primary," which debarred them from voting in the Democratic party's primary elections.

Court in 1915.[10] The Court in 1939 struck down state procedural obstacles to voting.

Blacks effectively were excluded from the nominating process in Southern states by the "white primary," which debarred them from voting in the Democratic party's primary elections. The exclusionary device was invalidated in 1944 when the Supreme Court declared this type of primary unconstitutional, holding that a state could not cast its election laws in such a fashion as to allow a private organization, in this case a political party, to practice racial discrimination in elections.[11] Southern states, except Texas, continued to use the literacy test as a condition for voting, and several Southern states had long residency requirements to disenfranchise blacks, who moved more frequently than whites. In 1949, the U.S. Supreme Court invalidated discriminatory application of voting tests.[12]

Literacy tests... remained in use in many states, and blacks in some areas were not permitted to register and vote for candidates for state and local government offices.

The racial gerrymander also was employed by state legislatures to reduce the voting power of black citizens. The most egregious racial gerrymander was drawn by the Alabama State Legislature for Tuskegee, home of the famous black university. In 1960, the U.S. Supreme Court struck down this gerrymander, which had produced a strangely shaped, irregular district with lines drawn around houses to exclude black voters from their preexisting right to vote in municipal elections by removing them from the city's limits.[13]

Public opinion against the treatment of blacks as second-class citizens was growing, especially after the end of World War II in 1945. Reacting to this sentiment, Congress in 1957 enacted a statute authorizing the Attorney General to initiate legal action on behalf of blacks denied the opportunity to register and vote, and established the United States Commission on Civil Rights, with authority to investigate and report on devices and procedures employed by state and local governments in a discriminatory manner against blacks.[14] The Civil Rights Act of 1960 mandated that states retain federal election records for 22 months, authorized the Attorney General to inspect such records, and enabled the District Court to order registration of blacks who were victims of a pattern of voting discrimination and appoint voting referees empowered to register voters.[15] Title I of the Civil Rights Act of 1964 forbids election officials to apply registration tests or standards to applicants different from the ones administered to persons previously registered. The Act also established a rebuttable presumption of literacy for registrants with a sixth-grade, English-speaking school education, and expedited procedures for judicial resolution of voting rights cases.[16]

In 1964, the 24th Amendment, abol-

ishing the poll tax as a condition for voting in federal elections, was ratified. Only eight blacks had been elected to the United States House of Representatives by that date, several of them during the Reconstruction Period immediately following the Civil War. Literacy tests, however, remained in use in many states, and blacks in some areas were not permitted to register and vote for candidates for state and local government offices.

The Voting Rights Act of 1965

In reaction to the growing civil rights movement in the early 1960s and actions of many Southern states preventing numerous blacks from exercising the franchise, Congress in 1965 passed the Voting Rights Act to protect blacks' Fifteenth Amendment voting rights.[17] President Lyndon B. Johnson proposed that the Act contain a ten-year sunset clause, but a five-year clause was adopted as a compromise for the preclearance and other temporary provisions in order to persuade a sufficient number of senators to vote for cloture to end a filibuster.[18] Certain provisions of the Act, as amended, apply to all states and local governments, and other provisions apply only to states and political subdivisions meeting the trigger conditions. Section 4 stipulates that the Act automatically applies to any state or political subdivision of a state if the Attorney General of the United States determines that as of November 1, 1964, a test or device had been employed to abridge the right of citizens to vote, and the Director of the United States Bureau of the Census determines that less than 50 percent of persons of voting age were registered to vote on November 1, 1964 or that less than 50 percent of persons of voting age exercised the franchise in the 1964 presidential election.[19] A "test or device" is defined as one involving literacy, morals, character, educational achievement, or knowledge of a specified subject.

Available evidence suggests that the factors incorporated as triggers deliberately were formulated to exclude Texas. Senator James B. Allen of Alabama maintained "it was first determined which states the law should be made applicable to, and then they proceeded to find the formula that would end up with those states being covered."[20] He added:

> by using the 50 percent voting in the election factor, that would have included the State of Texas. The President of the United States being a resident of Texas,... it was thought inadvisable to include Texas in that formula. So they added a second circumstance, that is, that they must have a device that would hinder registration; namely the literacy test. And, the double factor...is what took Texas out from under it, because they did not have the literacy test.[21]

The temporary provisions of the Act covered Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, as well as counties in Alaska, Arizona, Hawaii, Idaho, and North Carolina. Texas was brought under the temporary provisions of the Act by the 1975 amendments.

Section 2 of the original Act is a statutory restatement of the Fifteenth

Amendment's prohibition of the denial or abridgment of the right to vote based on "race, color, or previous condition of servitude."

Congress in effect imposed a federal "Dillon's Rule" on state and local governments subject to Section 5 of the Act, in that such jurisdictions may not change their electoral practices as they existed on November 1 of the year during which the prerequisite factors were met without first obtaining either the prior approval of the Attorney General, acting as an administrative surrogate of the court, or a declaratory judgment from the District Court of the District of Columbia. Actions implicating Section 5 include changing the location of a polling place, changing the existing voting system, transforming an elective office into an appointive one, annexation, or legislative redistricting, unless it is pursuant to a United States court order to correct an unconstitutional electoral system.[22] The preclearance requirement also applies to several activities of political parties, such as conduct of primary elections and selection of party officials and delegates to party conventions. Additionally, the Act directs the United States District Court to authorize appointment by the United States Civil Service Commission (now the Office of Personnel Management) of federal examiners to enforce constitutional guarantees in these state and local governments.

The preclearance requirement also applies to several activities of political parties, such as conduct of primary elections and selection of party officials and delegates to party conventions.

THE AMENDMENTS

The trigger dates were expanded by the 1970 amendments to the Act to include November 1, 1968 and the 1968 presidential election; the 1975 amendments added November 1, 1972 and the 1972 presidential election.

The 1970 amendments suspended all voting tests and devices, including literacy tests, throughout the nation until August 6, 1975, and the 1975 amendments made the suspension permanent.[23] The 1970 amendments also authorize the Attorney General to seek a preliminary or permanent injunction to prevent a state or local government from enacting or administering a test or device in violation of the Act's provisions.[24]

The 1975 amendments broadened the coverage of the Act to include "language minorities," defined as "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage," and cited the Fourteenth and Fifteenth Amendments as the constitutional authority for the Act.[25] The language-minority triggers, providing for mandatory coverage of a governmental unit by the Act, are activated if in excess of five percent of the citizens of voting age in a state or political subdivision are members of one lan-

guage minority group as of November 1, 1972 *and* less than 50 percent of all citizens of voting age participated in the presidential election of 1972. The triggers also are activated if in excess of five percent of the citizens of voting age in a state or political subdivision are members of one language minority group *and* the illiteracy rate of the group exceeds the national illiteracy rate. The definition of a test or device was expanded to include the use of only English election materials or ballots in a jurisdiction where a language minority constituted more than five percent of the voting-age population. In such jurisdictions, bilingual ballots and election materials must be provided if the group's literacy rate is lower than the national average.

The 1975 amendments also extended the preclearance and other temporary requirements for seven years. A total of 263,410 proposed changes were submitted to the Attorney General through 1994, who interposed an objection to 2,995.[26] The preclearance requirement currently applies to all or part of 16 states.

A jurisdiction's discriminatory intent may not always be apparent, since it may have maintained a racially neutral electoral system that was designed to or had the effect of diluting or eliminating the voting strength of a racial minority. In *White v. Regester*, the U.S. Supreme Court in 1973 held that the use of multimember districts in a state legislative reapportionment plan would violate the equal protection clause of the Fourteenth Amendment if "used invidiously to cancel out or minimize the voting strength of racial groups."[27]

The viability of this broad interpretation of the Act, which protected black voters without proof of deliberate or explicit desire to discriminate on the part of the jurisdiction, was weakened by subsequent Supreme Court decisions holding that proof of discrimination in violation of the Fourteenth Amendment's equal protection clause requires the establishment of "subjective intent."[28] In 1980, the Court majority in *Mobile v. Bolden* rejected the argument that voting rights discrimination should be determined by a "results" test instead of an "intent" test, as well as what the Court labeled the theory behind the former test. The Court opined that such a theory "appears to be that every political group or at least that every such group that is in the minority has a federal constitutional right to elect candidates in proportion to its numbers. ...The Equal Protection Clause does not require proportional representation as an imperative of political organization."[29]

This decision generated considerable debate, and induced Congress in 1982 to amend Section 2 of the Act to incorporate a "results" test providing that "The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered." Congress, however, added the proviso "that nothing in this section establishes a right to have members elected in numbers equal to their proportion in the population."[30]

The 1982 amendments also modi-

fied the preclearance provisions of the Act, directed Congress to reconsider these provisions in 1997, stipulated the provisions would expire in 2007, extended the language minority provisions until August 6, 1992, stipulated that no covered jurisdiction may provide voting materials only in English prior to August 6, 2007, and guarantees a voter in need of voting assistance because "of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union."[31]

BAIL-OUT PROVISIONS

Section 4(a) of the Act contains "bail-out" provisions to end the special coverage resulting from the triggers. A state or local government subject to coverage because of the racial provisions of the 1965 Act and amendments of 1970 and 1975 may file suit for a declaratory judgment in the United States District Court for the District of Columbia and offer proof that it has not discriminated against the voting rights of the protected group for ten years, or establish "that any such violations were trivial, were promptly corrected, and were not repeated."[32]

In practice, it is difficult for state and local governments covered by the original Act to use the bail-out provisions successfully. Virginia attempted to obtain such exemption, but its suit for a declaratory judgement was rejected by the United States Supreme Court in 1975.[33] If a jurisdiction is successful in bailing out, it remains subject to litigation under the results standards of Section 2 of the Act.

COURT INTERPRETATION

The constitutionality of the Act was challenged on the grounds that Congress encroached on the powers reserved to the states by the United States Constitution (Tenth Amendment), since many of its key provisions were targeted at one region of the nation. Rejecting these arguments, the United States Supreme Court in 1966 ruled that "the sections of the Act which are properly before us are an appropriate means of carrying out Congress' constitutional responsibilities and are consonant with all other provisions of the Constitution."[34]

In 1968, the Court held in *Allen v. State Board of Elections* that it was the intent of Congress that the Act be given "the broadest possible scope" to reach "any state enactment which altered the election law of a covered state in even a minor way."[35] In 1973, the Court justified its 1968 decision by maintaining:

> Had Congress disagreed with the interpretation of § 5 in *Allen*, it had ample opportunity to amend the statute. After extensive deliberations in 1970 on bills to amend the Voting Rights Act, during which the *Allen* case was repeatedly discussed, the Act was extended for five years, without substantive modifications of § 5.[36]

Neither annexation *per se* nor at-large elections *per se* have been declared unconstitutional by the courts. The Voting Rights Act of 1965, however, added a

federal dimension to annexation proceedings in several states, particularly Southern states, as the U.S. Supreme Court observed in its 1971 opinion in *Perkins v. Matthews*.[37] The case involved annexation of territory by the City of Canton, Mississippi, and a 1965 determination by Attorney General Nicholas B. Katzenbach that Mississippi and its political subdivisions were covered by the Act.[38] In 1969, the special three-judge District Court for the Southern District of Mississippi dissolved a temporary injunction against the holding of city elections issued by a federal judge, and dismissed a complaint on the ground that "the Black voters still had a majority of not less than 600 after the expansions were effected."[39] A total of 82 black voters and 331 white voters had been added to the city by annexations in 1965, 1966 and 1968; no white voters were added to the city by the 1965 annexation.

The Supreme Court overturned the decision of the three-judge District Court:

> ...changing boundary lines by annexations which enlarge the City's number of eligible voters also constitutes the change of a "standard, practice, or procedure with respect to voting." Clearly, revision of boundary lines has an effect on voting in two ways: (1) by including certain voters within the City and leaving others outside, it determines who may vote in the municipal election and who may not; (2) it dilutes the weight of the voters to whom the franchise was limited before annexation, and "the right to suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Moreover, § 5 was designed to cover changes having a potential for racial discrimination in voting, and such potential inheres in a change in composition of the electorate affected by an annexation.[40]

This decision resulted in a sharp decline in annexations by large Southern cities, which have relatively broad state constitutional and/or statutory authority to annex territory. Subsequently, several large cities have sought the approval of the Attorney General to annex territory. Today, most Southern annexations are small in terms of the size of the annexed territory and number of residents. The complexity of the issues involved with annexation are illustrated by cases involving the cities of Richmond and Petersburg, Virginia.

Today, most Southern annexations are small in terms of the size of the annexed territory and number of residents.

The first Richmond case. The 1970 annexation of territory by Richmond increased the city's population and real property tax base by 19 percent and 23 percent, respectively, but was contested as violating the Voting Rights Act of 1965. A group of black plaintiffs objected to the annexation and contended it was designed to dilute black voting strength in a city with a council elected at large, thereby violating their rights under the Four-

teenth and Fifteenth Amendments and Section 5 of the Voting Rights Act. Ninety-seven percent of the residents of the annexed area were white. Fifty percent of the Richmond's pre-annexation population of 202,359 was black in 1970. This proportion was lowered to 42 percent, as the annexation added 45,705 whites and 1,557 blacks to the city's population, increasing the totals to 143,857 whites and 105,764 blacks.

The United States District Court for the Eastern District of Virginia ruled in favor of the plaintiffs: "the Fourteenth Amendment forbids a deprivation of one's vote by reason of race — this Court interprets that to mean dilution as well."[41] Declaring that de-annexation would be impractical because the city had appropriated millions of dollars for improvements in the annexed area, the court ordered that the city be divided into two districts for purposes of new councilmanic elections.[42] According to the plan, seven council members would be elected from the district comprising most of the pre-annexation territory of the city, and two members would be elected from the annexed area and a small part of the city's pre-annexation territory.

The District Court's decision was reversed by the United States Court of Appeals for the Fourth Circuit, which held that "for perfectly valid reasons Richmond's elected representatives had sought annexation since 1966."[43] The U.S. Supreme Court denied a petition for writ of certiorari, thereby upholding the decision of the Court of Appeals.[44]

The Petersburg case. In a similar case, the Supreme Court in 1973 affirmed a decision of the District Court for the District of Columbia denying Petersburg the right to annex 14 square miles of land in Dinwiddie and Prince George Counties, because the boundary extension would increase the proportion of white population from 45 to 54 percent in a city that elected its council members at-large, thereby discriminating against black voters by diluting their votes.[45]

The annexation ordinance, effective on December 31, 1971, was adopted unanimously in 1967 by the five-member city council. Two members, including the one who had introduced the ordinance, were black. The three-member district court found that the purpose of the annexation was to expand the city's growth and tax base, and there was no evidence that the annexation had a racial motive. The court, however, found that the city had "a long history of racial segregation and discrimination."[46]

Conceding "that an at-large system of electing city councilmen has many advantages over the ward system," the court ruled the annexation could be approved only if the city substituted ward elections for at-large election of the council, which had been expanded from five to seven members by the 1972 Virginia Legislature.[47]

The second Richmond case. Richmond in 1972 sought court approval for its 1970 annexation, since the Attorney General twice refused to give approval for the annexation. The city council was elected at large in 1970 with voters from

the annexed area in Chesterfield County participating; only one black councilman was elected. According to the three-judge District Court for the District of Columbia, "it is conceded here that Richmond conducted these elections illegally in violation of Section 5. It did not, prior to diluting by annexation the votes of the citizens residing within the old Richmond boundaries, obtain the approval of the Attorney General or a declaratory judgment from this Court that this dilution did not have the purpose and would not have the effect of abridging the right to vote on account of race or color. Richmond has held no councilmanic elections since 1970; the illegally elected City Council continues to serve at this time."[48] During the four-year period, three members of the nine-member council resigned and their replacements were coopted by the council.

...the Court indicated it was no longer concerned that the pre-annexation black vote would be diluted, provided blacks were represented "fairly" in a city's governing body following annexation.

Subsequent to the annexation, the city substituted a single-member district system for the at-large system. The District Court concluded that the change in electoral system was "discriminatory in purpose and effect and thus violative of Section 5's substantive standards as well as the section's procedural command that prior approval be obtained from the Attorney General or this Court."[49]

The Supreme Court in 1975 reversed the lower court decision and made a distinction between the Petersburg and Richmond cases:

> Petersburg was correctly decided. On the facts here presented, the annexation of an area with a white majority, combined with at-large councilmanic elections and racial voting, created or enhanced the power of the white majority to exclude Negroes totally from participation in the governing of the city through membership on the city council. We agreed, however, that the consequence would be satisfactorily obviated if at-large elections were replaced by a ward system of choosing councilmen....
>
> We can not accept the position that such a single-member ward system would nevertheless have the effect of denying or abridging the right to vote because Negroes would constitute a lesser proportion of the population after the annexation than before, and given racial bloc voting, would have fewer seats on the city council.[50]

This decision constitutes a significant departure from the *Perkins* decision because the Court indicated it was no longer concerned that the pre-annexation black vote would be diluted, provided blacks were represented "fairly" in a city's governing body following annexation. New elections, held on March 1, 1977, resulted in the selection of five blacks and four whites as members of the city council.

While annexation may be viewed as an "indirect" form of racial gerrymandering, since annexation may have as its purpose and its effect the dilution of the voting rights of blacks living within the pre-annexation boundaries of the city, the Supreme Court in 1976 and 1977 was faced with the question of whether a "reverse racial gerrymander" — one that deliberately created a "safe" black district — was constitutional.

...annexation may be viewed as an "indirect" form of racial gerrymandering, since annexation may have as its purpose and its effect the dilution of the voting rights of blacks living within the pre-annexation boundaries of the city...

The Hasidic Jews case. Although the Voting Rights Act was designed to end voting discrimination in the Southern states, the Attorney General in 1970 made a determination that New York State had maintained a test or device on November 1, 1968, as defined by Section 4(c) of the Act as amended. Moreover, the Director of the Bureau of the Census determined that Bronx, Kings (Brooklyn) and New York (Manhattan) Counties were subject to Sections 4 and 5 of the Act, since fewer than 50 percent of the residents of voting age cast a ballot in the 1968 presidential election and a literacy test had been used in the counties prior to 1970.[51] The specific reasons for applying the Act were the 1970 amendments changing the trigger date to 1968, and the fact that ballots were printed only in English. The District Court for the Southern District of New York ruled that "plaintiffs can not cast an effective vote without being able to comprehend fully the registration and election forms and the ballot itself."[52] The decision was affirmed by the United States Supreme Court.[53]

New York filed a complaint in the District Court for the District of Columbia seeking a declaratory judgment exempting the counties from coverage by the Act. With the approval of the United States Department of Justice, the court granted the judgment. Denied leave to intervene in the case, the National Association for the Advancement of Colored People (NAACP) unsuccessfully appealed the denial to the U.S. Supreme Court. However, on remand the NAACP's motion was granted.[54]

The NAACP, after reopening the declaratory judgment action, obtained an order from the District Court for the District of Columbia holding that the Act, as amended in 1970, applied to congressional and state legislative districts in Manhattan, Brooklyn and the Bronx, and the decision was affirmed by the Supreme Court.[55] These judgments necessitated a special session of the New York State Legislature, which on May 29, 1974 redrew congressional and state legislative district lines drawn in 1972.[56] Although the 1974 redistricting did not change the number of state senate

and assembly districts with non-white voting majorities, it did increase the non-white majority *percentage* in two senate districts and two assembly districts, and decreased the non-white majority percentage in one senate district and two assembly districts.

Objections to several of the new district lines were advanced by representatives of Brooklyn's Hasidic Jews, who argued that the new assembly districts divided the Hasidic community and made it the victim of a racial gerrymander, thereby diluting the value of their votes in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.[57] The Hasidic community, which had been able to elect one of its members to the state assembly, also challenged the assumption that only black legislators can represent the interests of blacks. In response to questioning in the District Court, Executive Director Richard S. Scolaro of the State Legislative Committee that drew the district lines stated that the United States Justice Department's insistence on a proportion of black voters of 65 percent was the "sole reason" why the Hasidic community was split between two assembly districts.[58]

On July 1, 1974, the Attorney General approved the new districts and dismissed the objections of Hasidic Jews and Irish, Italian and Polish groups on the ground that the Voting Rights Act was designed to prohibit voting discrimination on the basis of race, not ethnic origin or religious beliefs.[59] In carrying out his duties under Section 5 of the Act, the Attorney General emphasized that it was not his function "to dictate to the State of New York specific actions, steps, or lines with respect to its own redistricting plan."[60]

The District Court dismissed the complaint of the Hasidic Jews on the grounds that the petitioners were not disenfranchised and that race could be considered in redistricting in order to correct previous racial discrimination.[61] The Court of Appeals affirmed the District Court's decision by reasoning that the redistricting did not under-represent whites, who composed 65 percent of the population, since approximately 70 percent of the state assembly and senate districts in Brooklyn would have white majorities.[62]

The Court of Appeals was convinced that it would be an impossible task for a legislature to reapportion itself if "a state must in a reapportionment draw lines so as to preserve ethnic community unity."[63]

The Supreme Court heard oral arguments in *United Jewish Organizations of Williamsburg v. Wilson* on October 6, 1976. Justice White asked Nathan Lewin, the plaintiffs' attorney, a question relative to the establishment of legislative districts with a specified percentage of blacks to help them elect members of their own race. Chief Justice Warren E. Burger interjected and inquired whether this action "would have the unfortunate effect to cut against the whole effort to achieve an integrated society?"[64] After Mr. Lewin responded in the affirmative, the Chief Justice added that "it does more than

that. It pushes people to move into blocks" where others of the same race live.[65]

On March 1, 1977, the Court, by a seven-to-one vote, upheld the lower court ruling that the 1974 redistricting was constitutional, and ruled that the Act "was itself broadly remedial," and the use of racial considerations in drawing district lines often would be necessary.[66] The Court specifically opined that "neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment."[67]

Many observers were disturbed by the Court's opinion because it appeared to overturn its 1960 decision in *Gomillion v. Lightfoot*, which invalidated racial gerrymandering. Justice Frankel of the District Court of the Southern District of New York, sitting by designation on the Court of Appeals for the Second Circuit, in his dissent offered penetrating insight into the nature of the case:

> The case is one where no preexisting wrong was shown of such a character as to justify, or render congruent, a presumptively odious concept of racial "critical mass" as the principle for the fashioning of electoral districts. Indeed, it is a case where no official is willing to accept, let alone to claim, responsibility for the requirement of 65 [percent] or over nonwhite.[68]

The Court also was faulted for its uncritical acceptance of the 65 percent "non-white" majority as the magic percentage needed to ensure that the voting rights of "nonwhites" are not abridged. The Court presented state and local governments with a difficult choice between concentrating members of a protected minority into a single district until they constitute 65 percent of the population and spreading them out among two or more districts to permit them to exercise a "balance of power."

Evidence is lacking that white voters and black voters form respective homogeneous entities for voting purposes. Interestingly, many of the Puerto Rican voters in the Williamsburg district were described as "non-whites," and the assumption apparently was made that blacks and Puerto Ricans have identical interests. Nevertheless, this decision provided a powerful incentive for the adoption of single-member districts apportioned solely on the basis of race.

The subject of racial gerrymandering remains a contentious one. The Supreme Court in *Shaw v. Reno* in 1993 remanded a case involving a North Carolina "serpentine" congressional district, which stretched 160 miles along Interstate 85, for a determination of whether the obvious racial gerrymander violated the equal protection clause of the Fourteenth Amendment. Writing for the majority, Justice Sandra Day O'Connor opined:

Evidence is lacking that white voters and black voters form respective homogeneous entities for voting purposes.

Racial classifications ... reinforce the belief, held by too many for too much of our history, that individuals should be judged on the color of their skin. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters... .[69]

...a 1967 congressional act mandates the use of single-member districts to elect members of the U.S. House of Representatives.

Building upon its 1993 voting rights decision, the Supreme Court announced its 5-to-4 opinion in *Miller v. Johnson* on June 29, 1995, which invalidated the boundary lines of Georgia's 11th congressional district because race was the predominant factor in drawing them.[70] Writing for the majority, Justice Anthony Kennedy opined that race can not be "the predominant factor motivating the legislature's decision to place a significant number of voters within a particular district." The majority announced the Court would employ "strict scrutiny" in future voting rights cases to determine whether districts were tailored narrowly to achieve a compelling state interest.

The Kennedy opinion was particularly critical of the role of the United States Department of Justice and rejected the State of Georgia's argument that the plan was enacted to comply with the demands of the Department. The Department's performance, the Court concluded, "raises a serious constitutional question" and is "unsupportable."

Summary and Conclusion

The Voting Rights Act has succeeded in removing insidious barriers to voting by blacks and foreign language minorities,

Alternatives to Single-Member District Voting Rights Remedies

Assuming that the U.S. Supreme Court will not sanction racial gerrymanders in the future, blacks and language minorities still can be guaranteed direct representation through multi-member districts employing the single transferable vote form of proportional representation, cumulative voting or limited voting. Currently, a 1967 congressional act mandates the use of single-member districts to elect members of the U.S. House of Representatives.

U.S. Representative Cynthia McKinney, whose district was invalidated in the Georgia case, announced on the same day as the Court's announcement that she would introduce a bill repealing the single-member district requirement for U.S. House seats. The *Miller v. Johnson* decision and its implications are examined in greater detail by Richard L. Engstrom elsewhere in this issue of the National Civic Review.

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REFLECTIONS ON THE VOTING RIGHTS ACT

but has resulted in the remedial employment of the single-member district system, which constitutes a significant source of current political and legal controversy. Proportional representation, limited voting and cumulative voting can promote the election of minority candidates without encouraging segregation. The ideal system for candidate-based election in the United States is the single-transferable vote form of PR, which permits simultaneous representation of general and particular interests as candidates must build jurisdiction-wide coalitions in order to win election to office.

...there are voting systems that can help minority groups obtain direct representation while avoiding racial or "language minority" gerrymanders.

Merely changing electoral systems, however, will not necessarily increase dramatically the election of minorities to office. There are barriers to election other than the electoral system, many of which inhere to the advantages of incumbency. Incumbents in large jurisdictions have staff who spend part of their time promoting the re-election of their employers. In addition, elected officers attract media attention by presenting speeches and attending various public functions. They also may communicate with voters in their districts through newsletters printed and posted at government expense, and may make public service announcements which reinforce their name recognition.

The original thrust of the Voting Rights Act was to enfranchise eligible black voters by removing obstacles to their registration and participation in the electoral process. A second thrust (the results test), sought to guarantee representation of blacks and "language minorities" in approximate proportion to their respective voting strength, principally through the introduction of single-member districts as noted in the accompanying article. In multi-cultural jurisdictions, however, this conventional legal remedy has the potential to frustrate the wishes of voters where, for example, a large Hispanic minority that identifies more with the white majority than the other principal minority group, blacks, may prefer the existing at-large electoral plan over an imposed system of single-member districts. On the other hand, should black plaintiffs fail to establish their complaint convincingly in court, their perceived injury will continue. Thus, in this hypothetical example, the legal process will inevitably disappoint one of the protected classes of voters. Moreover, the recent wave of voting rights litigation has introduced a new wrinkle: The introduction of single-member districts primarily in response to racial considerations may be challenged on the basis that it violates the equal protection rights of majority voters.

Fortunately, there are voting systems that can help minority groups obtain direct representation while avoiding racial or "lan-

The most critical barrier to the effective challenge of an incumbent elected official often is lack of funds to mount a major campaign. Records filed with election officials in the various states reveal that incumbents, with few exceptions, possess a vastly superior ability to raise funds.[74]

The task for reformers today is to measure the quality of representation produced by various electoral systems and evaluate them in terms of the following criteria: effectiveness of ballots cast, maximization of voter participation, representation of competing interests, maximization of citizen access to elected decision makers, equity in interest group members' representation, and legitimacy of the legislative body.

NOTES

[1]*Vermont Constitution of 1791*, Chap. II, § 21.

[2]*Kentucky Constitution of 1792*, Art. III, § 1.

[3]*New Hampshire Constitution of 1784*, Part Second, Arts. 13 and 27 (1792) and *Georgia Constitution of 1798*, Art. IV, § 1.

[4]*New York Constitution of 1821*, Art. II, § 1.

[5]*Massachusetts Constitution of 1780*, Art. XX of Articles of Amendments.

[6]*North Carolina Constitution of 1776*, Art. I of Amendments, § 3.

[7]16 Stat. 140 (1870).

[8]16 Stat. 433 (1871).

guage minority" gerrymanders. Proportional representation (PR) and two semi-proportional systems — limited voting and cumulative voting — currently are used by many local governments in the United States.

Proportional representation. Under the single-transferable vote (STV) form of PR, each political party or group voting as a bloc will receive representation in direct proportion to its percentage of the number of votes cast. STV is employed in city council and school board elections in Cambridge, Massachusetts and New York City Community School Boards elections. STV is a type of preferential voting in which each voter expresses preferences for candidates by placing numbers next to their names on paper ballots. Winners are determined by a quota based upon the following formula:

Q = (Number of Valid Votes) ÷
(Number of Seats to Be Filled + 1) + 1

Thus, the quota in an election where 100,000 valid ballots are cast to elect a nine-member city council would be:

100,000/(9 + 1) + 1 = 10,001

First-choice ballots are sorted by hand or computer and a candidate receiving the quota of votes is declared elected. Should a candidate exceed the quota, the

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REFLECTIONS ON THE VOTING RIGHTS ACT

[9]*United States v. Reese*, 92 U.S. 214 (1875).

[10]*Guinn v. United States*, 238 U.S. 347 (1915).

[11]*Smith v. Allwright*, 321 U.S. 649 (1944).

[12]*Schell v. Davis*, 336 U.S. 933 (1949).

[13]*Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

[14]*Civil Rights Act of 1957*, 71 Stat. 634, 42 U.S.C.A. § 1975 (1958 Supp.).

[15]*Civil Rights Act of 1960*, 74 Stat. 86, 42 U.S.C.A. § 1971 (1961 Supp.).

[16]*Civil Rights Act of 1964*, 78 Stat. 241, 42 U.S.C.A. § 2000a (1965 Supp.).

[17]*Voting Rights Act of 1965*, 79 Stat. 437, 42 U.S.C.A. § 1973 (1966 Supp.).

[18]*Voting Rights Extension: Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives* (Washington, D.C.: United States Government Printing Office, 1969), Serial No. 3, p. 265.

[19]*Voting Rights Act of 1965*, 79 Stat. 437, 42 U.S.C.A. § 19 (1966 Supp.).

[20]*Extension of the Voting Rights Act of 1965: Hearings Before Sub-Committee on Constitutional Rights of the Committee of the Judiciary, United States Senate* (Washington, D.C.: United States Government Printing Office, 1975), p. 24.

[21]*Ibid.*

[22]See, 28 *CFR* § 51 (1993).

[23]*Voting Rights Act Amendments of 1970,*

surplus ballots are distributed to other candidates according to second choices.[7] Following this transfer of ballots, the candidates with the fewest number of first- and second-choice ballots are declared defeated, and their ballots are transferred to second- and third-choice candidates. A second count is conducted and any candidate receiving number 1 and transferred ballots exceeding the quota is declared elected. This process of declaring defeated the candidate with the fewest number of first-choice votes and transfers of ballots from defeated candidates continues until, in the case above, nine city council members are elected.

STV is employed at large in Cambridge and on a multi-member district basis in New York City. In both communities, the system has a demonstrable record of ensuring majority rule with guaranteed minority representation. In the 1989 New York City elections, 138 (47.9 percent) of the 288 Community School Board members elected were members of minority groups — 88 were black, 46 were Hispanic, and four were Asian. Interestingly, women for the first time constituted a majority (54.2 percent) of the members, and fewer than one-half (48.6 percent) were incumbents.

STV has additional advantages. A popular candidate at the head of a party column in a conventional plurality election can carry weak or unqualified candidates into office, an impossible result under STV.

84 Stat. 312, 42 U.S.C.A. § 1973 (1971 Supp.) and *Voting Rights Act Amendments of 1975*, 89 Stat. 401, 42 U.S.C.A. § 1973b (1994).

[24]*Voting Rights Act Amendments of 1970*, 84 Stat. 312, 28 U.S.C.A. §§ 1391-393 (1971 Supp.).

[25]*Voting Rights Act Amendments of 1975*, 89 Stat. 402, 42 U.S.C.A. §§ 1973a, 1973d, and 1973i (1976 Supp.).

[26]Data supplied to author by attorney David H. Hunter, Voting Section, United States Department of Justice, 17 January 1995.

[27]*White v. Regester*, 412 U.S. 755 (1973).

[28]*Washington v. Davis*, 426 U.S. 229 at 238-39 (1976) and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 at 256 (1977).

[29]*City of Mobile v. Bolden*, 446 U.S. 55 at 75 (1980).

[30]*Voting Rights Act Amendments of 1982*, 96 Stat. 134, 42 U.S.C.A. § 1973(b) (1994).

[31]*Ibid.*, 96 Stat. 133-35, 42 U.S.C.A. §§ 1973b and 1973aa-6 (1994).

[32]*Ibid.*, 96 Stat. 132, 42 U.S.C.A. § 1973C (1994).

[33]*Virginia v. United States*, 386 F.Supp. 1319 (1974) and *Virginia v. United States* U.S. 901 (1975).

[34]*South Carolina v. Katzenbach*, 383 U.S.

Election fraud also is reduced, since ballots are counted centrally under close supervision.

Bullet or single-shot voting is common under at-large election systems, since an additional choice may help defeat the candidate of a group. Second and subsequent choices in a PR election, however, are examined only if the first-choice has been elected or defeated. Hence, indicating many preferences on a ballot has no effect on the prospects of the first choice of a group securing election. Thus, PR ensures that each ballot can help elect a candidate either by first choice or by transfer. In a single-member district system, ballots cast for the losing candidates — possibly totalling a majority of all votes cast — are wasted.

Elimination of the need for a primary or preliminary election to reduce the number of candidates is another advantage of PR, reducing the burden placed upon voters and election administrators alike. Council members become more responsive to voters throughout the city, since votes have equal weight regardless of the precinct in which they are cast. As a result, aggrieved constituents can seek relief from all the elected representatives of the jurisdiction, rather than merely one, as is typically the case with single-member districts. Finally, where PR is employed on an at-large basis, it elimi-

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301 at 308 (1966).

[35]*Allen v. State Board of Elections*, 393 U.S. 544 at 566-67 (1968).

[36]*Georgia v. United States*, 411 U.S. 526 at 533 (1973).

[37]*Perkins v. Matthews*, 400 U.S. 379 (1971).

[38]20 *Federal Register* 9897 (August 6, 1965).

[39]*Perkins v. Matthews*, 301 F.Supp. 565 (S.D. Miss. 1969).

[40]*Perkins v. Matthews*, 400 U.S. 379 at 388-89 (1971).

[41]*Holt v. City of Richmond*, 334 F.Supp. 228 at 236 (1971).

[42]*Ibid.*, pp. 238-40.

[43]*Holt v. Richmond*, 459 F.2d 1093 at 1099 (4th Cir., 1972).

[44]*Holt v. Richmond*, 408 U.S. 931 (1972).

[45]*City of Petersburg, Virginia v. United States et al.*, 354 F.Supp. 1021 (1972); *City of Petersburg, Virginia v. United States et al.*, 410 U.S. 962 (1973).

[46]*City of Petersburg, Virginia v. United States et al.*, 354 F.Supp. 1021 at 1025 (1972).

[47]*Ibid.* at 1027.

[48]*City of Richmond v. United States*, 376 F.Supp. 1344 at 1351 (1974).

nates the distracting problem of gerrymandering and the need for periodic redistricting.

Limited voting. Although the single-member district system is a type of limited voting, the term typically is reserved for a system that allows electors to cast votes for more than one candidate, but fewer votes than the number of seats to be filled. This makes it impossible for the party or group with the plurality of votes to win a disproportionate number of seats.

Limited voting can be employed on an at-large or district basis, and may be employed with partisan or non-partisan ballots. When New York City used the system to elect two members of its city council from each borough between 1963 and 1985, the city also used limited nominations. To date, the U.S. Justice Department has approved 29 of 47 submissions for the use of limited voting under the preclearance requirements of Section 5 of the Voting Rights Act.[72]

While limited voting is superior to the single-member district system, the former neither guarantees that each party or group will be represented nor prevents a minority from electing a majority of the members when several strong slates of candidates divide the votes cast. The majority party also may influence the selection of a sympathetic minority council member by instructing its members to cast some votes for a

[49]*Ibid.* at 1352. Under the ward plan, blacks would have a majority of at least 64.0 percent in four wards and would constitute 40.9 percent of the population in a fifth ward. Whites would have a majority in four wards.

[50]*City of Richmond v. United States*, 422 U.S. 358 at 370-71 (1975).

[51]35 *Federal Register*, 12354 (July 31, 1970) and 36 *Federal Register* 5809 (March 21, 1971).

[52]*Torres v. Sachs*, 381 F.Supp. 309 at 312 (1973).

[53]*Torres v. Sachs*, 419 U.S. 888 (1974).

[54]*NAACP v. New York*, 413 U.S. 345 (1973).

[55]*New York v. United States*, 419 U.S. 888 (1974).

[56]*New York Laws of 1974*, Chaps. 588-91 and 599.

[57]Emanuel Perlmutter, "Hasidic Groups File Suit to Bar Redistricting as 'Gerrymander,'" *The New York Times*, 12 June 1974, p. 28.

[58]Linda Greenhouse, "Hasidic Jews are Called 'Victims of a Racial Gerrymander' at Hearing on Suit," *The New York Times*, 21 June 1974, p. 19.

[59]*Memorandum of Decision* (Washington, D.C.: Civil Rights Division, United States Department of Justice, 1 July 1974), unpublished.

favored minority candidate. This could encourage minority candidates to curry the favor of the majority, rather than appealing conscientiously to their "natural" constituencies.

Cumulative voting. This electoral system, which also may be employed on either an at-large or multi-member district basis, allots each voter a number of votes equal to the number of seats to be filled. Each elector may allot all votes to one candidate, or allocate them among several candidates. The purpose of the system is to guarantee representation for the largest minority party or group. Cumulative voting is used in 18 local governments, including Peoria, Illinois and Alamogordo, New Mexico. The Justice Department has approved 17 of the 18 Section 5 pre-clearance submissions for cumulative voting. A submission by the City of Morton, Texas was rejected because the Department concluded it was unlikely minority voters could elect their candidates.[73]

Cumulative voting does not guarantee proportional representation because groups and parties are unable to make their members follow instructions, and may miscalculate their voting strength. The experience of the State of Illinois, which used cumulative voting to elect members of its House of Representatives from 1870 to 1970, reveals that the minority party occa-

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sionally elected two candidates from the system's three-member districts because the over-confident majority party nominated three candidates, thereby splitting its members' votes and enabling the minority party to capitalize on its more reliable support.

Many Illinois voters considered the system technically complicated and confusing because the ballots could be marked in four different ways. Critics maintained that inter-party competition was eliminated in certain districts by "sweetheart deals" and "horse trading" between the two major parties, whereby they agreed to nominate a *total* of three candidates between them, which deprived voters of any choice. Additionally, the two major party incumbents and the minority incumbent in several districts would campaign on each other's behalf. Elsewhere in this issue of the REVIEW, Edward Still and Pamela Karlan focus their attention on cumulative voting as a remedy for violation of the Voting Rights Act in Worcester County, Maryland. ■

[60]*Ibid.* p. 17.

[61]*United Jewish Organizations of Williamsburg, Incorporated v. Wilson*, 377 F.Supp. 1164 at 1165-166 (1974).

[62]*United Jewish Organizations of Williamsburg, Incorporated v. Wilson*, 510 F.2d 512 at 523 (1975).

[63]*Ibid.* at 521.

[64]Lesley Oelsner, "Brooklyn's Hasidim Argue Voting Rights Case Before the Supreme Court," *The New York Times*, 7 October 1976, p. 47.

[65]*Ibid.*

[66]*United Jewish Organizations of Williamsburg, Incorporated v. Carey*, 430

U.S. 144 at 156 and 159-60 (1977).

[67]*Ibid.* at 161.

[68]*United Jewish Organizations of Williamsburg v. Wilson*, 510 F.2d 512 at 526 (1975).

[69]*Shaw v. Reno*, 113 S.ct. 2816 at 2832 (1993).

[70]The Miller decision has not yet been published, but may be identified by its case numbers: 94-631, 94-797 and 94-929.

[71]For a description of the two principal methods used to distribute surplus ballots under STV, see, Joseph F. Zimmerman, *The Federated City: Community Control in Large Cities* (New York: St. Martin's Press, 1972), p. 75.

[72]Steven J. Mulroy, "Limited, Cumulative Evidence: Divining Justice Department Positions on Alternative Electoral Systems," NATIONAL CIVIC REVIEW, 84:1, Winter 1995, p. 67.

[73]*Ibid.*, pp. 66-67.

[74]For additional details, see, Joseph F. Zimmerman, "Fair Representation for Minorities and Women" in Wilma Rule and Joseph Zimmerman, eds., *United States Electoral Systems: Their Impact on Women and Minorities* (Westport, Conn.: Greenwood Press, 1992), pp. 1-11. ■

TENUOUS INTERPRETATION

SECTIONS 2 AND 5 OF THE VOTING RIGHTS ACT

The Supreme Court has vacillated in its interpretation of the key enforcement provisions of the Voting Rights Act, suggesting that there never has been any clear consensus on the extension of voting rights.

OLETHIA DAVIS

Minority vote dilution continues to be a hotly debated issue 30 years after passage of the Voting Rights Act. Responsibility has fallen largely to the judiciary to determine whether unlawful vote dilution has occurred in jurisdictions covered by Sections 2 and 5 of the Act. Yet, a review of case law reveals that the Court has been inconsistent in its interpretation of Sections 2 and 5. This vagueness has provided ammunition for opponents of voting rights and intensified the debate over federal civil rights guarantees.

In the context of voting rights, this debate centers around such issues as the appropriate evidence required to prove minority vote dilution, the types of election systems that might be challenged on the grounds of Section 2 and/or Section 5, and whether the three-pronged test devised by the Supreme Court in *Thornburg v. Gingles* is a supplement to the 1982 revised version of Section 2 or a reiteration of the legislative intent of the U.S. Senate.[1]

Judicial Interpretation of Section 5

Most challenges to vote dilution have been brought on grounds other than Section 5 because of its limited scope. Until 1987, the required test of retrogression — whether a change in electoral laws or structures has a dilutionary effect — and proof of intentional discrimination were difficult and in many cases impossible to prove.

In 1987, however, the U.S. Department of Justice adopted the language of the Senate report on voting rights, which

indicated that the legislative intent of the amended Act was to incorporate the results standard of Section 2 into the preclearance requirement of Section 5.[2] This interpretation is based on that portion of Section 2 that mandates that a totality of circumstances must be met in order for jurisdictions to receive declaratory judgment as mandated by Section 2 and set forth in Section 4(f)(2).[3]

The Court in several earlier rulings expanded the scope of Section 5, thus protecting the voting rights of minorities. In *Allen v. State Board of Elections*, the Court required preclearance when a jurisdiction attempted to replace elections with appointment of officials.[4] The Court's opinion shifted the focus of Section 5 challenges from vote denial — disenfranchisement — to vote dilution, and indicated that Section 5 encompassed a broad range of voting practices and procedures. The Court's holding in *Georgia v. United States* reinforced its decision in *Allen*.[5] In *Georgia*, the Court contended that "had Congress disagreed with the interpretations of Section 5 in *Allen*, it had ample opportunity to amend the statute, [therefore,] we can only conclude ... that *Allen* [was] correctly interpreted."[6] In *Hadnott v. Amos*, the Court required federal approval of a change in the declaration deadline for independent candidates.[7] In *Perkins v. Matthews*, the Court required preclearance of a change in location of polling places as well as approval of a change from single-member district to at-large elections.[8] In *City of Petersburg, Virginia v. United States*, the Court ruled that annexations that diluted minority voting strength were illegal, even in the absence of an invidious or discriminatory intent.[9] Likewise, in *City of Rome v. United States*, the Court ruled that annexations violated the Voting Rights Act.[10] In *Rome*, the Court held that the change in electoral structure "would lead to a retrogression in the position of racial minorities with respect to their *effective* [emphasis added] exercise of the electoral [process]."[11]

However, in *City of Richmond, Virginia v. United States* and *Beer v. United States*, the Court began to limit the scope of its interpretation of Section 5.[12] In both of these cases, the Court rejected Section 5 voting rights claims. In contrast to its preclearance inclusion of a broad range of election procedures in *Allen* and *Georgia*, the Court placed limitations on the type of changes it considered violative of Section 5 in *Beer* and *Richmond*. In *Beer*, the Court placed weight on the retrogression test of Section 5. In *Richmond*, the Court upheld an annexation that decreased the percentage of blacks in the population of Richmond, Virginia. According to the Court, "as long as the ward system fairly represents the voting strength of the Negro community as it exists after annexation we cannot hold ... that such an annexation is nevertheless barred by Section 5."[13] Despite the Court's ruling in *Richmond*, its focus on the dilutive effect of a reapportionment plan resulted in a deviation from a strict application of the *Beer* retrogression standard to a "dilutive effect" standard."[14]

The Court's ambiguity in Section 5 litigation reached its peak in *Presley v.*

TENUOUS INTERPRETATION

Etowah County Commission.[15] According to the Court, shifts in power on local governmental bodies were not covered by the preclearance provisions of Section 5 unless such changes resulted in disenfranchisement of a protected class. The Court concluded that the Voting Rights Act covers only four types of voting changes: 1) the manner of voting, such as switching from single-member districts to at-large elections; 2) candidate qualifications; 3) voter registration; and 4) creation or abolition of an elected office.[16] Furthermore, the Court held that election changes, in order to be declared violative of Section 5, must have a direct impact on the electoral process.

Not only did the Court devise the "intent" standard in Mobile, *it also distinguished between disenfranchisement and vote dilution.*

In *Presley*, Justice Stevens disagreed with the Court's interpretation of Section 5. In his dissenting opinion, Stevens emphasized that *Presley* resulted in the Court's ignoring "the broad scope of Section 5 coverage" established by its ruling in *Allen*.[17] Stevens concluded that "the reallocation of decision making authority of an elective office that is taken 1) after the victory of a black candidate, and 2) after the entry of a consent decree designed to give black voters an opportunity to have representation on an elective body [should be] covered by Section 5."[18]

THE 1982 AMENDMENT OF SECTION 2

As a result of problems encountered by individuals and organizations pursuing voting rights complaints under Section 5, the case law of the Court on vote dilution mostly involves allegations of Section 2 violations. In 1982, Congress revised the language of Section 2 in an attempt to diminish the possible consequences of the Supreme Court's decision in *City of Mobile v. Bolden*, which placed a heavy evidentiary burden of proof on the plaintiffs in vote-dilution litigation.[19] Congress also relied on the Supreme Court's previous decision in *White v. Regester* and the decision of the Fifth Circuit Court of Appeals in *Zimmer v. McKeithen* in drafting the 1982 amendment.[20]

In *Mobile*, the Supreme Court employed a strict constructionist interpretation of the Fifteenth Amendment, holding that it ensured only the right to register and vote, and offered no protection against vote dilution. Moreover, the Court concluded that the Fourteenth Amendment did prohibit vote dilution, but only in those cases where it could be proved that an electoral procedure had been established for racially discriminatory purposes.

Not only did the Court devise the "intent" standard in *Mobile*, it also distinguished between disenfranchisement and vote dilution. According to the Court, the former prevents or discourages a group from voting, while the latter may exist even though people are permitted to vote. The Court held that proof of

intentional discrimination was necessary to successfully demonstrate the employment of discriminatory voting practices. This standard placed an evidentiary burden of proof on plaintiffs in vote-dilution lawsuits.

The *Mobile* Court also rejected the *Zimmer* test, devised by the Fifth Circuit Court of Appeals in *Zimmer v. McKeithen*, thus requiring plaintiffs to provide proof of invidious or intentional discrimination in order to prevail in vote dilution claims.[21] In *Zimmer*, the Fifth Circuit augmented the Supreme Court's ruling in *White* by providing a list of guidelines to be met in proving a vote-dilution claim. It is specifically Section 2(b) of the amended Act that contains the language of both *White* and *Zimmer*. Proof of a "totality of circumstances" as outlined in *Zimmer* is required to prove that "a voting qualification or prerequisite to voting or standard practice, or procedure ... imposed by any State or political subdivision ... results in a denial or abridgement of the right of any citizen of the United States to vote... ."[22] Section 4(f)(2) of the Act extended this coverage to language minorities.

According to the *Zimmer* test, unconstitutional dilution is proved when an aggregate of these factors occur: 1) lack of access to the process of slating candidates, 2) unresponsiveness of legislators to the particularized interests of the minority community, 3) a tenuous state policy underlying the preference for multi-member or at-large districting, and 4) existence of past discrimination that generally precluded the effective participation of minorities in the political process.[23] Additional *Zimmer* factors that may be considered by the courts are anti-single shot voting requirements, existence of unusually large districts, majority vote requirements, and omission of provisions for residency requirements in geographical sub-districts in at-large elections.[24]

Section 2 originally protected only the act of voting, but Section 2 as amended in 1982 provided for the right to participate at every level ... of the political process.

Section 2 originally protected only the act of voting, but Section 2 as amended in 1982 provided for the right to participate at every level (e.g., nomination, election, holding political office) of the political process. In short, the overall purpose of revising Section 2 was to reinstate and reinforce the legislative intent of the Voting Rights Act following the *Mobile* decision. According to the Senate report, "this amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied to voting discrimination claims prior to the litigation involved in *Mobile v. Bolden*.[25]

Additionally, Congress was very much aware of the Court's past inconsistency in deciding challenges to at-large election structures, and sought in its 1982

amendments to eliminate that ambiguity.[26] Accordingly, Congress devised a "results" standard to be utilized by the courts in resolving voting rights claims. The components of this new standard were outlined in the Senate report.[27] In effect, the results standard nullified the intent standard devised by the Supreme Court in *Mobile*.

According to Congress, if "as a result of the challenged practice of structure plaintiffs do not have an equal opportunity to elect candidates of their choice, such a practice will be considered in violation of the Act, specifically Section 2."[28] Additionally, the language of Section 2 prohibited both vote dilution and disenfranchisement.

THE COURT'S INTERPRETATION OF SECTION 2 AS AMENDED

Congress's amendment of Section 2 resulted in the filing of numerous lawsuits. The first case to reach the U.S. Supreme Court involving allegations of a Section 2 violation following the 1982 amendments was *Thornburg v. Gingles*.[29] It is important to emphasize that prior to *Gingles*, the Court had adjudicated a case involving the subject of minority vote dilution, but the complaint in that instance was based on constitutional grounds, not the Voting Rights Act.[30] The Court ruled in *Rogers v. Lodge* that an at-large election system utilized by Burke County, Georgia resulted in minority vote dilution and was thus violative of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Gingles originally was a 1984 case filed by black registered voters in North Carolina challenging one single-member district and six multi-member districts in the state's reapportionment plan.[31] The plaintiffs alleged that the plan concentrated blacks into a majority-white multi-member district resulting in vote dilution. Relying on the Senate report factors, the District Court upheld the plaintiff's Section 2 claim, concluding that the totality of circumstances were consistent with vote dilution. The court's ruling with respect to five of the multi-member districts was appealed by the State of North Carolina.

On appeal to the United States Supreme Court, the state alleged that the District Court incorrectly concluded that the legislative reapportionment plan violated Section 2. The Court unanimously affirmed the District Court ruling in four of the five multi-member districts, but the justices split on the evidentiary standard to be applied in vote-dilution cases. This split resulted in the filing of four separate opinions, indicating a continued lack of consensus in judicial review of key Voting Rights Act provisions.

Despite its lack of consensus, the *Thornburg* Court devised a three-pronged test — the *Gingles* test — to detect justiciable vote dilution in multi-member/at-large districts. This test requires plaintiffs alleging vote dilution to meet three criteria: The protected minority must demonstrate that 1) it is sufficiently large and geographically compact to constitute a majority in one or more single-member districts, 2) it is politically cohesive and tends to vote as a bloc, and 3) the

majority vote sufficiently as a bloc to defeat the minority's preferred candidate.[32] The Court ruled that the *Gingles* factors were prerequisites that must be met to secure a determination of vote dilution.

Using similar reasoning as the Fifth Circuit in *Jones* and *McMillan* and the Eleventh Circuit in *Marengo* and *Dallas County*, the *Gingles* Court placed importance on the degree of racial bloc voting in vote-dilution cases.[33] In each of these cases, the circuit courts emphasized the importance of a finding of racial polarization in voting and pointed out that Section 2 did not require a demonstration of the existence of all of the factors included in Section 2. According to the courts, a showing of racial bloc voting is a prerequisite for a vote-dilution claim.

Of significance in *Gingles* was the Supreme Court's distinction between *legally significant* racial bloc voting (i.e., the degree of bloc voting required to prove a dilution claim) and racial polarization per se. Legally significant racial bloc voting requires plaintiffs to provide evidence of the existence of racial polarization that results in the inability of minorities to elect candidates of their choice.

In rendering a definition of legally significant racial bloc voting, the Court rejected the contention that proof of racial bloc voting should rest on the ability of minority voters to elect *minority* candidates of choice. According to the Court, "the fact that race of voter and race of candidate is often correlated is not directly pertinent to a Section 2 inquiry. Under Section 2, it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important.[34]

Gingles provided clarity with regard to the accepted definition of racial polarization. The Court accepted a less stringent definition than that accepted by the lower courts in *Collins* and *McCord*.[35] The *Gingles* Court accepted the definition provided by the plaintiffs' expert witness, Dr. Bernard Grofman. According to Grofman, racial polarization is "a consistent relationship between race of the voter and the way in which he votes...[or when] black voters and white voters vote differently."[36]

The *Gingles* Court also addressed the question of whether bivariate or multivariate analysis should be utilized to prove vote dilution. The lower courts had employed both methods.[37] The Supreme Court rejected the requirement of multivariate analysis, or the consideration of multiple factors in proving differential racial voting patterns. According to the Court, the proper question to ask is *whether* voters have divergent voting patterns on the basis of race, not *why* they vote differently. The Court concluded that "it is the *difference* between the choices made by black and white voters and not the reasons for the differences that leads to blacks having less opportunity to elect their candidates of choice."[38]

Despite the *Gingles* Court's attempt to specify criteria that must be met by plaintiffs alleging vote dilution, its actual decision in *Thornburg v. Gingles* resulted in numerous unresolved questions, which

TENUOUS INTERPRETATION

have catalyzed additional debate over voting rights.[39] Some of the questions posed as a result of the *Gingles* decision include:

1. Should the courts be interested only in the presence of racial bloc voting, and not explanations for such differences?

2. Did the three-pronged *Gingles* test replace or complement the "totality of circumstances" test incorporated into the amended Section 2?

3. Are plaintiffs required to provide evidence of the presence of any of the factors included in Section 2 as amended in 1982?

4. Since *Gingles* focused primarily on the second factor in Section 2, how should the courts adjudicate cases involving the other inclusive factors of Section 2?

These unanswered questions resulted in conflicting decisions rendered by lower courts.[40]

...the Court's fragmentation has continued, with the dissenters emphasizing the Court's tenuousness and disregard of precedents.

POST-THORNBURG INTERPRETATION OF SECTION 2

The United States Supreme Court did not revisit Section 2 until the early 1990s, in cases involving challenges to judicial election structures and processes.[41] These lawsuits forced the Court to provide clarity on its interpretation of Section 2, since the Fifth and Sixth Circuits differed in their respective interpretations of the applicability of Section 2 to the election of judges. The Fifth Circuit concluded in *Chisom v. Roemer* that Section 2 coverage did not extend to judicial contests since the explicit language of the Section — "to elect *representatives* of choice" — did not include judges, who are not viewed as representatives.[42] On the other hand, the Sixth Circuit held that Section 2 did apply to the election of judges.[43] In response to these conflicting rulings, the Supreme Court held in a Justice Department appeal of the *Chisom* ruling that Section 2 does indeed apply to judicial elections, opining that Section 2 "protected the right to vote ... without making any distinctions or imposing any limitations as to which elections would fall within its purview."[44]

To a certain degree, *Chisom* lessened the evidentiary burden imposed by the Court in *Gingles*. Even though the Court's decision in *Chisom* did not overrule *Gingles*, the fact remains that although the plaintiffs in judicial challenges provided the Court with evidence to fulfill the results standard of Section 2, the majority opinion of the Court focused primarily on whether judges were representatives rather than the issue of vote dilution. By centering on statutory interpretation of the legislative intent of Congress in revising Section 2, the Court, in effect, shifted the question in cases involving the election of judges from a results standard proving vote dilution to the ability of minorities to elect their pre-

ferred candidates — an influence standard. As a result, the Court opened a Pandora's Box which eventually led to what is considered by a number of observers to be one of its most infamous voting rights determinations.[45]

In response to the Court's decision in *Chisom*, many jurisdictions devised majority-minority single-member election districts. Opponents of such districts challenged their constitutionality by relying on the equal protection clause of the Fourteenth Amendment. As a result, the Court was faced with the formidable task of interpreting and balancing the protections set out in Section 2 of the Voting Rights Act with those provided by the Fourteenth Amendment. The result has been an unwillingness to provide definitive and consistent rulings with regard to voting rights.

This ambiguity leads to a discussion of the most recent case law involving vote dilution.[46] In *Growe*, the Court rendered a decision with negative implications for minority voting rights. Even though the decision was cloaked in a consideration of judicial federalism, with the Court contending that states should have autonomy in reapportionment, the overall ruling resulted in an attack on the creation of majority-minority legislative districts. This case represented the initial reluctance of the Court to render a decision involving its interpretation of either Section 2 or the *Gingles* standard. Then, in *Voinovich*, a unanimous Court upheld the creation of black-majority voting districts,[47] but during the same term questioned the constitutionality of race-conscious districting in *Shaw v. Reno*.[48]

In *Shaw*, the Court was asked to determine the constitutionality of the actions of the United States Department of Justice in its efforts to secure minority voting rights. *Shaw* represented a departure from a reliance on the Voting Rights Act and the Court's own precedents, since the plaintiffs in this case were not required to provide any evidentiary proof under Section 2 or in compliance wtih the *Gingles* test to prove the existence of vote dilution.[49] The results standard was completely ignored by the *Shaw* Court.

In subsequent voting rights cases, the Court's fragmentation has continued, with the dissenters emphasizing the Court's tenuousness and disregard of precedents. In the *Johnson* and *Holder* cases, a splintered Court narrowed the scope of Section 2 by concluding, respectively, that minorities in Florida were not entitled to additional majority-minority districts and that a grant of ultimate power to a single white county commissioner in Georgia did not deny African-Americans a voice in local government policy.[50]

The Court's decision in *Johnson* to a certain degree mirrored its reasoning in *Voinovich*, in which the Court concluded that the creation of majority-minority districts was permissible if it did not diminish minority voting strength. The *Voinovich* Court, however, included a qualifier by opining that a case-by-case approach should be employed to determine the constitutionality of such districts because the facts and circumstances of each might differ. Nonetheless, *Johnson* dramatizes the unwillingnes of the Court

TENUOUS INTERPRETATION

to declare *all* majority-minority districts unconstitutional after its controversial ruling in *Shaw*.

Holder provided a clear indication that the members of the Court differ in their interpretations of Section 2 of the Voting Rights Act. Justice Souter's reasoning in *Johnson* led to his dissention in *Holder*. In *Johnson*, Souter, writing for the Court's majority, held the creation of majority-minority districts permissible in order to increase minority representation. However, this same reasoning was not applied in *Holder*. Three Justices provided separate concurring opinions. In fact, Justice Thomas, in his dissenting opinion, advocated judicial restraint in voting rights cases, a narrow judicial interpretation of the Act, and the overturning of *Allen*.

Holder had been brought by black plaintiffs challenging a single-member county commission form of government in Bleckly, Georgia. The Court of Appeals for the Eleventh Circuit, finding that the form of government constituted an obstacle to minority voting and thus violated Section 2, ordered an expansion of the county commission. The Supreme Court reversed the appellate court's decision, holding that changes to the size of the governmental body or organization are not covered by the Voting Rights Act.

In *Miller*,[51] the Court declared a majority-minority congressional district in Georgia unconstitutional. The opinion of the Court rested on constitutional grounds — the Equal Protection Clause of the Fourteenth Amendement — rather than an interpretation of Section 2 of the Voting Rights Act or the three-pronged *Gingles* test. The *Miller* Court contended that neither *Shaw* nor *Miller* involved vote dilution claims, but equal protection claims, because states had employed race as a basis for "segregating" voters.

In essence, the *Miller* Court failed to recognize that it is impossible to comply with the mandates of Sections 2 and 5 of the Voting Rights Act without a consideration of race (in many cases race may be the paramount factor). The Court has therefore made it very difficult for jurisdictions to meet the requirements of the Voting Rights Act without violating the equal protection guarantees of the Fourteenth Amendment.

It is time to refocus the voting rights debate on the proper role of the judiciary in extending and enforcing minority political access.

CONCLUSION

The United States Supreme Court has been consistently vague in its interpretation of Sections 2 and 5 of the Voting Rights Act. This ambiguity has resulted in both plaintiffs and defendants in vote dilution cases attempting to meet evidentiary proof requirements as the Court continues to devise new modes of interpretation, ignores precedents, and fails to uniformly apply provisions of the Act.

In light of the fact that the Court has in many cases

abandoned its own voting rights precedents, lower courts — as well as parties involved in vote-dilution claims — lack clear guidance to follow in such cases.

In addition, the Court's holdings in the most recent cases have had serious ramifications relative to the political gains of minorities. These decisions have carried minority voting rights back to the second era of vote-dilution litigation, during which the Court rendered its *Mobile* decision. In fact, the Court's interpretation and application of the three-pronged test in *Gingles* has resulted in a return to the "intent" standard of *Bolden*.

Additionally, an overwhelming impact of the Court's tenuousness on the issue of voting rights constitutes what this author refers to as "vote dilutigation," in which attorneys and others opposed to ensuring the full electoral partcipation of minorities have devised standards and statistical interpretations that serve the same purpose as earlier barriers to voting, such as large, multi-member districts and anti-single shot provisions.

It is time to refocus the voting rights debate on the proper role of the judiciary in extending and enforcing minority political access. Such a reframing of the debate will require legislative involvement, just as it did when the Supreme Court rendered its decision in *Mobile*. However, the ultimate question is this: Will a conservatively oriented legislative branch place limitations on a conservative court?

CNR

NOTES

[1]*Thornburg v. Gingles*, 478 U.S. 30 (1986).

[2]H.R. Rep. Ser. No. 9, 99th Cong., 2d Sess. 11 (1986). See also, 28 C.F.R. Section 51.55. The amended Section 5 reads:

"(a) Section 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. 1973c [1988], prohibits the enforcement in any jurisdiction covered by Section 4(b) of the Act, 42 U.S.C. 1973b(b), of any voting qualification or prerequisite of voting or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage, until either:

(1) A declaratory judgment is obtained from the U.S. District Court for the District of Columbia that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, or

(2) It has been submitted to the Attorney General and the Attorney General has interposed no objection within a 60-day period following submission.

(b) In order to make clear the responsibilities of the Attorney General under Section 5 and the interpretation of the Attorney General of the responsibility imposed on other under this Section, the procedures in this part have been established to govern the administration of Section 5."

TENUOUS INTERPRETATION

[3]Section 4(f)(2) reads:

"(2) To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation." See also, 28 C.F.R. Section 51.2.

[4]*Allen v. State Board of Elections*, 393 U.S. 544 (1969).

[5]*Georgia v. United States*, 411 U.S. 526 (1973).

[6]*Georgia v. United States*, 411 U.S. at 534.

[7]*Hadnott v. Amos*, 394 U.S. at 358 (1969).

[8]*Perkins v. Matthews*, 400 U.S. at 379 (1971).

[9]*Petersburg v. United States*, 410 U.S. at 962 (1973).

[10]*City of Rome v. United States*, 446 U.S. at 156 (1980).

[11]*City of Rome v. United States*, 446 U.S. at 156.

[12]*City of Richmond v. United States*, 422 U.S. at 358 (1975); *Beer v. United States*, 425 U.S. at 130 (1976).

[13]*City of Richmond v. United States*, 422 U.S. at 371.

[14]This standard was developed by the Court in *Petersburg* and first applied in *Richmond*.

[15]*Presley v. Etowah County Commission*, 112 S.Ct. at 820 (1992). *Presley* involved separate challenges by black commissioners of Etowah and Russell Counties, Alabama. These commissioners filed a single complaint alleging that the restructuring of the county commisions resulted in racial discrimination in violation of the U.S. Constitution, civil rights statutes, court orders, and Section 5 of the Voting Rights Act.

[16]*Presley v. Etowah County Commission*, 112 S.Ct. at 828.

[17]*Presley v. Etowah County Commission*, 112 S.Ct. at 836.

[18]*Presley v. Etowah County Commission*, 112 S.Ct. at 839.

[19]*Voting Rights Act of 1982*, 96 Stat. 131, 42 U.S.C.A. Section 1973.

[20]*White v. Regester*, 412 U.S. 755 (1973) and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

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

[22]See, *Voting Rights Act of 1982*, 96 Stat. 134, 42 U.S.C. Section 1973 (1988).

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

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

[25]U.S. Senate, 1982, p. 2.

[26]See, Senate Judiciary Report on the Extension of the Voting Rights Act, Rep. No. 97-417, 97th Cong., 2d Sess., pp. 19-27 (1982).

[27]Senate Judiciary Report on the Extension of the Voting Rights Act, Rep. No. 97-417, 97th Cong., 2d Sess. at 19-27 (1982).

[28]House of Representatives 1981 at 29; Senate 1982b at 28, 36-37.

[29]*Thornburg v. Gingles*, 478 U.S. at 30 (1986).

[30]*Rogers v. Lodge*, 458 U.S. at 613 (1982).

[31]*Gingles v. Edmisten*, 590 F.Supp. at 345 (E.D. N.C. 1984), *aff'd sub nom Thornburg v. Gingles*, 478 U.S. at 30 (1986).

[32]*Gingles v. Edmisten*, 590 F.Supp. at 345 (E.D. N.C. 1984), *aff'd sub nom Thornburg v. Gingles*, 478 U.S. at 30 (1986).

[33]*Jones v. City of Lubbock, Texas*, 727 F.2d at 364 (5th Cir. 1984); *U.S. v. Marengo County Commission*, 731 F.2d at 1546 (11th Cir. 1984); *McMillan v. Escambia County*, 748 F.2d at 1037 (5th Circ. 1984); *Lee County Branch of NAACP v. City of Opelika*, 748 F.2d at 147 (11th Cir. 1984).

[34]*Gingles v. Edmisten*, 590 F.Supp. at 345 (E.D. N.C. 1984), *aff'd sub nom Thornburg v. Gingles*, 478 U.S. at 30 (1986).

[35]*Collins v. City of Norfolk*, 605 F.Supp. at 377 (E.D. Va. 1984); *aff'd* 768 F.2d at 572 (4th Cir. 1985); *rev'd* 816 F.2d at 932 (4th Cir. 1987); 679 F.Supp. (E.D. Va. 1988); 883 F.2d at 1232 (4th Cir. 1989); *McCord v. City of Fort Lauderdale*, 787 F.2d at 1528 (11th Cir. 1986).

[36]*Thornburg v. Gingles*, 478 U.S. at 53.

[37]Bivariate analysis was utilized in *Jones, Marengo County* and *McMillan*. On the other hand, multivariate analysis was employed in *Opelika, Collins* and *McCord*.

[38]*Thornburg v. Gingles*, 478 U.S. at 63.

[39]See, Bernard Grofman, Lisa Handley and Richard Niemi, *Minority Representation and the Quest for Voting Equality* (Cambridge University Press, 1992). For a discussion of the unresolved issues flowing from the *Gingles* test, see, Robert Heath, "*Thornburg v. Gingles*: The Unresolved Issues," NATIONAL CIVIC REVIEW, January-February 1990, pp. 50-71.

[40]*Buckanaga v. Sisseton Independent School District*, 804 F.2d at 469 (8th Cir. 1989).

[41]See, *Georgia State Board of Elections v. Brooks*, 498 U.S. at 916 (1990); *Chisom v. Roemer*, 111 S.Ct. at 2354 (1991), and companion cases *United States v. Roemer*, 111 S.Ct. at 2354 (1991) and *Houston Lawyers' Association v. Texas Attorney General*, 501 U.S. at 419 (1991).

[42]*League of United Latin American Citizens Council No. 4434 [LULAC] v. Clements*,

914 F.2d at 620 (5th Cir. 1990).

[43] *Mallory v. Eyrich*, 839 F.2d at 275 (6th Cir. 1988).

[44] *United States v. Roemer*, 111 S.Ct. at 2354 (1991).

[45] *Shaw v. Reno*, 113 S.Ct. at 2816 (1993).

[46] *Growe, Secretary of State of Minnesota v. Emison*, 113 S.Ct. at 1075 (1993). See also, *Shaw v. Reno*, 113 S.Ct. at 2816 (1993); *In re Voinovich et al.*, 114 S.Ct. at 2156 (1994); *Johnson v. DeGrandy*, 114 S.Ct. at 2647 (1994); *Miller et al. v. Johnson et al.*, No. 94-631, 1995).

[47] *In re Voinovich et al.*, 114 S.Ct. at 2156 (1994).

[48] *Shaw v. Reno*, 113 S.Ct. at 2816 (1993).

[49] See dissenting opinions of Justices White, Blackmun, Stevens, and Souter.

[50] *Johnson v. DeGrandy*, 114 S.Ct. at 2647 (1994) and *Holder v. Hall*, 114 S.Ct. at 2581 (1994).

[51] The *Miller* decision has not yet been published, but may be identified by its case number 94-631. ▮

SHAW, MILLER AND THE DISTRICTING THICKET

Recent Supreme Court decisions involving majority-minority electoral districts have introduced new uncertainty into the political boundary-drawing process, particularly with regard to the relative importance applied to such factors as geography, incumbency, political affiliation, ethnicity, and race.

RICHARD L. ENGSTROM

Contiguity, compactness, and respect for both communities of interest and formal political subdivisions are districting criteria that have been elevated in importance recently by the United States Supreme Court. Although none of these criteria is required by the federal constitution or any federal statute, the Court identified them in *Miller v. Johnson* as "traditional, race-neutral districting principles" that, absent extraordinary justification, are not to be "subordinated" to racial considerations when representational districts are constructed.[1] These traditional criteria now serve, in Justice Sandra Day O'Connor's words, as "a crucial frame of reference" in the evaluation of districts.[2] If they are accorded less weight than race in the design of a district, the district must satisfy the strict scrutiny standard for compliance with the Fourteenth Amendment, which means the district must be "narrowly tailored" to further a "compelling governmental interest." Strict scrutiny is popularly described as "strict in theory but fatal in fact."

Miller involved a challenge to the Eleventh Congressional District in Georgia. The plaintiffs alleged that this majority African-American district was a "racial gerrymander." The allegation was not based on a claim that any racial group's voting strength had been diluted by the location of the district lines, but simply that this particular district had been deliberately constructed to have an African-American majority. The Court found that race had indeed been "the predominant factor" in the design of the district, and that this had occurred at the expense of the traditional districting criteria.[3] Strict scrutiny was therefore applied, and the district was found to be

THE DISTRICTING THICKET

fatally flawed.

Miller is the progeny of *Shaw v. Reno*, a 1993 decision involving majority African-American congressional districts in North Carolina.[4] The Court held in *Shaw* that race-based districting could be challenged as a violation of the equal protection clause even though there is no allegation that the voting strength of any racial group is adversely affected by the districts. Although *Shaw* failed to resolve this new type of "gerrymandering" claim, it succeeded in attracting increased attention to the criteria for drawing districts by holding that strict scrutiny will be required when "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" are disregarded in the design of districts.[5] *Miller* was the first application of the *Shaw* precedent by the Supreme Court. The principle of respecting "communities defined by actual shared interests" was added to the list of traditional districting criteria in *Miller*.[6]

The explicit recognition of these criteria will no doubt make them more important referents for future districting decisions. Those who design and/or adopt districting plans will not want to subject their product to strict scrutiny, and therefore will be less inclined to deviate from these criteria. This will not, however, make the districting task any easier. It is, in contrast, likely to make districting more difficult, because what exactly these criteria entail is far from certain.

The absence of clear definitions for some of these criteria, as well as clear standards for identifying when they have been "respected" and when they have been "subordinated," leaves districting cartographers, litigators, advocates, and judges in a conceptual thicket. This is already apparent in the post-*Shaw* decisions of the lower federal courts. This ambiguity is exacerbated by the fact that these traditional criteria are often in conflict rather than in harmony. Emphasizing one criterion, quite simply, can interfere with implementing another. Communities of interest, for example, may not be geographically distributed in a compact fashion and can be split by county and municipal boundaries. No agreed-upon hierarchy of these criteria exists to help resolve such conflicts.

Even assuming that these criteria can be clearly defined and readily measured, and therefore capable of providing an unambiguous "frame of reference," what exactly the standard for comparison will be also remains unclear. Will courts compare the respect accorded these criteria to some absolute standard, or to the respect actually accorded them in the past? Given that the Supreme Court has acknowledged that none of these criteria is constitutionally required,[7] it is not likely that some absolute standard will be judicially imposed. Nor, presumably, will the tolerance for deviations from these criteria be less because a gerrymandering allegation concerns race. Justice O'Connor's statement, in her concurrence in *Miller*, that "certainly the standard does not treat efforts to create majority-minority districts *less* favorably than similar efforts on behalf of other groups"[8]

indicates that deviations tolerated in the past, for nonracial purposes, will continue to be acceptable in the racial context. If that is the law, then the frame of reference will have to allow substantial deviations in many states and local political jurisdictions, for the application of these criteria has not been particularly strict. Indeed, their subordination to political considerations has been substantial, even when explicitly required by state constitutions or statutes or by city charters.

...districting is, unfortunately, an activity in which "the potential for mischief in the name of neutrality is substantial."

The conceptual ambiguity surrounding these districting criteria, and the new subordination standard, is a cause for serious concern. Adherence to these traditional principles does not extricate those responsible for districting from the "political thicket," but rather confronts them with capricious definitions and contrasting measurements, as evident in the litigation spawned by *Shaw*. Elevating the legal importance of these criteria, without more precise guidelines for their application, will not bring us closer to the goal of "fair and effective representation."[9] While these criteria may be facially neutral, districting is, unfortunately, an activity in which "the potential for mischief in the name of neutrality is substantial."[10]

This article reviews the criteria identified in the *Shaw* and *Miller* decisions. Special attention will be given to their treatment by the federal district courts in the gerrymandering litigation following the *Shaw* decision, and to their new role as a "frame of reference" in the post-*Miller* districting process.

Contiguity

Contiguity and compactness are criteria widely invoked in the evaluation of districts. They are conceptually distinct criteria that concern different aspects of the geographical form of districts. Many state constitutions, statutes, and local charters require representational districts to be contiguous; far fewer require them to be compact.[11]

Contiguity is, or at least was, the most straightforward of the criteria identified by the Court. It is a simple dichotomous concept. A district is either contiguous or it is not. The test for determining this is not complicated, "A contiguous district is one in which a person can go from any point within the district to any other point [within the district] without leaving the district".[12] In short, contiguity requires that districts not be divided into discrete geographical parts.

The lack of confusion over what contiguity entails rarely has resulted in controversy. The major issue concerning contiguity involves whether the ability to travel throughout a district is a theoretical or a literal requirement. This usually arises when bodies of water serve to connect what are otherwise separate parts of a district. Some contiguity provisions require an actual transportation linkage across any water separating parts of a

THE DISTRICTING THICKET

district, such as that in the New York City Charter, which specifies that "there shall be a connection by a bridge, a tunnel, a tramway or by regular ferry service."[13] Additional controversy has arisen over whether having parts of a district connecting only at a point satisfies the criterion of contiguity.

A district should not be found to violate the contiguity criterion simply because it's shape violates the compactness criterion.

Until *Shaw*, it could be said that "Contiguity is a relatively trivial requirement and usually a noncontroversial one."[14] Lower court decisions following *Shaw*, however, have created confusion about what "contiguity" now requires. Some judges have not been convinced that districts that meet the traditional definition of contiguity satisfy this criterion. In a case involving Louisiana's congressional districts, for example, a federal court held that a majority African-American district that was only 80 feet wide in places complied with this criterion, "but only hypertechnically and thus cynically," and that "Such tokenism mocks the traditional criterion of contiguity."[15] The expression "technical contiguity" has been applied to other majority-minority districts in other post-*Shaw* decisions.[16] Some courts even have begun to treat contiguity as a continuous concept, as if some districts can be viewed as "more" or "less" contiguous than others.[17]

This approach to contiguity has been an unfortunate development. It commingles the notion of contiguity with that of compactness, treating the two as if they are synonymous. A district that is never less than 80 miles wide may well be more compact than one that is 80 feet wide at points, but it should not be considered "more contiguous" for that reason as well. These are distinct criteria that concern different aspects of the geographical form that districts can assume. A district should not be found to violate the contiguity criterion simply because its shape violates the compactness criterion.

COMPACTNESS

In contrast to contiguity, the compactness criterion has always been a matter of considerable ambiguity. It concerns the shape of districts, not whether they contain geographically discrete parts. Compactness is a continuous concept. Districts can be considered more or less compact, and therefore this criterion, unlike contiguity, has been the object of a great variety of quantitative measurements. In fact, there is "no generally-accepted definition" of what exactly compactness entails, and therefore no generally-accepted measure of it either.[18]

Compactness is legally required less often than contiguity,[19] and there is far less consensus about its importance in the design of districts. The linkage between the shapes districts assume and the quality of representation district residents receive has long been questioned.

As candidly expressed by one set of commentators:

> It is, in truth, hard to develop a powerful case for the intrinsic value of having compact districts: If the representative lived at the center of a compact district, he or she wouldn't have to travel any more than absolutely necessary to campaign door-to-door or meet with constituents, but other than that, uncompactness does not seem to affect representation in any way.[20]

A compactness requirement is widely touted, however, as an impediment to gerrymandering. It will rarely preclude gerrymandering, at least the dilutive kind, because that type of gerrymandering is not limited to funny-shaped districts. Indeed, a compactness rule, in some circumstances, could even serve as an excuse for this type of gerrymander.[21] But it is at least a constraint on the way in which district lines can be drawn and therefore an impediment to the manipulation of those lines for political advantage. Odd-shaped districts do stimulate suspicions of deliberate manipulation, and therefore districting is an area, as Justice O'Connor observed in *Shaw*, "in which appearances do matter."[22]

Since *Shaw* elevated the concern for compactness, lower courts have been confronted with a wide array of quantitative indicators that supposedly reveal the relative compactness of districts.[23] These measures emphasize different aspects of shapes, however, and therefore can and do result in conflicting conclusions. Even bizarrely shaped districts can satisfy some of the tests. The measures also vary greatly in complexity. The simplest is based on the length of district boundaries. The shorter the length, the more compact a district is considered to be. Other measures examine the extent to which district shapes deviate from some specified standard, such as a circle or a square, or the extent to which a district fills the area of a polygon encasing it.

New measures have been proposed that depart from the notion of geographical appearances, focussing instead on the physical distances between the homes of the people residing within a district.[24] A federal court in California recently departed even further from the traditional concern for shape and adopted the notion of "functional compactness," holding that "Compactness does not refer to geometric shapes but the ability of citizens to relate to each other and their representatives and the ability of representatives to relate effectively to their constituency."[25]

The variation in approaches does not end here, either. Just as the federal court in Louisiana commingled contiguity with compactness, the federal court handling the *Miller* case commingled communities of interest with compactness. After reviewing several approaches to measuring geographical compactness, that court chose to rely instead on a population-based approach that would "require an assessment of population densities, shared history and common interests; essentially, whether the populations roped into a particular district are close

enough geographically, economically, and culturally to justify their being held in a single district."[26] The Supreme Court affirmed both the California decision (rejecting a *Shaw*-type claim) and the *Miller* decision without commenting on what compactness actually entails.

With this type of confusion over the concept of "compactness," requiring that districts not be subordinated to a compactness standard will not simplify the districting task. Districting decisions are likely to be more, not less, difficult in this context. Without some clarity concerning this constraint, those designing and/or adopting districts cannot be expected to know the limitations under which they must work.

COMMUNITIES OF INTEREST

Many sets of equi-populous districts can usually be created, even when contiguity is required and some type of compactness constraint is applied. Ideally, however, districts should be more than arbitrary aggregations of individuals. The use of geographically based districts is premised on the notion that people who reside close to one another share interests. Geographical proximity is assumed to either cause, or reflect, distinct interests and policy preferences. When such "communities of interest" exist, it is often suggested that they be maintained intact within representational districts.

The communities of interest standard is unfortunately "probably the least well defined" criterion for drawing districts.[27] Serious problems arise in identifying such communities, as well as deciding which ones deserve to be recognized in the design of districts. This criterion was not listed among the traditional districting principles in *Shaw*, and therefore has not received as much attention from the lower courts as has compactness. Respect for "communities defined by actual shared interests" was added to the list in *Miller*, however, with little indication of how this concept is to be applied.

One of the principle questions in light of *Miller* is whether this criterion concerns "shared interests" among people living in geographical proximity to each other, or whether it concerns the degree to which districts themselves are homogeneous along some dimension or dimensions. In *Miller*, Justice Anthony Kennedy said that "A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests."[28] The fact that this comment was immediately followed by a quote from *Shaw* indicating that it would be legitimate to concentrate minority group members in a single district — when they "live together in one community" — suggests that the concept may require geographic proximity.[29] But when Justice Kennedy concluded that the district at issue in *Miller* "tells a tale of disparity, not community," he was explicitly referencing "the social, political and economic makeup" of the district as a whole. African-Americans in the Savannah area had been joined with African-Americans in metropolitan Atlanta, thereby linking, according to Kennedy,

African-Americans who were "worlds apart in culture."[30]

This issue is central to the North Carolina congressional districting case, which will be reviewed by the Supreme Court during its 1995-96 term. In North Carolina the district court identified the state's two majority African-American congressional districts as distinctive in character, one being rural and the other urban. This resulted from the legislature's concern that districts reflect "significant communities of interest."[31] The application of this criterion to these districts was very systematic; a guideline was adopted that at least 80 percent of the population of one district reside outside cities with populations exceeding 20,000, and at least 80 percent of the population of the other reside within cities exceeding 20,000. This resulted in districts that are far from compact, but which, according to the district court, have "substantial, relatively high degrees of homogeneity of shared socio-economic — hence political — interests and needs among [their] citizens."[32]

Georgia had elevated one of the venerable unwritten rules of redistricting — save the incumbents! — to the status of an explicit guideline.

Justice Kennedy did state that the "mere recitation of purported communities of interest" will not successfully invoke this criterion.[33] Simply referencing well known geographical place names presumably will not suffice. Identifying an area as containing people with particular traits, such as ethnic or religious identifications or life-style preferences, may be sufficient, provided the particular interests shared are documented. But which "shared interests" deserve recognition in districting, and whether this recognition extends to people who share an applicable interest but do not reside in close geographical proximity to each other, remain to be determined. This is a districting criterion that has never been well specified, and is unlikely to be clearly defined prior to the next round of redistricting following the 2000 census.

Political Subdivisions

The final traditional criterion on the Supreme Court's list is respect for political subdivisions. Local units of government, especially counties, have often served as building blocks for state legislative and congressional districts. Prior to the Supreme Court's adoption of the "one person, one vote" principle, counties were even the units to which legislative seats were apportioned in many of the states.[34] Not dividing counties among districts, unless necessary to equalize populations, has been a common districting constraint.[35] Following established political boundaries such as these is said to keep districts more cognizable to voters.

Political subdivisions are recognized by law, and there should be no problem in identifying them and in determining whether or not they have been divided by representational district lines. This is a simple matter of counting. There may be arguments, however, over which

THE DISTRICTING THICKET

political subdivisions to include in the count. Counties, as noted, had been the major focus prior to *Shaw* and *Miller*, but the treatment of other subdivisions could be examined as well. The district court in Louisiana, for example, referenced how the state's congressional districts divided "major municipalities" as well as counties.[36] The list could include other units as well, such as school districts, other types of special districts, or townships. Where the list ends is an issue in need of resolution.

Simply counting the number of units divided by a district or districts may not be the appropriate basis for evaluation, either. Whereas the court in Louisiana found the splitting of municipalities to be objectionable *per se*, the federal court in the Texas congressional districting case responded very differently. The fact that cities in Texas had been divided between districts was not viewed as a negative, despite the divisions being along racial lines. The court noted instead that these divisions "gave the Congressmen a toe-hold in such cities and effectively doubled the cities' representation in Congress."[37] Other issues include such things as "How many splits are too many?" and "Is a little split from a single unit as bad as big split?"[38]

Another related issue is the respect to be accorded precinct lines. Precincts are not governmental jurisdictions, but merely administrative units for elections. It is often argued that precincts should not be divided by districts, but this is simply a matter of administrative convenience. Requiring districts to follow pre-existing precinct boundaries can impede the achievement of other, more important districting goals, such as creating majority-minority districts, and courts should not allow this constraint to be a pretext for discriminatory districting. Precincts can be changed relatively easily to accommodate more important districting criteria.

FRAME OF REFERENCE

Traditional race-neutral districting criteria are now supposed to provide a frame of reference for evaluating *Shaw*- and *Miller*-type gerrymandering allegations. The districting criteria discussed above are those that the Supreme Court has explicitly recognized as falling within that category. The Court made it clear in *Miller*, however, that it did not consider these to be an exhaustive list of such principles.[39] While the Court provided no indication of the other types of criteria that might be employed to evaluate these allegations, it did leave some of Georgia's expressed criteria off the list, perhaps indicating that these criteria are not to be included.

The Georgia legislature had adopted districting "guidelines" that included, in addition to contiguity and respect for political subdivisions, the protection of incumbent office holders. This was expressed through two separate guidelines. One was "avoiding contests between incumbents," the other was "preserving the core of existing districts," which functions largely as a euphemism for incumbent protection.[40] Georgia had elevated one of the venerable unwritten

rules of redistricting — save the incumbents! — to the status of an explicit guideline.[41] Indeed, even the federal court in Georgia had included "protecting incumbents" among its list of "traditional districting principles."[42] The absence of this criterion in the Supreme Court's recitation of principles may reflect the fact that this criterion, while traditional, has hardly been "race-neutral" in application, given the over-representation of whites (or Anglos) in elected offices.

Another question concerning the use of the recognized criteria as a frame of reference concerns, as noted above, the standard for comparison. While protecting incumbents may not make the list of traditional criteria, it is not by itself an impermissible districting goal,[43] and has often been a reason for deviating from the other criteria. The federal court in Louisiana, for example, acknowledged that the compactness criterion, not required by any Louisiana law, had been trumped by incumbent protection considerations in previous congressional districting schemes of that state. The "Old Eighth" district, which the court described as "certainly bizarre" in shape, was admittedly "crafted for the purpose of ensuring the reelection of Congressman Gillis Long."[44] Will districts drawn to enhance the electoral opportunities of African-Americans in Louisiana therefore also be allowed to be bizarre, or at least no more bizarre, or will such districts now be held to a higher standard?[45]

While protecting incumbents may not make the list of traditional criteria, it is not by itself an impermissible districting goal... .

Traditional districting principles often have been subordinated to non-racial political goals, of course, without any requirement that such subordination be justified. This is illustrated by another Supreme Court case, *Gaffney v. Cummings*, which involved districts for the lower house of the Connecticut state legislature.[46] The parallels between *Gaffney* and the *Shaw* and *Miller* cases are striking, except the issue in *Gaffney* is the deliberate manipulation of district boundaries for partisan rather than racial reasons.

In designing Connecticut's legislative districts, two of the traditional criteria cited in *Shaw* and *Miller*, compactness and respect for political subdivisions (the latter even a requirement of the Connecticut Constitution), were clearly subordinated to a purported goal of providing "proportional representation." The proportionality in this case concerned the representation of the state's Republican and Democratic voters. The Supreme Court found that "The record abounds with evidence, and it is frankly admitted by those who prepared the plan, that virtually every Senate and House district line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties."[47]

THE DISTRICTING THICKET

While the Connecticut plan has been described as "a bipartisan gerrymander,"[48] it was not, in fact, the product of any bipartisan agreement. It was developed by the Republican party's representative to a three-person apportionment board, with the assistance of counsel to the state Republican party, and was vigorously opposed by the Democratic party's representative on the board. (The decisive vote was provided by the third member of the board, who had been selected by the two party appointees.) The plans were subsequently challenged by Democratic plaintiffs as "a gigantic gerrymander."[49] A large number of Republican party supporters were concentrated in one geographical area of the state, and therefore districts based on neutral districting principles would result in many Republican votes being wasted in safe Republican districts. The plaintiffs argued that the architects of the plan had deliberately gerrymandered the districts across the state in order to offset this unfavorable (for districting purposes) geographical pattern of Republican support.[50]

The federal district court in Connecticut found that districts in the plan had "highly irregular and bizarre outlines."[51] The state acknowledged the fact that districts had been made less compact than otherwise necessary in order to achieve the desired partisan balance among the districts. This was also "frankly admitted by those who prepared the plan."[52] Indeed, in defending the distorted shapes of the districts, the state rejected the notion that districts should be held to a compactness standard, of any type, stating:

> Compactness has no necessary relation to the devising of districts to provide fair and effective representation because the crucial variables are the residential patterns of the persons to be represented. Noncompactness could be the only way to provide even minimal representation of a scattered minority.[53]

Another neutral districting criterion, respect for political subdivisions, was also subordinated to the proportionality goal. In this case, the criterion was actually a state constitutional requirement. The Connecticut constitution contained a prohibition against dividing towns when creating state assembly districts, and this criterion was also violated more than necessary so that districts would have particular partisan configurations.[54] This was also frankly acknowledged by the authors of the plan. Its chief architect testified, "We considered keeping the breaking of town lines within as reasonable limits as we could but where there were other considerations of fairness [proportional representation] that overrode that. I did not insist the town lines be maintained exact."[55] His assistant likewise testified:

> A. I cut town lines which were in my opinion necessary.
>
> Q. In order to achieve the political balance?
>
> A. In order to achieve the balance, yes.[56]

The subordination of these tradi-

tional criteria in this context produced no adverse comment by the Supreme Court. They certainly did not constitute "a crucial frame of reference" for the Court's evaluation of these state legislative districts.

The districting criteria the Court has recognized as constituting the frame of reference have not been rigidly adhered to in the past. They have, in contrast, often been subordinated to political considerations. In light of Justice O'Connor's comment that majority-minority districts will not be held to a higher standard, presumably past practices rather than political science texts will be the point of comparison. Whether deviations from these criteria resulting from nondilutive racial considerations will be no less tolerable than past, or even present, deviations due to other acceptable political considerations, however, remains to be seen. While Justice O'Connor's words no doubt were meant to reassure minority voters that a double standard was not being adopted, no other justice in the majority joined her in that gesture.[57]

Conclusion

The *Shaw* and *Miller* decisions have made several districting criteria the frame of reference for adjudicating allegations of racial gerrymandering. These criteria, unfortunately, are neither well defined nor easily measured; moreover, they have not all been strictly applied prior to these decisions. Even contiguity, which was once the clearest of the criteria, is now clouded in ambiguity and no longer readily distinguishable from compactness.

The confusion surrounding these criteria themselves, as well as the standards for determining when they are respected and when they are subordinated, are a cause for concern. The districting task is difficult enough without adding this additional complexity to the process. The Supreme Court will review cases concerning congressional districts in North Carolina and Texas during its next term. Hopefully the Court will see the need to begin clarifying the components and application of the new frame of reference it has created. Without such clarification, redistricting in the post-*Miller* era will indeed be, as Justice Ruth Bader Ginsburg has predicted, "perilous work for state legislatures,"[58] not to mention county boards, city councils, school boards, and any other person or group who may be responsible for structuring representational districts. CNR

Notes

[1]The decision in *Miller v. Johnson* has not yet been published but the "slip opinion" may be identified by the following case numbers: 94-631, 94-797 and 94-929.

[2]*Miller*, sl. op. at 1 (O'Connor, concurring).

[3]*Miller*, sl. op. at 17-18.

THE DISTRICTING THICKET

[4]*Shaw v. Reno*, 113 S.Ct. 2816 (1993).

[5]*Shaw*, sl. op. at 15.

[6]*Miller*, sl. op. at 15.

[7]*Shaw*, sl. op. at 15.

[8]*Miller*, sl. op. at 1 (O'Connor, J., concurring) (emphasis in original).

[9]*Reynolds v. Sims*, 377 U.S. 533, 565-566 (1964).

[10]David Butler and Bruce Cain, *Congressional Redistricting: Comparative and Theoretical Perspectives* (New York: MacMillan Publishing Co., 1992), p. 150.

[11]See Bernard Grofman, "Criteria for Districting: A Social Science Perspective," 33 *UCLA Law Review* (October 1985), pp. 177-183; Richard H. Pildes and Richard G. Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances after *Shaw v. Reno*," 92 *Michigan Law Review* (December 1992), pp. 528-531; and W.E. Lyons and Malcolm E. Jewell, "Redrawing Council Districts in American Cities," 18 *State and Local Government Review*, (Spring 1986), p. 76.

[12]Note, "Reapportionment," 79 *Harvard Law Review* (April, 1966), p. 1284.

[13]N.Y.C. Charter ch. 2, sec. 52(2).

[14]Bernard Grofman, "Criteria for Districting," p. 84.

[15]*Hays v. State of Louisiana*, 839 F. Supp. 1188, 1200 (E.D. La. 1993).

[16]*Shaw v. Hunt*, 861 F. Supp. 408, 468 (E.D. N.C. 1994) and *Johnson v. Miller*, 864 F. Supp. 1354, 1368 (S.D. Ga. 1994).

[17]*Shaw*, at 452. See also *Vera v. Richards*, 861 F. Supp. 1304, 1338, 1342 (S.D. Tex. 1994). It has also been suggested that "... 'contiguity' is not an abstract or geometric technical phrase. It assumes meaning when seen in combination with concepts of 'regional integrity' and 'community of interest.'" *DeWitt v. Wilson*, 856 F. Supp. 1409, 1414 (E.D. Cal. 1994).

[18]*Shaw v. Hunt*, at 452; see also *Johnson*, at 1388.

[19]See Lyons and Jewell, "Redrawing Council Districts," at 76.

[20]Charles Backstrom, Leonard Robins, and Scott Eller, "Establishing a Statewide Electoral Effects Baseline," in Bernard Grofman (ed.), *Political Gerrymandering and the Courts* (New York: Agathon Press, 1990), p.152.

[21]See David Butler and Bruce Cain, *Congressional Redistricting*, pp. 149-150.

[22]*Shaw*, sl. op. at 15.

[23]See especially *Johnson*, at 1388-1390, and Vera, at 1329-1330.

[24]See generally Richard G. Niemi, Bernard Grofman, Carl Carlucci, and Tho-

mas Hofeller, "Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering," 52 *Journal of Politics*, (November 1990), 1155-1181, and H.P. Young, "Measuring the Compactness of Legislative Districts," 13 *Legislative Studies Quarterly*, (February 1988), 105-115.

[25]*DeWitt*, at 1414.

[26]*Johnson*, at 1389; see also *Vera*, at 1341.

[27]*DeWitt v. Wilson* (unsigned, one-paragraph order, issued by Supreme Court on June 29, 1995, upholding California's 1992 redistricting plan).

[28]Richard Morrill, "A Geographer's Perspective," in Bernard Grofman, ed., *Political Gerrymandering and the Courts* (New York: Agathon Press, 1990), p. 215.

[29]*Miller*, sl. op. at 18.

[30]*Shaw v. Reno*, sl. op. at 14.

[31]*Shaw v. Hunt*, at 471.

[32]*Shaw v. Hunt*, at 470.

[33]*Miller*, sl. op. at 15, 18.

[34]See Malcolm E. Jewell, "Constitutional Provisions for State Legislative Apportionment," 8 *Western Political Quarterly* (June 1955), 271-279.

[35]See Grofman, "Criteria for Districting," at 177-183.

[36]*Hays* (1993), at 1201, and *Hays v. State of Louisiana*, 862 F. Supp. 119, 121 (W.D. La. 1994).

[37]*Vera*, at 1345; compare, however, the same court's comments at 1334-1335, n. 43.

[38]Backstrom, Leonard, and Robbins, "Establishing a Statewide Electoral Effects Base," at 153.

[39]*Miller*, sl. op. at 15.

[40]*Miller*, sl. op. at 4.

[41]See, for example, Royce Hanson, *The Political Thicket: Reapportionment and Constitutional Democracy* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1966), p. 35.

[42]*Johnson*, at 1369.

[43]See *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966) and *White v. Weiser*, 412 U.S. 783, 791 (1973).

[44]*Hays* (1994), at 122.

[45]One judge on the *Hays* court stated that the old eighth district "has no application to this case," presumably because it "was never challenged on constitutionality by any court in the United States." *Hays* (1994), at 127 (Shaw, J., concurring). The main opinion in that case also mentioned that the old eighth was "before *Shaw* and never challenged". *Id.*, at 122. The grounds for such a constitutional challenge remain unclear, however, given

that the only features of the district referenced by the court were that it was (1) not compact and (2) protected an incumbent, neither of which violates the Constitution. See notes 7 and 44, *supra*.

[46]412 U.S. 735 (1973).

[47]Gaffney, at 753.

[48]*Davis v. Bandemer*, 478 U.S. 109, 154 (1986) (O'Connor, J., concurring).

[49]Brief for Appellees at 47, *Gaffney v. Cummings*, 412 U.S. 735 (1973).

[50]See Richard L. Engstrom, "The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation," 1976 *Arizona State University Law Journal* (No.2, 1976), 277, 301-304.

[51]*Cummings v. Meskill*, 341 F. Supp. 139, 147 (D. Conn. 1972).

[52]See depositions of Judge George A. Saden and James F. Collins, Appendix at 54-55, 100-101, 153-170, Record, *Gaffney v. Cummings*, 412 U.S. 735 (1973).

[53]Brief for Appellant at 51, *Gaffney v. Cummings*, 412 U.S. 735 (1973).

[54]*Cummings v. Meskill*, at 148.

[55]Saden deposition, *supra* note 50, at 53.

[56]Collins deposition, *supra* note 50, at 99; see also deposition testimony at 92, 95, and 98.

[57]Some courts have held that the "narrow tailoring" portion of the strict scrutiny test requires a majority-minority district to adhere as closely as possible to neutral districting criteria. See *Vera*, at 1343, and *Hays* (1993), at 1208-1209. In *Shaw v. Hunt*, however, narrow tailoring is viewed as requiring only compliance with constitutionally mandated criteria. *Shaw v. Hunt*, at 449-454.

[58]*Miller*, sl. op. at 17 (Ginsburg, J., dissenting). ▮

CUMULATIVE VOTING AS A REMEDY IN VOTING RIGHTS CASES

While majority-minority districts are bitterly litigated in the courts, a "quiet revolution" is taking place in jurisdictions across the nation employing the alternative system of cumulative voting.

EDWARD STILL AND PAMELA KARLAN

Having found in April of 1994 that Worcester County, Maryland's practice of electing its commission at large violated Section 2 of the Voting Rights Act, U.S. District Court Judge Joseph H. Young offered the commissioners the opportunity to propose a plan that "completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and elect candidates of their choice."[1] The Worcester County Commission responded only with a cosmetic change that required every commissioner to live in a defined residency area while continuing to seek election at large.

In light of the commission's abdication of its responsibility, Judge Young was obligated to draft a plan. After considering proposals advanced by the plaintiffs, he adopted a plan that retains the at-large election system preferred by the county, but modifies the way in which individual voters cast their ballots to provide *all* voters, regardless of race or place of residence, with an absolutely equal opportunity to elect the candidates of their choice. Under the circumstances of this case, *Honnis v. Cane v. Worcester County, Maryland*,[2] Judge Young's decision to order the use of cumulative voting within the county's existing at large system represents a sensitive response to

the needs of all the various litigants.

AT-LARGE VOTING WITHOUT EXCLUSIONARY TENDENCIES

Cumulative voting preserves many of the distinctive and valuable features of at-large elections. For example, candidates can live anywhere in the jurisdiction and vote for any candidate running for office, rather than being restricted to voting for a candidate from a designated district. Thus, candidates retain the incentive to compete for support throughout the county and, after election, continue to represent the entire county rather than a geographic subdivision.[3]

The sole significant difference between cumulative voting and traditional at-large voting is that in a cumluative voting system voters can "cumulate" their votes — that is, cast more than one vote for a candidate about whom they feel strongly. For example, a voter who strongly supports candidate Jones could cast all five of his votes for Jones. A voter remains free, of course, to cast one vote for each of five candidates, precisely as in a traditional at-large scheme.[4]

The suggestion that cumulative voting is confusing to voters is baseless. A study of recently adopted cumulative voting plans shows that nearly all the voters understood the proper way to cast a ballot, and only a small minority found the system more complex than other election systems.[5] Ninety-five percent of the voters knew they could cast all their votes for one candidate; a mere 13 percent found the cumulative voting plan "more difficult to understand" than systems utilized in other local elections in which they had voted.

The ability of voters to "plump" their votes behind a single candidate (or a few candidates) dampens the winner-take-all element of traditional at-large systems that enables a bloc-voting majority to capture all the available seats even when substantial numbers of voters prefer other candidates. As Judge Young explained in his opinion, all election systems have a "threshold of exclusion" equal in size to the smallest possible number of minority individuals needed to elect a candidate of their choice in a given jurisdiction.[6] In a traditional at-large system, the threshold of exclusion is 50 percent; unless a group constitutes a *majority* of the electorate, the remainder of the electorate — by voting strategically — can shut that group out completely. Similarly, within each district of a single-member district plan, the threshold of exclusion is again 50 percent — only the group that contitutes the majority of the electorate within the district can elect its preferred candidate.[7] By contrast, the threshold of exclusion in a cumulative voting system can be described by the equation $1/(s + 1)$, where s equals the number of seats

The ability of voters to "plump" their votes behind a single candidate ... dampens the winner-take-all element of traditional at-large systems

to be filled in the election.[8] In the case of Worcester County, with a five-member commission, the threshold of exclusion using cumulative voting would be 16.67 percent.[9]

This substantially smaller figure means that any politically cohesive group, regardless of who its members are or where they live, can, by plumping their votes behind a single candidate, elect a representative of their choice. Thus, cumulative voting modifies the traditional at-large election plan to give minority groups a real opportunity to elect the candidates they favor.[10] Nonetheless, cumulative voting does not guarantee proportional representation in the sense of setting aside seats for particular groups. It simply gives a greater number of groups a chance to elect the candidates they prefer.

Thus, cumulative voting is not "proportional representation." Cumulative voting is sometimes called a "semi-proportional" system. A recent book advocating the adoption of proportional representation in the United States noted with regard to cumulative voting and another semi-proportional system called limited voting:

> Both systems are designed to make it more difficult for one party to elect all the representatives in an election, and both *may* produce more proportional results than single-member or at-large plurality elections. But full representation is not guaranteed... . That is why these are called *semi*-proportional and why most proponents of ...[proportional representation] considered them crude systems... ."[11]

Contrary to suggestions contained in the Worcester County Commission's appeal brief, cumulative voting is not a novel system. Corporations, for example, often use cumulative voting to elect their boards of directors,[12] and an increasing number of jurisdictions have adopted cumulative voting to remediate Voting Rights Act violations.[13]

Cumulative Voting and Inclusion

Cumulative voting does an excellent job of fostering the notion of "civic inclusion." As Pamela Karlan has written:

> [The Supreme Court's longstanding] emphasis on equal political access for all voters ... rests on a belief that the distinctive values that inclusion in governmental decision making brings a sense of connectedness to the community and greater dignity; greater readiness to acquiesce in governmental decisions and hence broader consent and legitimacy; and more informed, equitable and intelligent governmental decision making.
>
> [Civic inclusion] accepts the bedrock diversity of modern American and seeks to bring diverse groups into the governing circle because, quite simply, the best way to ensure that all points of view are taken into account is to create decision-making bodies in which all points of view are represented by people who embody them. It is not enough that there are people who can only imagine what minority interests might require.[14]

Modifying an at-large system to provide for cumulative voting often can meet the goals of civic inclusion better

than single-member districts. First, empirical studies of recent cumulative voting elections show that they fully cure Voting Rights Act violations by enabling members of traditionally excluded racial and ethnic minorities to elect candidates of their choice.[15] At the same time, cumulative voting avoids the necessity for deliberately drawing districts along racial lines, with the signifant legal problems that practice can incur. Cumulative voting retains the at-large principle and allows *voters*, rather than governments, to form "voluntary districts" with other, like-minded voters.[16] Moreover, unlike districting schemes, which are imposed on voters by outside groups (e.g., legislatures, city councils, courts) and usually last for a decade or more, cumulative voting elections allow voters to make their affiliative decisions for themselves, on the occasion of every regular election.

Geographic districting plans are based on the implicit assumption that voters have an identity of interest with their geographical neighbors.

Geographic districting plans are based on the implicit assumption that voters have an identity of interest with their geographical neighbors. While neighbors may have a common interest in whether the city repaves the street in front of their houses or rezones the lot on the corner for use as a fraternity house, on other issues voters may have more in common with residents of other neighborhoods than with people who live down the street. Districting relies on geographical proximity, while cumulative voting allows the voters themselves to decide whether and when geography is more important than other connections or common interests. Under a modified at-large cumulative voting plan, a like-minded group of voters enjoys a chance to elect its preferred representatives regardless of where its members live.

The rule of *Connor v. Johnson*, requiring courts to adopt single-member districts, is not applicable to the case of Worcester County, Maryland.[17] *Connor* involved a state legislative redistricting plan consisting of both single-member and multi-member districts. The U.S. District Court, in rendering its decision, was forced to consider strong evidence that multi-member districts were dilutive of minority voting strength.[18] By imposing single-member districts as the presumptive standard, the court was following a trend in American politics, thereby insulating itself from the charge that a single-member district — because it "allows the majority to defeat the minority on all fronts" — allows a court to pick the eventual majority of the legislative body.[19] Worcester County had employed a county-wide election system for a number of years and expressed a strong preference for continued use of an at-large plan. Thus, Judge Young, in imposing the cumulative voting plan, deferred to the local jurisdiction's policy

choices. This decision followed the precedent of preserving existing practices and structures to the extent practicable, making only such changes as are necessary to eradicate any discriminatory features.[20]

Avoidance of Undesirable Side-Effects of District Remedies

In *Thornburg v. Gingles*,[21] the U.S. Supreme Court held that plaintiffs in racial vote dilution cases must *usually* show that "the minority group ... is sufficiently large and geographically compact to constitute a majority in a single-member district." The "geographically compact" requirement (which is not found in the Voting Rights Act) make sense if the plaintiffs' sole claim is that the use of at-large elections rather than single-member district elections dilutes their voting strength. But as both the Supreme Court and Congress have recognized, a group's voting strength can be diluted by other practices as well. For example, majority-vote requirements and numbered-post provisions can dilute a group's voting power.[22] Thus, sometimes it is the voting rules *within* an at-large system, rather than the at-large nature of the constituency, that dilutes the minority's voting strength. Modifying the winner-take-all rules, by switching, for example, to cumulative voting, can offer a complete remedy. Such modifications can provide equal electoral opportunity while retaining the legitimate interests served by at-large elections (e.g., the preservation of jurisdiction-wide constituencies).

Any election plan that depends on districts is subject to gerrymandering and dilution (and sometimes inflation) of a minority group's voting power. Moreover, race-conscious districting sometimes can send an unfortunate message to voters about the salience of race in the political process.[23] Finally, when a court is called upon to make the decisions about how to draw districts (because, as in the Worcester County Case, a defendant jurisdiction has defaulted on its obligation to provide a remedy), it often is plunged into a political thicket of competing, overlapping and sensitive interests.[24]

Far from accentuating racially polarized voting, cumulative voting ameliorates its effects. The use of cumulative voting in the British Empire supports this claim:

> The name "cumulative vote" appears for the first time in 1853, but three years earlier the system was recommended by a committee of the Privy Council for preventing the monopoly of colonial Legislative Councils by one party, and was applied in the Cape Colony. It continued to be used there for the election of the Legislative Council until that [body] disappeared under the new constitution of the Union of South Africa in 1909, and Lord Milner contrasted its effects most favourably with those of the majority system used to elect the House of Assembly (Lower House). In the Assembly, the division between Dutch and British stock was accentuated, for one part of the Colony returned only Boer representatives, the other party only non-Boers; in the Legislative Council, on the contrary, the minority in each region had representation.[25]

CUMULATIVE VOTING AS A VOTING RIGHTS REMEDY

The principal purpose of Section 2 of the Voting Rights Act is to ameliorate the effects of discriminatory actions, without requiring discriminatory voters to change the way they vote:

> By contrast [to other anti-discrimination statutes], the Voting Rights Act seeks to alter the consequences of racial bloc voting patterns without governing the way individual voters cast their ballots; the primary conduct — the racial patterns in voting — is unaffected.[26]

Thus, while the employment discrimination laws tell employers not to make choices on the basis of race, religion, etc., the Voting Rights Act allows the voter to make discriminatory *decisions*, but tries to prevent all the discriminatory *consequences* those decisions might otherwise engender.

Another consideration that favors cumulative voting and similar remedies is the recent hostility of the U.S. Supreme Court to the conventional single-member district approach to minority electoral empowerment. With regard to racial gerrymandering, Justice Sandra Day O'Connor, in her majority opinion, wrote, "Put differently, we believe that reapportionment is one area in which appearances do matter."[27] With the Supreme Court taking the position that oddly shaped electoral districts may be considered presumptively unconstitutional, lower courts and legislative bodies are constrained in the boundaries they may draw. If the only remedy for an instance of racially polarized voting is single-member districts, and if the only district providing a reasonable chance for black voters to elect candidates of their choice is one with a "bizarre" appearance, blacks will be left without an effective remedy to cure a proven violation of Voting Rights Act. If the Supreme Court is not to gut the Voting Rights Act of all meaning and power, the answer is that there must be a way to introduce electoral opportunity without Balkanizing the population. Cumulative voting is such a system.

Cumulative voting permits jurisdictions to avoid race-conscious district drawing. Individual voters decide whether, and to what extent, to be race-conscious. Furthermore, cumulative voting does not freeze existing race-consciousness into place, because the system does not institutionalize the divisions in society by drawing a "black district," a "Latino district" or a "white district." The system also does not leave voters who are in the numerical minority in a given district feeling as if their votes do not count. In a district that is 65 percent or more black and in which there is racially polarized voting, the white minority is apt to feel as closed out of the political process as blacks felt when they were the minority in the multi-member/at-large plan. Single-member districts shift the burden of the election plan from a minority group in a multi-member district to the new minorities in each of the single-member districts or sub-districts. The members of the jurisdiction-wide majority who are minorities in their own districts may harbor a resentment for the "affirmative action" that has placed them

in a powerless minority.[28] By contrast, cumulative voting allows *all* voters to vote for the candidates of their choice, and makes it quite probable that *most* voters will cast at least some of their votes for a candidate who actually wins, thereby increasing their sense of effective participation in electoral politics.

Finally, modifying at-large elections to permit cumulative voting allows bi-racial coalitions to form. Racially homogeneous single-member districts tend to preserve the racial divisions in society by making it unnecessary for candidates to appeal to any group other than their own and requiring all compromises (if any) to take place at the legislative/policy-making level, rather than among the voting public.[29] Professor Lani Guinier of the University of Pennsylvania School of Law offers a stinging criticism of single-member districts in a recent article:

> [T]he districting strategy excludes the possibility of representation for those whose interests are not defined by, or consistent with, those in the geographically defined district. Subdistricting simply assumes a linkage between interest and residence that is not necessarily as fixed as racial segregation patterns might otherwise suggest... .
>
> [D]istricting decisions may simply reflect the arbitrary preferences of incumbent politicians who prefer packed, safe districts to ensure their reelection. Indeed, districting battles are often pitched between incumbents fighting to retain their seats, without regard to issues of voter representation. Because the choice of districts is so arbitrary, incumbents enjoy extraordinary leverage in self-perpetuation through gerrymandering.
>
> Thus, districting strategies often promote noncompetitive election contests, which further reduce voter participation and interest.30

By contrast, in a cumulative voting system, candidates of all races hve the incentive to appeal to all voters.

Cumulative voting is not prohibited by the so-called anti-proportional representation disclaimer of Section 2 of the Voting Rights Act. That disclaimer provides:

> The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, 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.[31]

Since cumulative voting allows the racial minority the same power to elect candidates of their choice as the racial majority, but does not guarantee the racial make-up of the governmental body, there is no violation of the proviso. It was added to the text of the 1982 Voting Rights Act amendments bill to counter any tendency to establish a quota system in elections; that is, requirements that the results of an election be invalidated if a certain percentage of protected minorities failed to win office. As the Senate Judiciary Committee noted:

> This disclaimer is entirely consistent with the above mentioned Supreme Court and Court of Appeals precedents, which contain similar statements regarding the absence of any right to proportional representation. It puts to rest any concerns that have been voiced about racial quotas.[32]

As noted above, cumulative voting does not guarantee who will win; black voters may form a coalition with another group and choose a non-black; or black voters may split into warring ideological camps. In either case, cumulative voting allows them more opportunity to elect a candidate of their choice than does a winner-take-all system such as the at-large and single-member district plans.

CONCLUSION

Cumulative voting is a promising alternative to both traditional at-large elections, with their tendency to exclude minority groups from the political process, and single-member district systems, with their fragmentation of the electorate and requirement that courts or politicians allocate voters among constituencies. Moreover, as in Worcester County, Maryland, cumulative voting offers courts a tool for striking an appropriate balance between the interests of the plaintiffs in remedying racial vote dilution, and those of the county, in retaining the benefits of at-large elections and a city-wide constituency.

CNR

NOTES

[1]S. Rep. No. 97-417, p. 31 (1982).

[2]*Honnis W. Cane, Jr. v. Worcester County, Maryland*, 35 F.3d at 921 (1994).

[3]For general information on cumulative voting, see, Richard L. Engstrom, Delbert A. Taebel and Richard L. Cole, "Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico," *Journal of Law and Politics*, Vol. 5 (1989), pp. 469-497.

[4]Other combinations also are possible. A voter who was part of a coalition, for example, might cast three votes for candidate Smith and two for candidate Wilson.

[5]Richard L. Cole, Delbert A. Taebel and Richard L. Engstrom, "Alternatives to Single-Member Districts," *Western Political Quarterly*, March 1990, pp. 191-199.

[6]Pamela Karlan, "Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation," *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 24 (1989), p. 222; Edward Still, "Alternatives to Single-Member Districts," in Chandler Davidson, ed., *Minority Vote Dilution* (Washington, D.C.: Howard University Press, 1984), pp. 253-258.

[7]The threshold of exclusion assumes that all voters are voting strategically; that is, that every group of voters is trying to maximize its share of the seats. If the majority group does not vote strategically, a minority group may be able to win a seat even if its numerical strength

lies below the threshold. For example, black candidates for the Chilton County, Alabama Commission were able to win in a cumulative voting system even though blacks had less than the threshold of exclusion because the white majority spread its votes among more than seven candidates.

[8]Karlan, "Maps and Misreadings," p. 222.

[9]There are five available seats. Hence, the formula for the threshold of exclusion in Worcester County is 1/(1 + 5), or 1/6.

[10]"Minority" is not a euphemism for "black." In a cumulative system, a minority group might consist of a politically cohesive black community, but it can also consist of any group that is less than a majority of the relevant voting population, such as Republicans, people who feel strongly about environmental issues, or advocates of a single-payer health care plan.

[11]Douglas J. Amy, *Real Choices/New Voices: The Case for Proportional Representation Elections in the United States* (New York: Columbia University Press, 1993), p. 186.

[12]See the American Bar Association's "Model Business Corporation Act," §33. See also, Lani Guinier, "The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success," *Michigan Law Review*, Vol. 89 (1991), pp. 1077, 1139 n. 298.

[13]The Justice Department has also precleared under Section 5 the use of cumulative voting in 18 Texas jurisdictions during the last two years, including counties and school districts.

[14]Karlan, "Maps and Misreadings," p. 180 and n. 27.

[15]Richard L. Engstrom et al., "Cumulative Voting as a Remedy..."; Richard L. Engstrom and Charles Barrilleaux, "Native Americans and Cumulative Voting: The Sisseton-Wahpeton Sioux," *Social Science Quarterly*, June 1991, p. 338; and Still, "Cumulative and Limited Voting in Alabama," in Wilma Rule and Joseph F. Zimmerman, eds., *United States Electoral Systems: Their Impact on Minorities and Women* (Westport, Conn.: Greenwood Press, 1992), pp. 183-196.

[16]Karlan, "Maps and Misreadings," p. 226 and n. 24.

[17]"We agree that when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." *Connor v. Johnson*, 402 U.S. at 690 (1971).

[18]Frank Parker, in *Black Votes Count: Political Empowerment in Mississippi After 1965 (Chapel Hill: University of North Carolina Press, 1990) writes*, "The lawyers for the [*Connor v. Johnson*] plaintiffs had made a strong case that multi-member districts in Hind County [Mississippi] were racially discriminatory.... [T]he Supreme Court could order single-member dis-

tricts without departing from its repeatedly expressed position that multi-member districts are not *per se* unconstitutional or from the line of precedent rejecting the Fourteenth Amendment challenges to such districts." (p. 14)

[19]*Kilgarlin v. Hill*, 386 U.S. 120 at 126 (1967), Douglas, J. concurring. See also, Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* (New York: Oxford University Press, 1968).

[20]As the Supreme Court noted in another context, "[W]henever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people — no matter what constraints have limited the choices avaiable to them — the preclearance requirement of the Voting Rights Act is applicable." *McDaniel v. Sanchez*, 452 U.S. 139 at 153 (1981).

[21]*Thornburg v. Gingles*, 478 U.S. 30 at 48 (1986).

[22]See, for example, *City of Rome v. United States*, 446 U.S. 156 at 183-184 (1980) and S.Rep. No. 97-417, p. 28 (1982).

[23]See, for example, *Shaw v. Reno*, 113 S.Ct. 2816 at 2827 (1993).

[24]See, *Connor v. Johnson*, 402 U.S. 690 (1971), which requires courts to avoid the inherently political considerations that decisions about multi-member constituencies would raise.

[25]Enid Lakeman and James D. Lambert, *Voting in Democracies: A Study of the Majority and Proportional Electoral Systems* (London: Harcourt Brace, 1955), pp. 79-80.

[26]T. Alexander Aleinikof and Samuel Issacharoff, "Race and Redistricting: Drawing Constitutional Lines after *Shaw v. Reno*," *Michigan Law Review*, Vol. 92 (1993), pp. 588, 634.

[27]*Shaw v. Reno*, 113 S.Ct. 2816 at 2817 (1993).

[28]See, "Affirmative Action and Electoral Reform," *Yale Law Journal*, Vol. 90 (1981), pp. 1811, 1828-1829.

[29]See, *United Jewish Organizations v. Carey*, 430 U.S. 134 at 172-173 (1977). Justice Brennan, in his concurring opinion, wrote that racially safe districts may frustrate "potentially successful effort at coalition building across racial lines." See also, Guinier, *The Triumph of Tokenism*, pp. 1139 n. 30, 1148 n. 331, and accompanying text.

[30]Lani Guinier, "No Two Seats: The Elusive Quest for Political Equality," *Virginia Law Review*, Vol. 77 (1991), pp. 1413, 1451-1452 and 1454-1455.

[31]*Voting Rights Act Amendments of 1982*, 96 Stat. 134, 42 U.S.C. §1973 (1988).

[32]S.Rep. No. 97-417, p. 31 (1982), citing *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *White v. Regester*, 412 U.S. 755 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) *en banc*, affirmed on other grounds *sub nomine East Carroll Parish School District Board v. Marshall*, 424 U.S. 636 (1976). ▮

CUMULATIVE VOTING AS AN ALTERNATIVE TO DISTRICTING

AN EXIT SURVEY OF SIXTEEN TEXAS COMMUNITIES

Citizens participating in cumulative voting elections generally agree the system is fair, permitting all groups an opportunity to elect representatives of their choice. No electoral reform, however, can take the place of effective voter education and mobilization.

ROBERT BRISCHETTO

Last June, when the U.S. Supreme Court declared a black-majority congressional district in Georgia illegally drawn to segregate voters on the basis of race, three decades of progress under the Voting Rights Act seemed to begin unraveling. In *Miller v. Johnson*, the high Court ruled that drawing electoral district lines chiefly on the basis of race can be presumed unconstitutional, absent some compelling state interest.

The decision was presaged in 1993 in *Shaw v. Reno*, when the Court called into question a "bizarre shaped" district and warned that "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may Balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters... ."

For voting rights advocates, *Shaw* and *Miller* were bitter pills to take. For almost three decades, they had been drawing districts chiefly on the basis of race in order to level the playing field and allow minorities an opportunity to elect candidates of their own choice. Indeed, the creation of majority-minority districts largely explains why there are 40 African-Americans and 17 Latinos in the U.S. House of Representatives today. Some analysts predict that as many as a dozen

of those seats may be invalidated by federal rulings forcing the states to redraw their congressional maps with less attention to race.

In the wake of these Supreme Court decisions, voting rights advocates are seeking solutions that would provide better representation for minorities without resorting to racial gerrymandering. Some have turned to voting systems that approximate the outcomes of single-member districts in multi-seat elections: cumulative voting, limited voting and the single transferable vote form of proportional representation. Representative Cynthia McKinney, the Georgia congresswoman who stands to lose her district because of the Court's June ruling, has proposed a change in the 1967 law requiring single-member districts for congressional elections. The proposed amendments would allow states to adopt alternative methods of voting within multi-member districts that would be fair to minorities and other voting groups. Such alternatives were offered earlier by University of Pennsylvania law professor Lani Guinier. In 1993, Guinier's nomination to become Assistant Attorney General for Civil Rights was withdrawn by President Clinton in part because of her "radical" ideas promoting voting schemes that would achieve proportional representation. After *Shaw* and *Miller*, the ideas of the "quota queen" — as she was labeled by politicians and pundits alike — are looking more constitutional.

The search for alternatives to districting has engendered a long-overdue national debate on more basic questions about how well our democracy works and how we choose our elected officials. The United States is one of only a few modern democracies that have not adopted some form of proportional representation. As Birmingham civil rights attorney Edward Still puts it: "Surely any majoritarian system that can leave 49 percent of the people ... with nothing to show for having gone to the polls except a patriotic feeling is not the answer."

THE CUMULATIVE VOTING ANSWER

Cumulative voting is one of several modified at-large electoral systems that might be used to approximate proportional representation in a multi-member elective body. Each voter is allowed as many votes as seats to be filled in a given election. In that way, it is the same as simple at-large systems. However, under cumulative voting, a voter may distribute votes among candidates in any combination, even concentrating all votes on a single candidate.

The system is not new to the American political scene. From 1870 to 1980, Illinois elected members of its general assembly by means of cumulative voting. Each legislative district had three representatives and a voter could cast one vote for each of three candidates, one and one-half votes for each of two candidates, or three votes for one candidate. Cumulative voting also has been used for decades to elect members of many corporate boards of directors. Moreover, during the past decade, some three dozen local jurisdictions in Illinois, New Mexico,

South Dakota, and Alabama have adopted cumulative voting as a remedy for minority vote dilution. A federal judge last year was the first to *order* cumulative voting in a case against Worcester County, Maryland (*Cane v. Worcester County*).

Cumulative Voting in Texas

Since 1991, at least two dozen small cities and school districts in the Texas Panhandle and the Permian Basin have settled Voting Rights Act lawsuits via cumulative voting, most of them brought on behalf of the League of United Latin American Citizens (LULAC). On May 6, 1995, 26 small cities and school districts in Texas held elections under cumulative voting, most for the first time, and all in response to litigation. This event provided a rare opportunity for a researcher to test the effectiveness of that system. In 16 of these jurisdictions, minority candidates were competing against Anglos; in ten jurisdictions, minorities did not file candidacies.

Fifteen of the 16 jurisdictions studied had Latino candidates on the ballot. The Hispanic Research Center at the University of Texas at San Antonio conducted exit polls in these cities and school districts. Bilingual teams of pollsters visited these jurisdictions with bilingual questionnaires, gathering data from 3,615 voters on how they cast their ballots, how well they understood the new system of voting and how they evaluated it. The Atlanta Independent School District, located in East Texas about 25 miles from Texarkana, held the only election in which a black candidate was running under cumulative voting. The Atlanta ISD survey of 569 voters, a cooperative effort by experts for the plaintiffs and defendants, was conducted by the political science department at Texarkana College.

The study reported in this article analyzes the exit polls of 4,184 voters in the 16 jurisdictions in which minorities ran for office under cumulative voting on May 6. The study addresses several questions:

1. Was there racially polarized voting? Were there clear differences between minority and Anglo voters in their preferred candidates? Did minorities vote as a bloc?

2. Did cumulative voting work to elect minority-preferred candidates? If not, why not?

3. Did voters understand cumulative voting?

4. Did voters accept cumulative voting?

The search for alternatives to districting has engendered a long-overdue national debate on more basic questions about how well our democracy works... .

Racially Polarized Voting

Knowing whether voters polarize along racial lines is pivotal in voting rights cases, since in the absence of polarization there can be no claim of minority vote dilution.

AN ALTERNATIVE TO DISTRICTING

In the Atlanta ISD, white and black voters could not have been more polarized in their choices of candidates. Veloria Nanze came in last among white voters, but first among African-American voters. Fewer than three percent of white voters cast even one of their four votes for Nanze, while she received 94 percent of all votes cast by blacks.

The same general pattern of polarization between Anglos and Latinos was found in the jurisdictions with Latino candidates, but was less severe. With the exception of two cases, Latino candidates were the top choices of Latino voters and ranked last among Anglo voters.

THE THRESHOLD OF EXCLUSION

In the worst case scenario of totally polarized voters, one can predict the outcome for a racial or ethnic group under cumulative voting by simply calculating the "threshold of exclusion": the proportion of votes that any group of voters must exceed in order to elect a candidate of its choice, regardless of how the rest of the voters cast their ballots. It is calculated by one divided by one more than the

Cumulative Voting Election Outcomes in Texas Jurisdictions with Minority Candidates, May 6, 1995

	Total Candidates	Rank of Minority Candidate(s) by: Minority Voters	Anglo Voters	Positions Elected	Exclusion Threshold	%Minority Voters	Minority Elected?
Minorities Won:							
Atlanta ISD	5	1	5	4	20%	31%	Yes
Anton	8	1	5	3	25	30	Yes
Morton	4	1,2	3,4	3	25	26	Yes, one
Morton ISD	7	1,2	6,7	3	25	23	Yes, one
Roscoe	8	1	6	5	17	17	Yes
Rotan	8	1,2	7,8	5	17	32	Yes, two
Rotan ISD	5	1	5	3	25	25	Yes
Yorktown	2	1	2	2	33	43	Yes
Olton	6	1	6	2	33	22	Yes
Minorities Lost:							
Andrews ISD	7	1	6	3	25%	8	No
Denver City ISD	5	2	4	2	33	4	No
Dumas ISD	7	2	6	2	33	2	No
Earth	6	1,4	5,6	3	25	16	No
Friona	6	1	5	3	25	12	No
Friona ISD	6	1	6	2	33	7	No
Stamford ISD	5	1	4	3	25	7	No

"Minority" refers to African-Americans in the case of Atlanta ISD, where Latinos are fewer than one-half of one percent of the voters. In the other 15 jurisdictions, "minority" refers to Latinos, since blacks are only 1.2 percent of the voters.

number of seats to be filled (1/[1 + n]).

With four seats up in the 1995 Atlanta School Board election, the threshold of exclusion was 1/(1 + 4), or 20 percent. That meant that, even if Veloria Nanze did not receive a single white vote, she could win as long as black voters comprised one more than at least 20 percent of the total voters and concentrated their votes on her.

Blacks comprised 21 percent of the voting-age population in the Atlanta ISD in 1990 and 31 percent in 1995, which means that voter turnout among blacks in this election apparently was much higher than among whites. In next year's election, when three school board seats will become available, the threshold of exclusion will be 25 percent, and it is likely that blacks will elect another representative.

The Results Under Cumulative Voting

In the case of the Atlanta ISD, cumulative voting worked as it should have for black voters seeking to elect one candidate. The African-American community not only elected their candidate with almost no white support, but they voted together, placing almost all their votes on Nanze, who came in a close second among five candidates in a race that elected the top four choices.

In the 15 contests involving Latino candidates, on first glance the results seemed mixed: eight wins and seven losses. A closer examination of the contests involving Latinos, however, reveals that cumulative voting worked almost precisely as expected in polarized communities. In each of the seven jurisdictions where Latino candidates lost, there were not enough Latino voters to rise above the threshold of exclusion. For example, in the Denver City school district, Latinos were 36 percent of the total population, but only 15 percent of registered voters and four percent of the voters in the May 6 election. Since two seats were open in that election, the threshold of exclusion was set at 33 percent, not low enough for Latino voters to elect their preferred candidate.

In hindsight, all seven losses could have been avoided by lowering the threshold of exclusion or raising the level of minority participation in the election, or both. The thresholds could have been reduced by agreement between the parties designing the cumulative voting system, realizing that the more seats up in an election, the lower the threshold. Since school boards in Texas typically have seven members, if all seats were up at once, the threshold would be 1/(1+7) or 12.5 percent.

The Key Role of Community Organizing

Raising the level of voter participation through voter registration and education, minority candidate recruitment and get-out-the-vote efforts is a key winning strategy under cumulative voting. In the Atlanta ISD, blacks launched door-to-door voter education and get-out-the-vote drives in black neighborhoods. In the City of Morton, the Morton ISD, Roscoe, the Rotan ISD, and the City of

An Alternative to Districting

Rotan, the Southwest Voter Registration Education Project provided training in voter mobilization under cumulative voting. In Yorktown, where Concerned Citizens for Voting had begun mobilizing under their first cumulative voting election in 1992, a Latino was running as an incumbent.

In stark contrast, where Latino candidates lost, minority voter participation was low. The average turnout rate among Latinos registered to vote in the seven jurisdictions in which Latino candidates lost was one-half the turnout rate of non-Latino voters.

Finally, for a group or party to win under cumulative voting in a highly polarized political contest, they must vote together as a group. This may require planning to limit the number of minority candidates so as not to split their strength as a bloc. Placing all of one's votes on a single candidate, or "plumping," is a practice that may enable minority voters to concentrate the strength of their groups' vote and improve their chances of electing at least one candidate of their choice. African-American voters in the Atlanta ISD planned their effort very carefully in only a few weeks by agreeing to field only one candidate and by conducting strong voter outreach. The exit poll found that 90 percent of blacks in the Atlanta ISD "plumped" their votes for Veloria Nanze.

...for a group or party to win under cumulative voting in a highly polarized political contest... may require planning to limit the number of minority candidates so as not to split their strength as a bloc.

Is Cumulative Voting Understood and Accepted?

Ten of the 16 jurisdictions in this study held elections under cumulative voting for the first time; five for only the second time. Beyond documenting the success of minority candidates, this study sought to determine how voters responded to the cumulative voting system. Did they understand the new voting system? How do both Anglo and minority voters perceive cumulative voting?

Since all 16 jurisdictions had been sued for minority vote dilution, it is likely that Anglo voters harbored much resentment at being forced to adopt a settlement over which they had little or no control. Yet, the exit poll found greater understanding and acceptance of cumulative voting than might be expected. More than nine in ten voters of each ethnic group knew they could concentrate all their votes on a single candidate. Asked to compare cumulative voting with previous election systems, more respondents said that cumulative voting was easier than said it was more difficult.

There were large ethnic differences in evaluations of cumulative voting with regard to difficulty. More than twice as many minority as Anglo voters felt cumulative voting was easier compared to other elections in which they had voted; even so, fewer than two in ten Anglos

found this election system more difficult than previous voting methods.

Cumulative voting, moreover, was not rejected by the majority of Anglo voters. The poll revealed slightly more agreement than disagreement among Anglos with the statement: "The voting system used today gives everyone a fair chance to elect officials of their choice." Almost nine in ten blacks and eight in ten Latinos agreed that it was a fair system. However, there were a number of Anglos — 24 percent — who strongly disagreed with that statement.

In a racially polarized context, ...the traditional winner-take-all, at-large elections effectively precluded minority groups from electing candidates of their choice.

Recommendations

This study demonstrates that cumulative voting in Texas has resulted in more diverse city councils and school boards. In a racially polarized context — as was found in all cities and school districts studied — the traditional winner-take-all, at-large elections effectively precluded minority groups from electing candidates of their choice. In those cases where cumulative voting did not result in minority victories, it was not that the method of election did not work, but that it was not applied correctly (that is, to the greatest advantage of minorities). The results of the May 6 elections provide some lessons for those considering the adoption of cumulative voting:

• Before fashioning an alternative to single-member districts such as cumulative voting, one must calculate the relative size of the minority electorate. This proportion determines what "threshold of exclusion" is needed. For Latino communities, voting-age population figures generally will not be an accurate measure of the size of the potential Latino vote; a better indicator is the count of Spanish surnames on the list of registered voters for the jurisdiction.

• After determining the effective size of the minority voting bloc, the number of seats to be filled in any one election is crucial to determining a minority group's ability to elect its preferred candidate or candidates. If the seats are too widely dispersed over several elections, the chance that a minority group can elect a candidate of its choice will be diminished.

• If the size of the minority voting group is large enough to elect, the group must act strategically regarding the number of candidates to field in a given election. Control of candidacies is more crucial in cumulative voting than in other modified at-large systems, such as limited voting and proportional representation, because intra-minority competition can result in minority losses.

• Clearly, cumulative voting is not a minority set-aside program. The ability of minority voters to elect candidates of their choice depends on voter education and solidarity in allocating multiple votes

in a manner that will not disperse voting strength. If there is insufficient local mobilization of the minority vote, minority candidates are not likely to win.

• All of the Texas jurisdictions that have adopted cumulative voting are small. The Atlanta ISD was the only jurisdiction with more than 2,000 voters. A modified at-large election system was viewed by election administrators as a desirable alternative to carving their small communities into even smaller single-member districts. Nonetheless, this limited field experiment does not clearly demonstrate whether single-member districts would work as well or better in larger communities.

CONCLUSION

In view of all the local conditions that must be considered when choosing the type of voting system that best fits the needs of a specific community, the jury is still out on whether cumulative voting should be preferred over single-member districts to solve the problem of minority vote dilution.

Perhaps the answer may be found by returning to a different question, the basic philosophical debate over the kind of democracy we want in the United States. Is it to be a strictly majoritarian system, or should we recognize the democratic principle that the majority has a right to make policy decisions, but a significant minority also has a right to be represented in any decision-making body? Under cumulative voting, if *any group* — racial, gender, country club, "bubbas," the militia — is sufficiently large to meet the threshold and votes as a bloc, it can elect a candidate of its choice. Maybe that's why the system is so controversial, even among civil rights advocates.

CNR

WHY WOMEN SHOULD BE INCLUDED IN THE VOTING RIGHTS ACT

It is time to correct the ongoing injustice of the under-representation of women in governing institutions at all levels, perpetrated by the strenuous promotion of single-member districts. Without an appropriate remedy, the full promise of the 14th and 19th Amendments will not be realized.

WILMA RULE

As long as there is social bias toward minorities and deprivation of their rights to vote and elect representatives of their choice, the Voting Rights Act will remain a democratic and moral imperative. However, its coverage should be extended to that one-half of the population that is most deprived of voting rights and least represented in elective government: women. Their omission from the Voting Rights Act, as amended in 1982, should be corrected to eliminate this injustice.

The 19th Amendment gave women the right to vote. But under the prevailing system, where a majority of votes are needed, even a small number of discriminatory voters can deny female candidates the margin they need to secure election. Female voters have had no *de facto* right to elect representatives of their choice; female candidates were denied, in reality, the right to be elected.

The 1964 Civil Rights Act prohibits gender discrimination in employment. But scant, or no attention has been given to enacting a comparable law prohibiting gender discrimination against minority and non-minority women alike in elections to public office. The 1964 Civil Rights Act may be viewed as congressional enforcement of equal employment rights for women under the 14th Amendment to the United States Constitution.

INCLUDING WOMEN IN THE VOTING RIGHTS ACT

The Voting Rights Act as amended in 1982 also could have enforced the 14th *and* 19th Amendments by ensuring equal political rights for women. The critical Section 2 of the amended Act applies to women as well as to minority men. The section stipulates that a violation of the Act may occur if members of a protected class of citizens "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." However, the Voting Rights act does not apply to women specifically, for they are not defined as a protected class in the Act today.

...the Voting Rights act does not apply to women specifically, for they are not defined as a protected class in the Act today.

This article first presents the under-representation of minority and non-minority women elected in the "year of the woman" (1992) at the national, state and local levels of government. This factual material is set forth because, as Section 2 of the Voting Rights Act provides, the extent to which members of a protected class have been elected to office in the past is one circumstance that can be considered in determining whether a group's voting rights have been violated.

Next, we examine the damage done to women's voting rights by the U.S. Senate Judiciary Committee's 1982 Voting Rights Act report, the Courts and the U.S. Justice Department in their promotion of single-member district elections. The third section offers three non-racially and non-gender-based alternative electoral arrangements which could be offered as remedies under the revised Voting Rights Act. The fourth section presents authoritative research that backs up the claim that women's under-representation is due largely to election procedures.

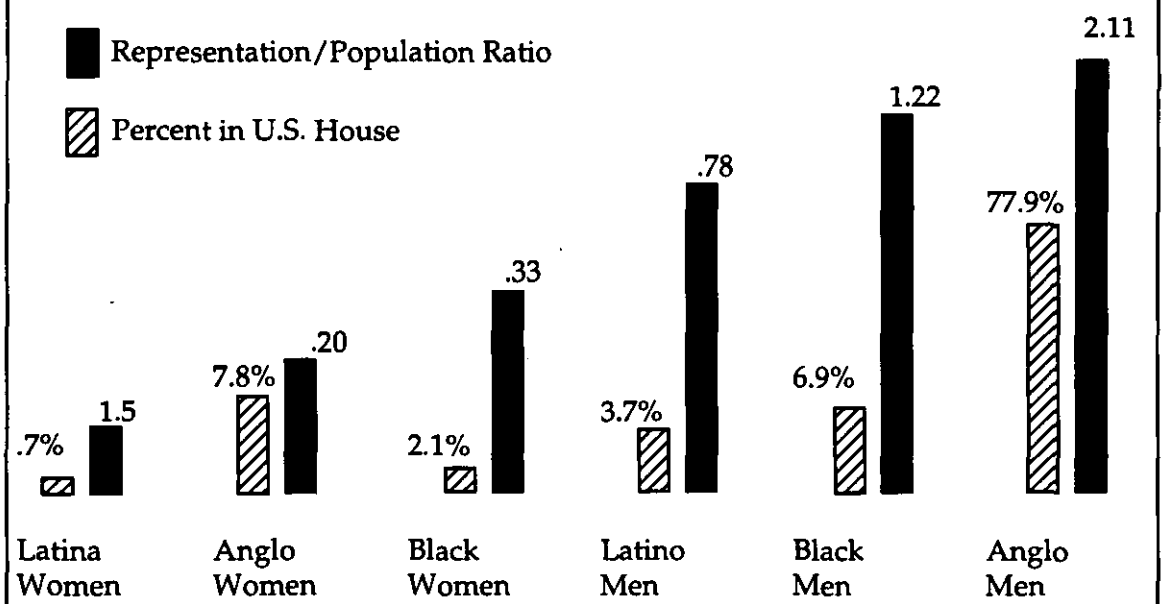
WOMEN'S ELECTION, 1992–94

The extent of female representation in Congress more than ten years after the Voting Rights Act was last amended in 1982 remains extremely limited. Counter to common perceptions, the "year of the woman" in 1992 was empty reality. Men's representation in the U.S. House of Representatives in 1992–94 declined six percent in ten years to a low, 89 percent male oligopoly. In the U.S. Senate, men had 94 percent of the seats, compared to 98 percent in 1982. African-American, Hispanic and other minority and non-minority women remain a small, under-represented group with little power in Congress to enact laws for the benefit of women and children. With few exceptions, such as the Violence Against Women Act, little of their agenda was enacted. It would be surprising if more of it had, given that women made up only 11 percent of the Congress, a ratio of one woman to every nine men.

Figure 1 shows the ethnic and gender representation and representation/population ratios for the U.S. House of Representatives in 1992, the best-ever year for the election of female candidates. Non-minority men and African-American

men, who constitute about 45 percent of the U.S. population, are over-represented by 111 percent and 22 percent, respectively, in terms of their share of the U.S. population. Latino men are under-represented among the three groups of members of the House of Representatives by approximately 22 percent.

Figure 1
U.S. House of Representatives, 1993
Ethnic and Gender Percentages
and Representation/Population Ratios
(N=435)



Representation/population ratio example: Anglo women are 38.82 percent of the national population (in 1991). Dividing their population share into their share of U.S. House members (7.8 percent) yields a ratio of .20, one-fifth of parity, which should be 1.00. In 1993, Asian women constituted .2 percent of U.S. House members, with a representation/population ratio of .13; Asian men held .7 percent of U.S. House seats, with a representation/population ratio of .48.

Sources: Center for the American Woman in Politics, Eagleton Institute, Rutgers University; Joint Center for Economic and Political Studies; National Association of Latino Elected and Appointed Officials; and United States Bureau of the Census, *Statistical Abstract of the United States: 1993* (Washington, D.C.: United States Government Printing Office, 1993), p. 22.

INCLUDING WOMEN IN THE VOTING RIGHTS ACT

The differences between the figures for men and women are tremendous. While Hispanic men lack about one-fifth of the representation one would expect given their share of the population, Hispanic women are under-represented by 99 percent. For non-minority women, under-representation is 80 percent, while their male counterparts have over ten times their representation/population ratio. Finally, while African-American women are the best of the three under-represented women's groups, they have only about one-fourth of black men's representation. Indeed, as three scholars — Darcy, Hadley and Kirksey — have noted, the under-representation of blacks is an under-representation of female Af-

Table 1
Population Proportions and Ethnic and Gender Representation in the 50 State Senates, 1992–1994

	Share of Population (%)	Share of State Senate Seats (%)	Number of State Senate Seats	Ratio of Men to Women
Latina Women	3.7	.4	7	
Latino Men	3.7	1.9	38	5.43:1
Non-Minority Women	41.2	15.4	305	
Non-Minority Men	39.5	76.2	1,511	4.95:1
African-American Women	6.2	1.5	29	
African-American Men	5.6	4.7	94	3.24:1
Totals/Average Ratio	99.9*	100.1*	1,984	54:1

*Does not total 100 percent due to rounding

Note: Non-minority figures were computed from the total number of female and male legislators minus the numbers Latino and African-American legislators. The number of Asian and Pacific Islander state senators was not available.

Sources: National Association of Latino Elected and Appointed Officials; Joint Center for Economic and Political Studies; Center for the American Woman in Politics, Eagleton Institute, Rutgers University; and United States Bureau of the Census, *Statistical Abstract of the United States: 1990* (Washington, D.C.: United States Government Printing Office, 1990), pp. 14, 16.

rican Americans.[1] The same is true for Hispanics.

Female candidates did not run for U.S. Representative in 325 (75 percent) of the House races in 1992. In that unusual election year there were twice the open seats, but female candidates were not elected in 75 percent of them.[2]

Women's representation in the state legislatures is extremely important, not only for state governance, but because legislative experience — especially as state senator — is often an unwritten but necessary qualification for election to the U.S. House. Table 1 reveals the small number of minority women in 1992 who held the critically important position of state senator.

In the 50 states, where Latinos constitute about eight percent of the population, and approximately 33 percent in New Mexico, California and Texas, there were only seven female state senators in 1992. There were three in New Mexico, two in New York, and one each in Texas and Washington State. There are 38 male Latino state senators, with the largest concentration in New Mexico, where they outnumber their female colleagues by 13-to-one.

When we examine male-female state senate ratios for non-minority and African-American women, their denial of full political participation rights in these significant legislative bodies is quite clear. The ratio of the 1,511 non-minority male state senators to the 305 non-minority female senators is almost five-to-one, while African-Americans' ratio is somewhat closer between the genders.

Figure 2 shows the 107 percent over-representation of non-minority men. All others are under-represented by as much as 50 to 90 percent over what might be expected if their representation were proportional to their population. Latina women are the most severely under-represented, followed by African-American women and non-minority women. Figure 2 also indicates that Latino male legislators are under-represented. The figure again demonstrates the need for the continuance of the Voting Rights Act as amended in 1982 to protect male minorities, and argues for an amendment to protect women of all ethnic backgrounds. The latter were only 32 percent of state legislative candidates in 1992.

In 1988, among municipalities with populations of 50,000 and larger with minority proportions of five percent or more, Latinas were not elected to 85 percent of city councils, and black women and non-minority women lacked representation on 67 percent and 23 percent of city councils, respectively. Black, Latino and non-minority men were elected about four times as often as African-American women, Latina women and non-minority women in those larger cities.

When we look at 1993 figures for small, medium and large municipalities, the ratio is closer, about three-to-one between men and women. The under-representation of African-Americans and Latinos at the city council level is due to the under-representation of black and Latina women.

INCLUDING WOMEN IN THE VOTING RIGHTS ACT

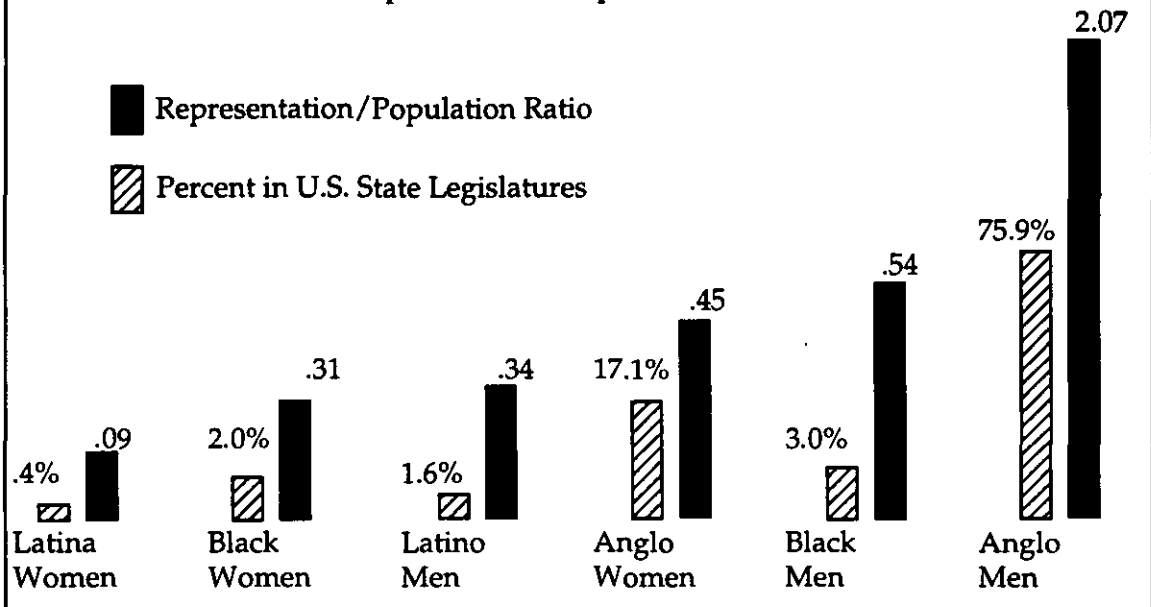
VRA ENFORCEMENT DAMAGES CHANCES OF WOMEN'S ELECTION

If only the Senate Judiciary Committee in 1982 and the courts thereafter could have perceived the lopsided gender differences in elective office along with the ethnic ones, there would be more opportunity today for female participation in the political process.

The Judiciary Committee in 1982 correctly understood how majority vote requirements in at-large elections discriminated against minorities,[3] but the all-male Committee failed to see that these same requirements in majority black or Latino *districts* would discriminate against women of each group, as well as women in non-minority districts. The Senate report, relying on past court decisions regarding multi-member districts, also identified "unusually large districts" as potentially discriminatory against minorities. Again, this finding disregarded the effects of such structures and procedures on women.

The U.S. Supreme Court in *Thornburg v. Gingles* (1986) reviewed the Senate report and put forth the condi-

Figure 2
U.S. State Legislatures, 1993
Ethnic and Gender Percentages and Representation/Population Ratios



Note: The number of Asian/Pacific Islander legislators was not available. The figure for Anglo men was derived by subtracting the number of female, black and Latino male legislators from the total number of legislators in 1993. See Figure 1 for an explanation of the representation/population ratio and list of sources.

tions under which a single-member district system may be ordered by a Court as a remedy for a violation of the Voting Rights Act. Subsequently, any jurisdiction — from a school board to a congressional house district — that had a sizable minority exhibiting geographic compactness and political cohesiveness and where the majority was able to defeat the minority's preferred candidate was open to challenge. Single-member districts constituted the usual remedy until *Shaw v. Reno* (1993), when the Supreme Court remanded to the District Court for re-examination a majority-minority district of "irregular" shape.

By changing to single-member from multi-member districts, the probability that minority and non-minority women would secure election to judicial posts was reduced substantially...

The U.S. Justice Department, which is charged with pre-clearing proposed changes in election law in jurisdictions covered by the Voting Rights Act, assumed a particularly activist enforcement role following the 1990 Census. In 1991, the Department supported the plaintiffs who argued successfully before the U.S. Supreme Court that the Voting Rights Act applies to the election of judges.[4] Supported by a six-to-three vote in favor of this application, the Justice Department stated that it would redouble its efforts to ensure that all election procedures conform with the Voting Rights Act. That meant the introduction of single-member districts, with all their positive effects on minority men and their deleterious effects on women. The Justice Department's enforcement patterns also had positive implications for Southern Republicans, as several lily-white districts were drawn alongside new majority-black districts.[5] However, there was little thought of either the gender consequences of these actions or alternative electoral systems that would be fair to all. In 1988, only seven percent of full-time elected judges in the United States were women, while African-American and Latinos remained largely unrepresented.[6] By changing to single-member from multi-member districts, the probability that minority and non-minority women would secure election to judicial posts was reduced substantially while that of minority men was greatly increased.

Fair Election Alternatives

If women were included in the Voting Rights Act, election procedures would be needed to ensure equal opportunity for female voters and candidates as well as minority men. A new Senate report explaining women's inclusion in the Act could list single-member districts as possibly discriminatory and recommend such alternative election methods as the following three: cumulative voting, the single transferable vote (STV) system of proportional representation (PR), and the list system of PR with a preference vote option, which is used in most European

nations.

Any of the above could prove a successful remedy in jurisdictions whose single-member districts have restricted the political opportunity of female candidates. Cumulative voting is offered by Lani Guinier and others as an alternative to single-member districts. In cumulative elections, the voter has as many votes as there are seats to be filled. The voter may distribute these votes in any way desired — for example, two votes each to two candidates and three to a third in a seven-member district, or all seven to a single candidate.[7] This system works well for non-minority women, but minorities must take care not to split their votes among too many candidates.

The single transferable vote form of PR is used in Cambridge, Massachusetts to elect its city council and school board, and to elect New York City Community School Boards. This system also is used by the Republic of Ireland to elect its parliament and local councils (see Joseph Zimmerman's article in this issue of the NATIONAL CIVIC REVIEW).

The list form of proportional representation might also be considered as a remedy for deprivation of voting rights. It is the most widely used election system at every level of government among 27 long-standing democracies. The list system is the most issue-oriented of the four election methods presented here, and it ensures fair representation to individual

Figure 3
Example of Marked (✘) PR List Election Ballot

VOTER MAY VOTE FOR UP TO 12 CANDIDATES

1 Business Progress List	2 Environment List	3 Black Rights List	4 Independents List	5 Women's Health List
All_____	All_____	All_____	All_____	All_____
Can. 1 ✘	Can. 1 ✘	Can. 1 ✘	Can. 1 ✘	Can. 1 ✘
Can. 2 ✘	Can. 2 ✘	Can. 2 ✘	Can. 2___	Can. 2___
Can. 3___	Can. 3 ✘	Can. 3 ✘	Can. 3___	Can. 3___
Can. 4___	Can. 4 ✘	Can. 4___	Can. 4___	Can. 4___
Can. 5___	Can. 5___	Can. 5___	Can. 5___	Can. 5 ✘

Note: A variation of this system as used in some countries would require voters to select candidates from one list only.

women and minority men. Slates of like-minded citizens, whether local environmental groups or political parties, nominate lists of candidates to appear on the ballot. A preference law or rule in most countries employing this system allows voters to choose particular candidates on the list or vote for the entire list. The number of representatives elected from each list equals the proportion of the total votes received by the list. For example, a list receiving one-third of the votes would be allocated four seats on a 12-member governing body, with the top-four candidates on the list being selected. Figure 3 presents an example of a marked ballot using the list system of proportional representation.

Authoritative Research on Women and Electoral Systems

Nations employing PR with large numbers of representatives apportioned per parliamentary district have more female candidates and a greater percentage of female parliamentarians elected. Research shows that PR is the number one predictor of women's national legislative election when it is tested against other political and socio-economic variables.[8] Where voters may select individual candidates on a party's slate, the number of women also is enhanced greatly. Voters may select female candidates as several of their representatives, not as the *only one*. Political parties, always conscious of the need to broaden their appeal, thus have an *incentive* to place women on their respective lists. In U.S.-style single-member district elections, however, parties risk defeat when they nominate female candidates.

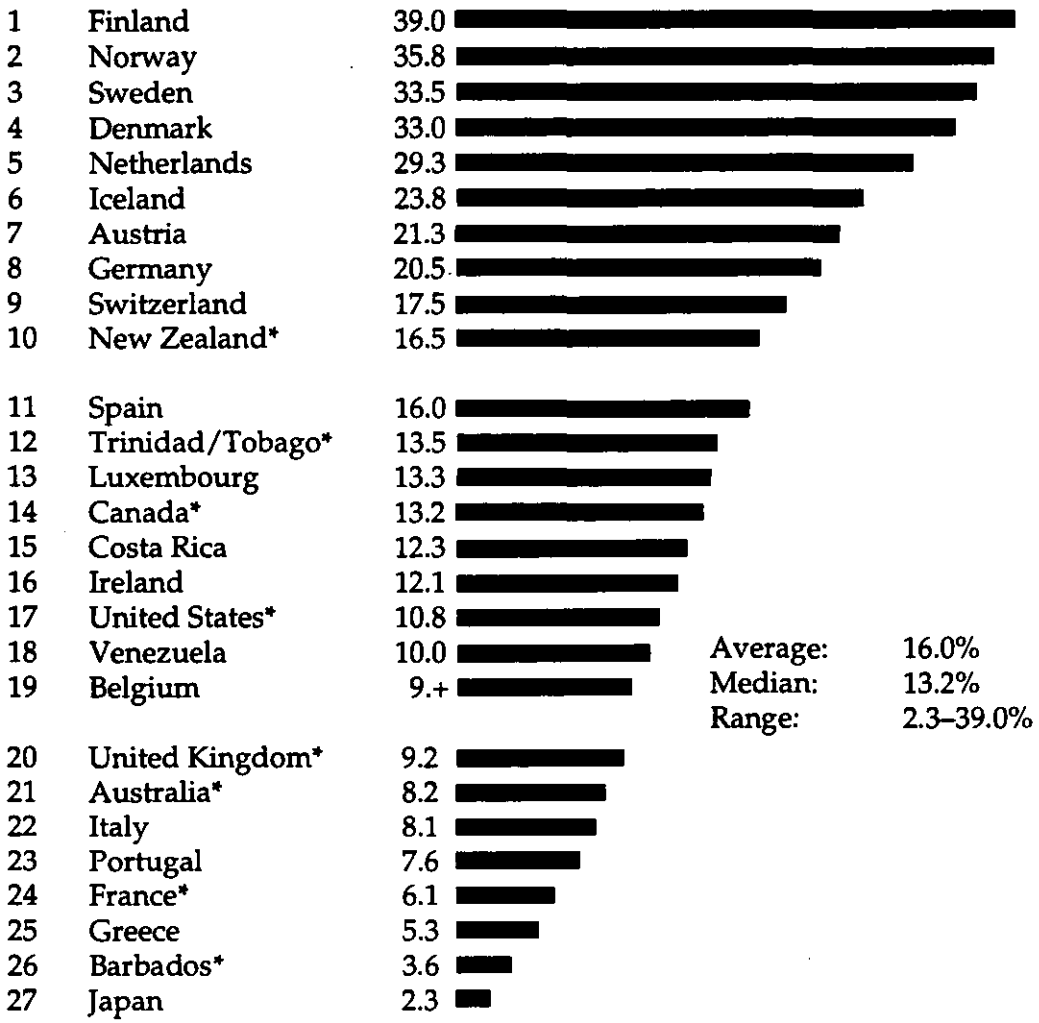
Figure 4 reveals that the United States ranks 17th among 27 democracies in the percentage of women serving in national legislatures. Of the first ten rankings, eight have the optimal election features described above (i.e., party list, where voters may select entire slates of candidates or vote for individual candidates). Along with women, minority and majority men are well represented.

The argument that culture explains the difference in women's election to national legislatures has been disproved. Different election systems in the same national culture produce significantly different results in the election of female candidates. In Australia, Japan and Germany, PR and single-member or very small districts are used for electing different legislative bodies or for election of members to the same body (as in Germany). PR balloting, compared to single-member district balloting, resulted in three times as many female legislators in Australia, ten times as many in Japan, and over double the proportions in Germany in the 1987–1993 elections.[9]

Throughout the 1980s, scholars have documented that more women were elected to state legislatures where there were multi-member districts or a mixed system of multi-member and single-member districts. It was further documented in the early 1990s that African-American women were more likely than non-minority women to be elected in multi-member districts.[10] Although the data for Latina legislators are too few to

INCLUDING WOMEN IN THE VOTING RIGHTS ACT

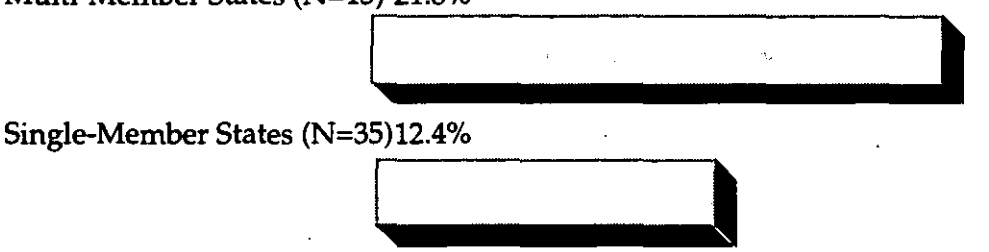
Figure 4
National Legislatures in Long-Established Democracies
Percentage of Women in 27 Single or Lower Houses



*Indicates the eight nations that elect a single representative from each national district by a required majority or plurality vote. The remainder includes 17 nations with the party list form of proportional representation; Ireland, with the single transferable vote form of PR; and Japan, with the single non-transferable vote form of PR.

Source: *Distribution of Seats Between Men and Women in National Parliaments* (Geneva: Inter-Parliamentary Union, 1993).

Figure 5
States with Multi-Member and Single-Member Assembly (Lower House) Districts
Average Percentage of Female Legislators, 1987



Note: The multi-member states in 1987 were Alaska, Arizona, Georgia, Idaho, Indiana, Maryland, New Hampshire, New Jersey, North Carolina, North Dakota, South Dakota, Vermont, Washington, West Virginia, and Wyoming. (Nebraska is the only state with a unicameral legislature, and its female proportion was included in the average for the other 34 states using single-member districts to elect their lower houses.)

Source: Center for the American Woman in Politics, Eagleton Institute, Rutgers University, New Brunswick, New Jersey.

permit comparison, there is no reason to believe that their patterns differ substantially from those of women from other groups.

States that switched to single-member districts from multi-member districts between 1960 and 1980 experienced a decline in female legislators relative to the national average. As the 1980s opened, there were still about double the proportion of female legislators in states with multi-member districts as in states with single-member districts. However, as pressure increased to adopt single-member districts, Florida, Hawaii and Illinois did so. Certainly, the need to conform to the standards of the Voting Rights Act influenced lawmakers and other influential leaders in these three states. In 1982, female legislators in Florida, Hawaii and Illinois averaged about 20 percent above the national mean. After the switch, the growth in female representation in these states gradually declined, and proportions dwindled to below the national average pace by 1992. The proportions for female state legislators in 1987, when the process of decline was well underway, are presented in Figure 5.

Alaska, Georgia, Indiana, and Wyoming changed to single-member districts in the 1990s. We may expect declines in women's legislative growth in these states relative to the national average — just as we have observed elsewhere during the past 20 years.[11] In turn, a smaller increase in women's election to

INCLUDING WOMEN IN THE VOTING RIGHTS ACT

Congress during the 1990s may well be in the offing; the main increases likely will occur in the less populated states where campaign costs are lower, as opposed to the big campaign money states.

Another barrier to legislative election of both African-American and non-minority women is the runoff primary, employed in ten Southern states, which requires a majority vote for the nomination of a candidate, thus discriminating against women and minority men in non-minority districts. The runoff is a barrier that only a few manage to pass in order to face the other party's candidate in the general election.[12] It is likely that Southern majority rules for primaries, combined with single-member districts, are the most significant reason for women's differential political opportunity in that region.

Hobbled by the single-member district electoral system, women are out-numbered nine-to-one in Congress, and generally four-to-one in state and local legislatures.

The same generalization about election systems applies to local governments where women have greater opportunity for political participation in multi-member districts. There were five multi-member district municipalities in a 1988 study of 315 medium and large cities. African-American female council members reached 87 percent of parity relative to their proportion in the population in the multi-member district municipalities, while black male council members reached 97 percent of parity in those jurisdictions.[13]

Although most local-level research is both anecdotal and dated, it nonetheless indicates that while at-large districts provide election opportunities for women, they may harm the election chances of Latino men.[14] Moreover, it appears that during the 1990s — with the increased efforts on the part of women's organizations to elect more of their gender — women are securing election in larger numbers to city councils with at-large voting schemes. Meanwhile, minority men in at-large municipalities continue to be denied electoral opportunity, or are being elected in smaller numbers than one would expect given their share of the population.[15]

CONCLUSION

Women, whether minority or non-minority, are the most under-represented citizens in the United States. They should be included in the Voting Rights Act as a protected class, since over 50 percent of the U.S. population has been denied an opportunity to fully participate in the political process, to elect candidates of their choice, and to enact legislation of concern to them. Hobbled by the single-member district electoral system, women are out-numbered nine-to-one in Congress, and generally four-to-one in state and local legislatures. It is time to correct this injustice and fulfill the promise of the 14th and 19th Amendments to give women equal rights for voting and election to public office. CNR

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[3]See, Bernard Grofman, Lisa Handley and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* (New York: Cambridge University Press, 1992), pp. 40-60.

[4]Linda Greenhouse, "Court, 6–3, Applies Voting Rights Act to Judicial Races," *The New York Times*, 21 June 1991, pp. A1, A9.

[5]Michael Barone and Grant Ujifusa, *The Almanac of American Politics* (Washington, D.C.: National Journal, 1993). See, for example, "Florida," pp. 275-276.

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[8]See, Pippa Norris, "Women's Legislative Participation in Western Europe," *Western European Politics*, October 1985, pp. 90-91, and Wilma Rule, "Electoral Systems, Contextual Factors, and Women's Opportunity for Election to Parliament in Twenty-Three Democracies," *Western Political Quarterly*, September 1987, pp. 477-498.

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[10]Wilma Rule, "Multimember Legislative Districts, Minority and Anglo Women's and Men's Recruitment Opportunities," in Rule and Zimmerman, eds., *United States Electoral Systems*, pp. 57-72, and Darcy Hadley and Kirksey, "Election Systems and the Representation of Black Women," 73-90.

[11]R. Darcy, Susan Welch and Janet Clark, *Women, Elections and Representation* (Lincoln: University of Nebraska Press, 1994), pp. 160-168.

[12]See, Rule, "Multimember Legislative Districts...."

[13]Susan Welch and Rebecca Herrick, "The Impact of At-Large Elections on the Rep-

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[14]Welch and Herrick, p. 158.

[15]See, Richard L. Engstrom and Michael MacDonald, "Enhancing Factors in At-Large Plurality and Majority Systems: A Reconsideration," *Electoral Studies*, Vol. 12 (1993), pp. 312-401. ▮

WHAT DO YOU DO WHEN REFORMED GOVERNMENT DOESN'T WORK?

THE CINCINNATI EXPERIENCE

A recent campaign to abandon council-manager government in Cincinnati, Ohio demonstrates that the democratically elected city council remains the key to preserving and maintaining the vigor of the council-manager plan. When councils fail to lead as a group, they open the door to potentially disastrous remedies.

GERALD E. NEWFARMER

Cincinnati, Ohio: a city routinely associated with quality local government, and an early leader in the Progressive reform movement. How could it be that its political workings had become so dysfunctional as to inspire a serious proposal to switch back to pre-reform conditions by reinstituting a mayor-council structure? On August 30, 1995, the citizens of Cincinnati voted on a proposal to change the structure of their city government from the council-manager plan to the strong mayor plan. That such a proposal would even make it to the ballot in a city with Cincinnati's history of good government was cause for grave concern among those who favor the council-manager plan as the epitome of progressive, reformed local government.

THE BACKGROUND

Cincinnati enjoys a long tradition of good government. In 1926, after decades of political bossism, a citizens group known as the Charter Committee decided enough was enough. They drafted a new city charter adopting the council-man-

ager form of local government to rid the city of its strong mayor form of government. Its adoption marked the beginning of a 70-year period during which Cincinnati was widely recognized as having clean, good government.

Under the city charter, the nine-member city council appoints and supervises the professional city manager, who serves as the chief executive of the municipal corporation. The entire council is elected every two years in a single election, at-large and without primaries, ostensibly on a non-partisan basis. Anyone interested in serving on council can run; the nine candidates receiving the most votes are elected and the top vote-getter among them is elected mayor. While the mayor is the presiding officer of the council — and is regarded as the political leader of the city — the mayor has no more power on the council than any of the other eight members.

Although the ballot is non-partisan, elections in Cincinnati are thoroughly "partisan." Both the Democrats and the Republicans run slates of candidates for city council, as does the Charter Committee.[1] For years the council has had representatives of all three groups, although in recent years the representation of the Charter Committee has declined to a single member. In recent years, council seats are held by full-time politicians — persons whose primary occupation is elective office.

The Cincinnati political scene has some other important features. Since the mayor and members of the council are elected in a field race, it is not possible to run directly for the office of mayor or against any individual member of council. Thus, there is no individual electoral accountability. If an incumbent mayor or council member performs poorly, it is not possible to challenge that person directly. One can only run for the council at large.

Unlike many cities in America without enthusiastic leadership from the business community, Cincinnati has always enjoyed the active engagement of private sector leaders in civic affairs. The Cincinnati Business Committee provided the impetus for reform of the city's maintenance of its public works infrastructure (led by John Smale, then CEO of Procter and Gamble) and of the public schools (led by Clem Buenger, then CEO of Fifth Third Bank), two major areas of concern regarding the quality of government services. But in spite of its effectiveness in providing leadership to achieve these reforms, the business community does not have meaningful representation on the city council.

Another significant political feature is that Cincinnati is located within a media market of 1.7 million people. Given its size, politicians must become known to the public through media attention (wholesale politics), rather than through the one-on-one contact that is characteristic of a small community (retail politics). Under normal circumstances, this means politicians must vie for media attention by providing leadership in resolving issues; when every member of council must compete in a field race with every other member of council for elec-

tion every two years, the competition for media attention is severe.

When this competition is coupled with an intensely partisan framework, the result is council meetings that have, as their primary defining characteristic, competition among members for the political edge and public notice. The city council is charitably described as "fractious"; council meetings may be uncharitably — but accurately — described as political food fights.

...Cincinnati has always enjoyed the active engagement of private sector leaders in civic affairs.

Stewarding Reform

In recent years, recognition that the city council needed reform became so widespread as to constitute a community consensus. A Charter Review Committee was launched by the heads of the three political parties in July of 1994, chaired by Dr. Henry Winkler, President-Emeritus of the University of Cincinnati. The Charter Review Committee met frequently over the ensuing ten months, but had difficulty agreeing on proposals to report out, since it was just as divided as the partisan environment that had created it.

On April 28, while the Charter Review Committee was still trying to develop a consensus, the two leading CEOs of Cincinnati's largest businesses held a press conference. Reflecting the leadership of the 26 top Cincinnati-area companies, the Cincinnati Business Committee (CBC), they announced the business community's intention to circulate initiative petitions to place a proposed charter change on the ballot.

The ballot proposal provided for significant changes to the existing structure. The mayor and all council members would be elected for four-year, rather than two-year terms, with the mayor directly elected and the nine-member council elected at large. The mayor, rather than the city manager, would be the chief executive, but would appoint a city manager who would serve at his pleasure. The mayor would no longer sit as a member of council, and would have veto power over the council's legislative acts subject to a six-vote override. Except for its power to appoint and oversee the city manager, the council retained all of its legislative authority. In short, what was proposed was the classic mayor-council form of government.

The Charter Review Committee finally submitted its package of proposals to the council for consideration on May 9. It called for the mayor to be assigned limited additional power to lead the city council, and for the direct election of the mayor by majority vote (the CBC proposal required only a plurality). The Committee's proposal agreed with the CBC proposal that the council members should serve four-year, staggered terms, but differed in that it proposed repeal of the recently adopted concept of term limits.

As the campaign battle lines were forming, Mayor Roxanne Qualls announced another proposal to circulate

petitions and place an alternative plan on the ballot.[2] The Qualls proposal retained the council-manager form, but strengthened the ability of the mayor to lead the city council by giving the mayor the power to designate the vice mayor and the chairs of council committees. Her proposal, like the CBC initiative, lengthened council terms to four years and retained the concept of term limits, a reform adopted by the voters in 1991. But unlike both the CBC and Charter Committee proposals, Qualls's plan curiously would not stagger the terms of council members. The Cincinnati *Post* quickly announced its editorial support for the Mayor's approach, excepting the failure to stagger council terms, of which, the *Post* said interestingly, "This, we fear, would perpetuate the backbiting and nonstop search for media attention."[3]

...it was time to end the fractiousness at city hall by reorganizing to give administrative and executive powers to a strong, directly-elected — and presumably more accountable — mayor.

THE CAMPAIGN

On June 7, after having been presented with the successful initiative petition, the city council called a special election (as required by law), which it scheduled for August 30, 1995.[4]

Though the city's many political factions could not agree on an alternative to the existing system — or even the CBC's strong mayor proposal — they could agree that the latter, designated by the Board of Elections as Issue One, was not the solution. The coalition opposed to the proposal included the Democratic Party, the Charter Committee, the AFL-CIO, League of Women Voters, and the city's African-American and women's organizations. Only the Republican Party and the Chamber of Commerce took positions in support of the CBC proposal.

The proponents argued that it was time to end the fractiousness at city hall by reorganizing to give administrative and executive powers to a strong, directly-elected — and presumably more accountable — mayor. As the Cincinnati *Enquirer* editorialized in support of the proposal:

> The system is broken. City council is a dysfunctional regional joke, in deep denial. The best argument for change is council itself: Given two years to come up with its own Charter reforms ... city council dumped the issue on a committee [and] failed to agree on any proposals.... It has been a sorry spectacle.[5]

Proponents reasoned that the current system lacks the accountability that a directly elected mayor affords. The "Executive Mayor" would be able to function unfettered by council interference. Council's role would be further limited by the mayor's power to veto council acts. Again, from the *Enquirer* editorial:

> Take a look at what we have: Chronic bickering has crippled the mayor; nine

> council members act like pretender presidents; there is no single voice of leadership. A veto will let the mayor set the agenda that the voters have chosen. There will be one leader who is clearly accountable... .[6]

Opponents, on the other hand, argued that the Issue One cure was worse than the disease. It would remove the mayor from the city council and the professional city manager from the chief executive role. Since the problem with the current system was a fractious, ineffective city council, removal of the mayor from membership on the council, they argued, would weaken rather than strengthen the legislative body. Opponents also warned that shifting the executive responsibility from a professional manager to a political leader would be sure to result in a politicized city work force.

Opponents, on the other hand, argued that the Issue One cure was worse than the disease.

The defining moment of the campaign came on August 19, less than two weeks before the election, when the Cincinnati *Post* reported the campaign contribution filings on record with the Hamilton County Board of Elections. The *Post* revealed that $254,682 (later to be increased to $270,000) had been donated to finance the Issue One campaign, all from Cincinnati corporations in the CBC.

Shortly thereafter, with the sponsorship of the International City/County Management Association (ICMA), several current and former city managers visited Cincinnati to participate in a League of Women Voters seminar about the structure of local government. They pointed out that the city manager in the Issue One proposal was one in title only and no longer retained the characteristics of a recognized council-manager government. As former Dallas City Manager Jan Hart noted, Issue One "...fixes the executive branch which is not broken, but does not fix the legislative branch, which is."[7]

In their election eve recommendations to voters, the city's two newspapers voiced different opinions, with the Cincinnati *Enquirer* editorializing in favor of Issue One, and the Cincinnati *Post* against. On Wednesday, August 30, as Cincinnatians went to the polls, the County Board of Elections was predicting a low, 20 percent voter turnout for the single-issue special election. When the polls had closed, however, an unexpected 26 percent of the city's registered voters had voted to resoundingly defeat Issue One, with a 64 percent vote against the proposal.

Analysis and Implications for Good Government

Issue One failed primarily for two reasons, as acknowledged editorially by the *Enquirer* a few days after the election.[8] It was perceived as a power grab by big-money business interests and it went too far by eliminating the council-manager form of government, a system that Cincinnatians hold in high regard. The extreme, over-reaching character of Issue One had managed to turn a two-to-

one margin in favor of direct election of the mayor into a two-to-one defeat in four short months.[9]

The success of the campaign against the proposal was due to the ability of the opponents to coalesce in opposition, in spite of their inability to agree on an alternative to the CBC proposal. In the "retail politics" of a special election, with its limited turnout, only those who really care about an issue will make the effort to go to the polls. Since the majority of the Cincinnati electorate, those in the middle, would not turn out to vote, the expensive media campaign approach, or "wholesale politics," was largely wasted. The one-on-one, get-out-the-vote effort was predictably decisive.

The poorly-crafted proposal reflected a serious misunderstanding of the role of the legislature in local government structure and gave opponents numerous opportunities to criticize Issue One.

There were other factors that led to the failure of the business community's effort to reform Cincinnati city government. The poorly-crafted proposal reflected a serious misunderstanding of the role of the legislature in local government structure and gave opponents numerous opportunities to criticize Issue One. Indeed, perhaps one of the more unfortunate results of the election is that it has been widely interpreted as a rejection of the business community's involvement in the politics of the city. Cincinnati has benefited in a way that most cities would envy from an active, involved business community, as noted above. It is too bad that this attempt at reform was undertaken without more advance consultation about the probable consequences.

The council-manager form of government does have an Achilles heel that this Cincinnati experience demonstrates: the dysfunctional city council. City councils work together poorly when the partisan or personal self-interests of individual politicians become the principal determinants of behavior. The usual early symptoms of this malady are council members engaging in staff-bashing (being critical of their own employees), or routinely denigrating each other in their desperate attempts to secure a political advantage.

As in Cincinnati, the election system itself can contribute to the problem, where every council member is pitted against every other member of council in political competition. The "9-X,"[10] at-large, election system, with its absence of individual accountability for elected officials, guarantees political bickering and fractiousness. As noted by the Cincinnati *Post*, this circumstance is exacerbated in a media-driven political environment, where politicians must scramble for media attention.

When the council is successful in enacting policy for the municipal corporation and supporting its professional

staff in executing that policy, the council-manager form of government works well. As in everything, success starts at the top, in this case, the council. But if the legislative body becomes dysfunctional, the solution must be to introduce a source of discipline within the legislative body, and that can only be done by empowering the mayor to provide leadership for the council. That is the point that was misunderstood by this most recent effort by the business community to provide reform leadership in Cincinnati.

Conclusion

The structure of local government and the power assigned to its leaders is important, but it is also important that it be operated well by people of ability and goodwill. In addressing the needs for structural change, the part that is broken should be the part that gets fixed. Without detracting from professional management, a source of strength in the council-manager plan, it is possible to empower the mayor to provide leadership to the city council. Then, together, city leaders can work to make city government successful, on behalf of the citizens they serve. CNR

Notes

[1]The Charter Committee disdains being referred to as a "party," but within the partisan context of Cincinnati politics is generally regarded as the third party, in addition to the Democrats and Republicans.

[2]This move appeared to be taken with the knowledge that six votes could not be obtained on a divided council to submit the Charter Review Committee's recommendations to the voters.

[3]Cincinnati *Post*, "Sensible Reform at City Hall," 9 June 1995.

[4]Given the basic nature of the political battle being waged, it was not surprising that a second front of the battle was in the courts. There were a number of suits filed, but the most significant were over the date of the election, the council's ministerial responsibility to submit the proposal for a vote, and the number of signatures required for a valid initiative petition. Those battles went up and down the Ohio judicial system during the months preceding the election, with no net effect on the political process or outcome.

[5]Cincinnati *Enquirer*, "Issue 1: Yes," 29 August 1995 (editorial).

[6]*Ibid.*

[7]Cincinnati *Post*, "Managers: Issue 1 fixes what isn't broken," 24 August 1995.

[8]Cincinnati *Enquirer*, "Try again," 3 September 1995 (editorial).

[9]Cincinnati *Enquirer*, "CEOs start drive for direct vote on mayor," 29 April 1995. The news story stated: "Announcement ... comes on the heels of an independent Enquirer poll that reflects strong dissatisfaction among Cincinnati residents about the system of electing mayors and council, in general. Sixty-eight percent

said the city should switch to direct election of the mayor."

Issue One was defeated, of course, with 64 percent of the vote.

[10]Cincinnati's at-large election system is dubbed "9-X" because voters mark their ballots with an X next to the nine individuals they wish to serve on the council. Under the current plan, the council member receiving the most votes in the at-large field is declared mayor. ▮

D.C.-AREA C.O.G.: AIR POLLUTION TOPS CAPITOL'S ENVIRONMENTAL WOES

Air pollution is the metropolitan Washington, D.C. region's number one environmental concern, according to a poll released by the Metropolitan Washington Council of Governments.

Nearly 40 percent of residents and 42 percent of businesses in the metropolitan area rank air pollution as their top environmental concern. Moreover, nearly three-fourths of residents and businesses see air pollution as a major health concern.

These results and others regarding the causes of and responsibility for air pollution were key findings from a survey of 1,000 area residents and 257 employers conducted by the Gallup Organization. Gallup also interviewed 700 residents and 241 businesses in the Baltimore region as part of a multi-regional effort mounted by a joint task force of the Metropolitan Washington Air Quality Committee (MWAQC) and the Transportation Planning Board (TPB), working with the Baltimore Metropolitan Council (BMC). The research provides an in-depth understanding of the general public's awareness of clean air, and will be used to develop a clean air public education program.

Other key findings reported by Dr. Max Larsen, Gallup executive vice president, include:

- Ninety-two percent of area residents say they would be willing to take personal actions to reduce air pollution.
- Seventy-seven percent cite driving their cars as their contribution to air pollution. Twelve percent said they do nothing to contribute to air pollution.
- Nearly one-half of all residents want their employers to become involved in actions to clean the air, agreeing that employers should alert them of upcoming "bad air days." Similarly, one-half of businesses said they would be very willing to share information with employees on bad air days.
- Eighty-five percent of Washington-area residents recognize the Air Quality Index (AQI), released daily throughout the summer by the Metropolitan Washington COG, and 39 percent have taken some action as a result of AQI ozone alerts.
- Forty-nine percent of Washington-area business representatives believe air pollution has a negative effect on economic development.
- Sixty-two percent of business representatives are convinced it is their civic responsibility or the "right thing to do" to take action to reduce air pollution.
- District residents (58 percent) are more likely to rate air pollution as a serious problem than their counterparts in suburban Maryland (41 percent) and northern Virginia (39 percent).
- Residents of the region's suburban areas are more likely to contribute to the air-quality problem through their automobile use and use of gasoline-powered lawn equipment.

The results from the Baltimore survey were very similar to those of the Washington area.

"That's why we need real regional cooperation in this effort," said Paul Farragut, BMC executive director. "We all share the same air — weather patterns shift pollution from south to north, west to east, drifting all along the corridor from Richmond to Philadelphia.

"And we share commuting patterns as well. By joining together,

we are maximizing our impact," Farragut said.

Ozone is the Washington area's worst air-pollution problem. It is an invisible but serious lung irritant that is especially harmful to children, the elderly and those with lung diseases. The Washington area is classified as a "serious non-attainment area" and does not meet federal health standards for ozone. Under the Clean Air Act it is required to reduce pollution and meet standards by 1999.

The Metropolitan Washington Air Quality Committee (MWAQC) is responsible for preparing the region's air-quality plans and recommends strategies to control ground-level ozone. MWAQC was formed under the authority of the governors of Maryland and Virginia, and the mayor of the District of Columbia. The committee is composed of elected officials and key governmental staff from area state and local governments. The Transportation Planning Board is responsible for developing transportation plans for the region, ensuring that they contribute to the improvement of regional air quality. Funding for the project is being made available through the Transportation Improvement Program of Maryland, Virginia and the District of Columbia.

— Zimmerman

REPORT DETAILS FREQUENT MOVEMENT IN AND OUT OF POVERTY

For large numbers of people, poverty is characterized by continuous changes in duration, intensity and frequency, according to a Census Bureau report.

Substantially more persons were poor for two or more months than in an average month, showing considerable movement in and out of poverty, the report states.

The report, *The Dynamics of Economic Well-Being: Poverty, 1990–1992*, presents data from the Survey of Income and Program Participation (SIPP) and examines the incidence of poverty experienced by a panel of persons at a point in time and over the 32-month period spanning October, 1989 and August, 1992.

"By examining poverty in this manner, we can distinguish between short- and long-term poverty as well as measure the movement into and out of poverty for the same persons for the life of the study," explained Martina Shea, the report's author. "We can deal with the static and dynamic aspects of poverty," she added.

Principal findings presented in the report include:

- One-half of all poverty spells lasted longer than four months and 13 percent lasted longer than two years.
- One in five children were poor in an average month of 1990, compared with 10.5 percent of non-elderly adults and 9.4 percent of the elderly.
- African-Americans were three times as likely as whites to be poor in an average month. Hispanics had a poverty rate intermediate between whites and African-Americans during 1990.
- Despite much higher rates of poverty among African-Americans and Hispanics, the majority of poor persons were white, regardless of the measure used. Whites constituted 67 percent of the poverty population in an average month in 1990, 70 percent of those who were poor for two or more months, and 56 percent of the long-term poor in 1990.
- Persons in families headed by women were much more likely to be poor, and for longer periods, than persons in

married-couple families. For example, over 35 percent of persons in families headed by women were poor in an average month of 1990, compared with seven percent of persons in married-couple families. Median poverty periods for persons in female-headed families lasted 6.5 months compared to 3.8 months for persons in married-couple families.

• About 2.9 percent of persons who were not poor in 1990 became poor in 1991, and 21.2 percent of poor persons in 1990 escaped poverty in 1991.

According to the report, about 28.5 million persons participated in major, means-tested government programs during an average month in 1990, and the average increased to 30.9 million in 1991. The number of persons who participated for *at least* one month during the year was significantly higher, nearly 36 million in 1990 and 38 million in 1991.

Of the assistance programs considered in the report, the Medicaid and Food Stamp programs had the highest monthly participation in 1990, at 19.1 and 17.1 million persons, respectively.

The Dynamics of Economic Well-Being also points out that the median length of time that persons received housing assistance was 15.6 months for those beginning assistance during the 1990-92 period, significantly longer than assistance on Medicaid (10.6 months), cash welfare such as Aid to Families with Dependent Children (10.4 months), and Food Stamps (8.8 months).

The report reveals that during an average month in 1990, 61 percent of participants in major assistance programs were white, 34 percent were African-American, and 18 percent were of Hispanic origin (who may be of any race). At the same time, only eight percent of the white population participated in means-tested programs, while over 32 percent of the African-American population and 25 percent of the Hispanic population received such assistance.

In terms of the nation's regions, Southerners were the most likely assistance program participants during the study period. About 17 percent of persons living in the South participated in means-tested government programs for at least one month in 1990, compared with 14 percent each for Westerners and those in the Northeast, and 13 percent for Midwesterners.

Not surprisingly, the poor participate in means-tested public assistance programs to a far greater extent than the non-poor. During 1990, the average monthly participation rate for persons living in poverty was 53 percent, contrasted with five percent of the non-poor.

Persons in female-headed households were six times as likely as persons in married-couple families to have participated in a major assistance program during an average month in 1990. About 21 percent of those aged 18 years or older who had no high school degree received assistance, compared to eight percent of those who were high school graduates. Children were more likely than adults or the elderly to receive major program assistance, with about 19 percent of children participating, compared with 12 percent of non-elderly adults.

The means-tested government programs for which participation rates were tracked for this study include Aid to Families with Dependent Children (AFDC), General Assistance, Supplemental Security Income (SSI), public or subsidized rental housing, Medicaid, and the

Special Supplemental Food Program for Women, Infants and Children (WIC), among others. Participation in such non-means-tested programs as Social Security and Veterans Benefits was not included in the study.

The Survey on Income and Program Participation is a longitudinal survey that collects information on the economic well-being of persons, families and households. As with all surveys, the data in this study are subject to sampling variability and other sources of error.

— Zimmerman

RAIL SHIPPING REGAINS PROMINENCE

The Twin cities metropolitan area in Minnesota must locate a site for a new truck-to-train terminal facility to accommodate the expected growth in "intermodal" freight transportation. The intermodal share of the inter-city market is growing because it is a highly efficient means of shipping trailer and containerized freight over long distances. It is expected to capture one-fourth of the national transport market by 1996. The region's businesses depend on an efficient intermodal system to compete in the expanding national and global economy.

The recommendation to identify potential sites for a new terminal has been endorsed by the Burlington Northern Railroad, CP Railroad System, the Minnesota Department of Transportation, and the Metropolitan Council. Last year, the four organizations commissioned a joint study of future growth in shipper demand for container (intermodal) transportation, then compared the demand with the capacity of the region's two existing intermodal facilities.

According to the study, the region will need to double its current capacity to move shipments through intermodal terminals by the year 2012. Currently, Burlington Northern operates a hub center in the Midway area of St. Paul, and CP Rail System has a facility in Northeast Minneapolis. The study concludes that the Northeast Minneapolis site, with modest expansion, will be able to handle expected growth to the year 2012.

The forecasts were developed by R.L. Banks, a national consulting firm, in consultation with the Minnesota Intermodal Railroad Terminal Study (MIRTS), a public-private partnership composed of representatives from the four organizations. MIRTS, which will conduct the site research, will look for a site of about 165 acres. Ideally, the site would have a large buffer area around it. Other considerations include a convenient and cost effective location for shippers, with good highway and rail access. The site would be shared by any railroad choosing to provide intermodal service in the region.

MIRTS expects to expand its membership so additional railroads, truckers and shippers will be involved in the siting process. The expanded MIRTS group will also develop a governance arrangement and financing plan for the proposed facility. These activities, and the siting, are projected to be completed within 12 to 18 months. At that time, the parties will decide whether to proceed further.

— Zimmerman

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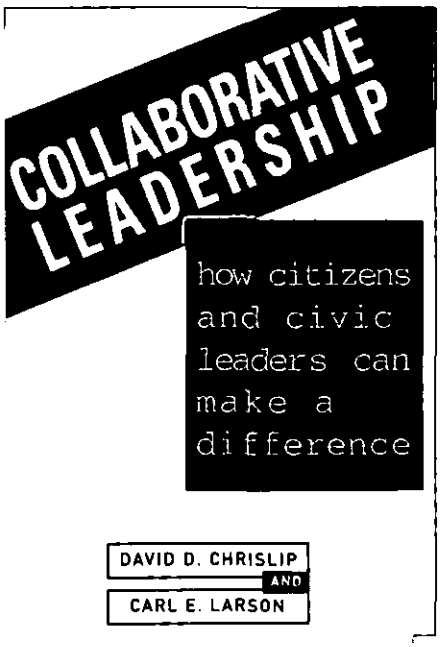

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