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Fair Representation in Local Government

Ruth Greenwood*

ABSTRACT

This Article focuses on my work in Illinois to use the Voting Rights Act¹ (VRA) to improve minority representation at the local level, but the themes and findings are applicable across the country because many states have growing minority populations in the suburbs just outside of large city centers.² These minority populations tend to be much less segregated than the minority communities in the cities,³ and so it is more difficult to use Section 2 of the VRA⁴ (“Section 2”) to ensure both descriptive and substantive representation. I recommend the use of fair representation systems like ranked choice and cumulative voting (with multi-member districts) to improve minority representation in these decreasingly segregated areas. I introduce three case studies from Illinois to highlight the numerous burdens facing those that seek to reform their local government redistricting systems. I finish with some thoughts on how litigation and legislative advocacy may be used to promote fair representation systems in local government.

INTRODUCTION

“It is an essential part of democracy that minorities should be . . . represented. No real democracy, nothing but a false show of democracy, is possible without it.”⁵

John Stuart, Mill 1862

Representation in a democracy is “a substitute for the meeting of citizens in person.”⁶ Federal, state, and local governments could not function if all of the millions of citizens with a stake in the decisions of government were involved in every decision. Americans long ago decided that they did not want a single leader to determine issues

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1 52 U.S.C.A. §§ 10301–14 (West 2016).

2 William H. Frey, *Melting Pot Cities and Suburbs: Racial and Ethnic Change in Metro America in the 2000s*, METROPOLITAN POL’Y PROGRAMS AT BROOKINGS, 9–11 (May 2011), https://www.brookings.edu/wp-content/uploads/2016/06/0504_census_ethnicity_frey.pdf.

3 See Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 1329, 1343–48 (2016).

4 52 U.S.C.A. § 10301.

5 John Stuart Mill, *Representative Government*, in THREE ESSAYS BY JOHN STUART MILL 143, 252 (Oxford 1960).

6 HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 191 (Univ. of Cal. Press 1967) (quoting Alexander Hamilton, James Madison & John Jay, *THE FEDERALIST* No.52, in *THE FEDERALIST* 269, 270 (Max Beloff ed. 1948)).

of the commonwealth. Thus, governmental systems were chosen whereby some people represent others to determine the rules by which we live.

To be represented has four relevant meanings in the context of voting rights.⁷ One can be said to be represented if:⁸

1. she can register, vote, and have that vote count;
2. she can join with her community to elect candidates of their choice;
3. people with the same demographic or social characteristics are part of a governmental decision making body (I will refer to this as descriptive representation); and
4. there is a congruence between the actions and behavior of a representative and one's policy preferences (I will refer to this as substantive representation).

The first form of representation is not a focus of this Article but has been a focus of recent successful litigation efforts across the country.⁹ It is the latter three types of representation that this Article discusses.

Recognizing that representation is required in a democracy is only the first step. A community must then decide how it will choose its representatives. What mechanism is chosen will depend on a community's conception of democracy and of representation. Is democracy served by a purely majoritarian representative body whereby representatives do only what those they represent want and the decision made in each case is by majority rule (majoritarianism)?¹⁰ Is it served by a representative body where the most talented members of society are trusted to deliberate and act in favor of the national interest, even if it involves unpopular choices (trusteeship)?¹¹ Is it served by a representative body that is a vibrant marketplace of ideas, where every demographic and interest group is represented, and decision makers form different coalitions come to different compromises depending on the issue (pluralism)?¹² Perhaps a little of each of these drove the decisions of the Founders to establish the decision-making structures of federal government.

The federal government structure is laid out in our almost-unamendable Constitution,¹³ but the structure of a local government is, in many states, relatively

7 For a full discussion of definitions of representation, see PITKIN, *supra* note 6, at 1–11.

8 Adapted from PITKIN, *supra* note 6, at 38–59.

9 Successful litigation on this form of representation has occurred in Wisconsin, *One Wisconsin Inst., Inc. v. Thomsen*, No. 15-cv-324-jpd, 2016 WL 4059222 (W.D. Wis. July 29, 2016), Texas, *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016), North Carolina, *North Carolina State Conference of the NAACP v. McCroy*, No. 1:13CV861, 2016 WL 1650774 (M.D.N.C. April 25, 2016), and Kansas, *Fish v. Kobach*, No. 16-2105-JAR-JPO, 2016 WL 2866195, May 17, 2016 (D.C. Kan).

10 See PITKIN, *supra* note 6, at 30.

11 *Id.* at 181.

12 *Id.* at 191.

13 Eric Posner, *The U.S. Constitution Is Impossible to Amend*, SLATE (May 5, 2014, 4:22 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/05/amending_the_constitution_is_much_too_hard_blame_the_founders.html.

easily amended. For example, in Illinois, home rule jurisdictions¹⁴ can change their system of government (that is, their county, town, or school board) by majority vote at a general election after collecting a relatively small number of signatures to place the question on the ballot.¹⁵

At the local level then, we are all potential founders.

In a world of relatively infinite choice, what system of democracy suits local government? And, therefore, what system of representation is preferable? Some guidance can be drawn from Hanna Pitkin's seminal 1967 book, *The Concept of Representation*. Pitkin found that political decisions are "questions about action, about what should be done; consequently they involve both facts and value commitments."¹⁶ While decisions based on facts may be delegated to experts, decisions based on value commitments—like the decisions of what rules a community wants to live by—require diverse representation.

Not every type of diversity will be relevant for representation. For example, it is hard to think of a reason why blue-eyed people need specific representation that they could not get from brown-or green-eyed people. Additionally, in some communities, different religions or ages need not be represented, but in others, religion or age may be a key cleavage in a community, and so establishing a system that ensures diverse representation with respect to religion or age will be necessary. In every community in America one thing is for certain: race and ethnicity will be an issue that requires diverse representation.¹⁷

This Article proceeds as follows: It starts by defining minority representation and outlining the normative and practical case for promoting minority representation, highlights the importance of focusing on local government representation, discusses the legal routes currently available to improve minority representation, goes through two case studies of work I have done at the local level to try to improve minority representation (in Joliet and Blue Island), and concludes with thoughts for the strategies that can be used going forward to advocate and litigate for local government structures that will better protect and promote minority representation.

I. MINORITY REPRESENTATION

If the goal of democracy is majority rule, why is pluralism or an explicit protection of racial justice needed? This question strikes at the basic paradox of

14 See ILL. CONST. art. VII, § 6.

15 See 10 ILL. COMP. STAT. 5/28-7 (2016) (the number of signatures required is equal to 8% of total vote of that jurisdiction in most recent gubernatorial election).

16 PITKIN, *supra* note 6, at 212.

17 See Ian F. Haney Lopez, *Post-Race Racialism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010); Mario L. Barnes, *Reflections on a Dream World: Race, Post-Race and the Question of Making It Over*, 11 BERKELEY J. AFR.-AM. L. & POL'Y 6 (2009); Eduardo Bonilla-Silva, *RACISM WITHOUT RACISTS: COLORBLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2d ed. 2006); see also JOHN D. GRIFFIN & BRIAN NEWMAN, *MINORITY REPORT 196* (2008) (citing Kinder and Sanders 1996, and Sniderman and Carmines 1997 as examples of how race continues to divide American society and politics).

democracy—can a society be equally committed to majority rule and minority protection?¹⁸ Because it conflicts with government by the majority, the commitment to minority protection must be grounded in some other value. A commitment to minority representation can be grounded in pluralism and/or a commitment to racial justice. Failing to focus on minority representation is not a choice in favor of race neutrality, but instead a de facto vote against racial justice.

For minority representation to exist, all four types of representation outlined above should be present. That is, minority communities must be able to register and vote, to elect candidates of their choice, and to be both descriptively and substantively represented in federal, state, and local government. These types of representation stand in contrast to various kinds of disenfranchisement and political disempowerment minorities have experienced in America's history.

A. The Voting Rights Act

It wasn't until the Voting Rights Act (VRA) in 1965 that part of the promise of the Fifteenth Amendment was codified by Congress.¹⁹ Though passed in direct response to the violence in Selma, Alabama, on Bloody Sunday, March 7, 1965, the aims of the VRA were broader than simply allowing Black people to register to vote without fear of losing their lives. Dr. Martin Luther King Jr.'s views on the topic were summarized by Lani Guinier in 1991: "King advocated full political participation by an enlightened electorate to elect blacks to key political positions, to liberalize the political climate in the United States and to influence the allocation of resources."²⁰ Guinier also notes that Roy Wilkins, Executive Director of the NAACP and Chairman Lawyers' Committee for Civil Rights (LCCR), advocated for the VRA before the House Committee on the Judiciary, on the grounds that eliminating voting restrictions would mean that elected officials "will become responsive to the will of all the people."²¹

Provisions protecting language minority communities (Latinos, Asian Americans, American Indians, and Native Alaskans and Hawaiians) were not

18 See Alexis de Tocqueville, *Tyranny of the Majority*, in *DEMOCRACY IN AMERICA* 306 (Schocken Books 1961); see also JACQUES DERRIDA, *ROGUES: TWO ESSAYS ON REASON* 31–36 (Pascale-Anne Brault & Michael Naas trans., Stanford Univ. Press 2005).

19 There are other statutes that indirectly protect minority voting rights by protecting voting rights of particular communities that include people of color, e.g., the National Voter Registration Act (NVRA), 42 U.S.C. §§ 1973gg–10 (1993); the Uniformed and Overseas Citizens Act (UOCAVA), 42 U.S.C. § 1973ff-7 (1998); the Help America Vote Act (HAVA), 42 U.S.C. §§ 15301–545 (2002); and the Military and Overseas Voter Empowerment Act (MOVE Act), 42 U.S.C. § 1973ff-7 (2009).

20 Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and The Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1084 n.26 (1991) (citing MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 166 (1963)).

21 *Id.* at 1077 n.26 (citing *Voting Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong. 377–80 (1965) (statement of Roy Wilkins)).

included in the VRA until 1975.²² These were added to help non-English-speaking voters to “cast an effective ballot”²³

The definition of minority political participation used during the 1975 debates included registering, voting, running for office, and holding office as civic participation goals.²⁴ The 1975 Act’s added protections were written to apply to “language minority groups,” defined as “persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.”²⁵

B. Promoting Minority Representation

i. Registering, Voting, and Having that Vote Count Today

The removal of practices that directly prevented minority voters from registering and voting (for example, literacy tests, and some of the practices prevented through Section 5 preclearance, such as not opening voter registration opportunities when Black citizens appeared at the relevant office to register) supported the most basic type of minority representation: allowing people of color to register, vote, and have that vote count.

There are still laws that disproportionately disenfranchise voters of color, such as felon disenfranchisement laws, photo ID laws, citizenship requirements, and restrictions on early voting that are either currently on the books or are being advanced in legislatures or through ballot initiatives.²⁶ Advocates for minority representation are using Section 2 of the VRA somewhat effectively²⁷ where previous litigation under the Fourteenth Amendment has not been successful.²⁸

ii. Electing Candidates of the Minority Community’s Choice

The VRA, though originally interpreted by the Supreme Court to protect against only intentional discrimination with respect to the right to vote, was clarified by Congress in 1982 such that today it prohibits systems of election that prevent minority communities from electing candidates of their choice.²⁹ The classic example of such a system is a town council that elects all of its representatives at large, meaning that every voter chooses someone for each of, say, seven positions. The result

22 The expansion was both through the coverage formula in Section 4 of the Voting Rights Act, 42 U.S.C. §§ 1973–1973aa-6 (1965), and the addition of Section 203 that required election materials to be printed in multiple languages in areas where there was a significant community with a common language that also spoke English less than well.

23 *Voting Rights Act: Ten Years After*, U.S. COMM. ON CIVIL RIGHTS 1, 117 (1975).

24 *Id.* at 39–58.

25 *Section 4 of the Voting Rights Act*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/crt/section-4-voting-rights-act> (last updated August 8, 2015).

26 For a full list of restrictive voting laws introduced and passed in 2015, see *Voting Laws Roundup 2015*, BRENNAN CTR. FOR JUST. (June 3, 2015), <https://www.brennancenter.org/analysis/voting-laws-roundup-2015#Restrictive>.

27 See *supra* text accompanying note 9.

28 See generally *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

29 52 U.S.C.A. § 10301(b).

of at-large systems is that the majority white population, if there is racial polarization in voting, will elect all seven members, and the minority community will never be able to elect a candidate to the local office. In places where it is possible to divide the jurisdiction into single-member districts (SMDs) such that one or more will have a majority of minority citizens, Section 2 of the VRA has been interpreted to require that SMDs (or another remedy) be implemented.³⁰

iii. Descriptive Representation

The VRA says nothing explicitly about descriptive representation, but the Senate, in passing the amendments to Section 2 in 1982, added in a list of factors that a court must consider as part of the “totality of the circumstances” test.³¹ Factor seven, in particular, is concerned with descriptive representation: “the extent to which members of the minority group have been elected to public office in the jurisdiction.”

In many cases, the VRA’s protection of communities electing candidates of their choice has resulted in a protection of descriptive representation because people of color have largely been the choice of the minority community and white people have largely been the choice of the white community. For example, at the congressional level in elections from 1966–96 (the thirty years after the VRA was passed) only 35 of the 6,667 elections in white majority districts provided Black winners (that is 0.005%).³² There are more white winners in majority Black or Latino districts than this low rate, but not a sufficient amount to threaten the ability of representatives of color to be elected at the local, state, and national level.

iv. Substantive Representation

Substantive representation can have both an individual representative component and a whole legislature/policy outcomes component. With respect to individual representatives, the VRA protection of communities of color’s ability to elect candidates of their choice should protect substantive representation (if the community votes in its self-interest and is able to hold the legislator to account). In addition, the Senate factors in the Section 2 amendments to the VRA outline the issues that a court should consider as part of the “totality of the circumstances” test required by the section. One of the Senate factors requires a court to look at whether the relevant minority group bears the effects of discrimination in areas such as education, employment, and health.

Additionally, political scientists have found strong evidence that substantive representation follows directly from descriptive representation. For example, Kerry L. Haynie finds, in analyzing agenda-setting behavior, that “a legislator’s race tends

30 See *Thornburg v. Gingles*, 478 U.S. 30 (1986); see also *Bartlett v. Strickland*, 556 U.S. 1 (2009).

31 See S. Rep. No. 97-417, 97TH CONG., 2D SESS., at 28–29 (1982).

32 DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION 12 (1999).

to have a stronger effect on substantive representation than does a legislator's party membership.”³³

With respect to whole legislature/policy outcomes, the story is somewhat different due to the nature of winner-take-all district elections. Whether substantive policy outcomes are promoted by the VRA depends on the size and distribution of the minority communities and the level of racially polarized voting.

The need to divide minority representation into a substantive and descriptive component reveals how differently the political world is experienced by whites and people of color (and hence why it is important to approach the political world with an appreciation of racial difference). Since ninety percent of elected officials are white (and sixty-five percent are white men),³⁴ a white person will almost never need to worry about whether the candidate who will substantively represent him will also descriptively represent him.

C. *The Benefits of Minority Representation*

Q: Now why would you come from Crittenden County to participate in a fundraiser for a county race that was basically a local race to Philips County?

A: Well, the reason I would come, first of all, there are no blacks elected to a county position in eastern Arkansas and no blacks serving in the House of Representatives in eastern Arkansas and no blacks elected to anything other than school boards in districts that are predominantly black. And I feel like blacks should be elected to public office because they should have a chance to serve.

And I want to help get blacks elected so little black children can see them serving and I want to dispell (sic) the myth that some white kids might have that blacks can't serve or shouldn't be serving at the courthouse. And when my little girl goes to the courthouse or when other little girls go to the courthouse, I want them to be able to see black people working up there.

And if we can get some blacks elected at the local level, eventually we can—blacks will have the expertise and we can groom them to the point where they can run for the state legislature and other positions

Ben McGee, 1988³⁵

i. Black Americans

Though the Black community is not homogenous, and Black community groups will differ in their support for various policies and laws, it is possible to find a large

33 KERRY L. HAYNIE, *AFRICAN AMERICAN LEGISLATORS IN THE AMERICAN STATES* 25, 30 (2001). Haynie justifies assessing agenda-setting behavior as a method of assessing substantive representation by relying on R. Douglas Arnold's finding that "analyzing legislator's bill introductions is often superior to a reliance on roll-call votes for attempting to establish a linkage between constituency interests or preferences and the legislative behavior of representatives." *Id.* at 25.

34 *Do America's Elected Officials Reflect Our Population?*, WHO LEADS US, <http://wholeads.us/electedofficials/> (last visited Oct. 10, 2016).

35 LANI GUINIER, *TYRANNY OF THE MAJORITY* 54 (1994) (citing *Whitfield v. Democratic Party*, 686 F.Supp. 1365 (E.D. Ark. 1988), *aff'd by an equally divided court*, 890 F.2d 1423 (8th Cir. 1989) (en banc) (trial transcript at 654–55)).

body of common ground between black citizens on questions of public policy, ideology, and candidate choice, and therefore to define “Black interests,” for the purpose of studying whether these interests are furthered by an increased presence of black legislators, by greater seniority of black legislators, or other practices aimed at promoting minority representation. Kerry L. Haynie finds that Black citizens “have been the most cohesive and consistent political subgroup in U.S. politics.”³⁶

This coherence has made it easier for researchers to draw conclusions as to whether white or Black representatives are better able to represent the views of the Black community. Canon researched thousands of Congressional representatives over a thirty-year period and found that

white representatives from districts that are 30–40 percent Black *can* largely ignore their Black constituents, and many do. Black representatives from districts that are 30–40 percent white cannot ignore their white constituents *because they are operating in an institution that is about 86 percent white and a nation that is 82.5 percent white.*³⁷

He concludes that there is “very little support” for the claim that “whites are just as able to represent black interests as blacks.”³⁸

Additionally, Haynie, in analyzing state legislatures, found that Black members did not need to be in positions of power (for example, on legislative committees) to exert an influence over substantive outcomes, instead “the mere presence of African Americans in state legislatures . . . was sufficient to yield significant institutional and governmental responsiveness to black interests.”³⁹ Haynie also examined the introduction of bills by state legislatures and found that “the race of the representative has a powerful and statistically significant effect on the introduction of traditional civil rights legislation.”⁴⁰

A corollary of the Canon and Haynie findings is that “districts with a majority black population had no significant impact on whether legislators representing such districts introduced black interest legislation.”⁴¹ That means that majority-Black districts without a Black elected official are not likely to see Black-interest legislation introduced on their behalf, even though the minority community voted that representative into office. Thus, the candidate of choice of a minority community will best represent them substantively if—and only if—that candidate also descriptively represents them. There are of course exceptions to this statistical finding: there have been and are a small number of majority Black communities that elect white candidates to represent them, and those candidates provide substantive representation for their communities. Those exceptions do not undercut the link between descriptive and substantive representation, but rather should give us hope

36 HAYNIE, *supra* note 33, at 19.

37 CANON, *supra* note 32, at 13.

38 *Id.* at 12.

39 HAYNIE, *supra* note 33, at 90.

40 *Id.* at 30.

41 *Id.*

that in a future time it will be possible for *all* white candidates to represent *all* of their constituents, not just the white ones.

ii. Latinos

The Latino community is not as politically cohesive as the Black community, largely because of group differences by country of origin, e.g., Mexico, Puerto Rico, and Cuba.⁴² This makes it difficult to assess whether on the whole, the Latino community is able to get “what it wants” because there is no “it.”

However, it is possible to assess whether Latinos are more likely to get the outcomes they desire than white Americans. It has been shown that, in Congress, Latinos, like Black Americans, are less likely to have policies implemented that they care about when their representatives are white, with the exception of districts that are over fifty percent Latino and represented by white members.⁴³ In the latter case, Latinos are as likely to have their policies represented by their congressional members as the whites in that district.⁴⁴ Thus, having a Latino representative generally leads to substantive representation for Latinos.

For Latinos (as well as Blacks), the substantive representation that results from descriptive representation also goes beyond just being more generally liberal. An analysis of voting patterns in several Congresses shows that “rather than simply greater intensity on a liberal-conservative spectrum, which generally emphasizes economic/class cleavages, minority representatives see a second, racial dimension of policies as highly salient.”⁴⁵ This finding also tends to discredit those who say that substantive representation for minorities can be achieved by simply increasing the number of liberal representatives in office. White representatives—even liberal ones—do not have the “sense of racially ‘linked fate’” or “personal experience with discrimination” to draw upon, which shows up in how they vote.⁴⁶

iii. Asian Americans

Though the Asian American community does not share a common history, language, or country of origin, political scientists conclude that an “Asian American identity does exist and frequently works as a collective group.”⁴⁷ Unlike Black

42 See JOHN D. GRIFFIN & BRIAN NEWMAN, MINORITY REPORT 51 (2008).

43 See *id.* at 197.

44 See *id.*

45 Robert R. Preuhs & Rodney E. Hero, *A Different Kind of Representation: Black and Latino Descriptive Representation and the Role of Ideological Cuing*, 64 POL. RES. Q. 157, 157–71 (2011).

46 See *id.* at 158, 160. Preuhs and Hero used a measure of how liberal a representative was (the DW NOMINATE score) along with scores on race issues from the NAACP (for Blacks) and NHLA (National Hispanic Leadership Council) to analyze voting patterns. They found that for white liberals, the DW NOMINATE score was highly explanatory of voting patterns whereas for Black and Latino representatives, the scores from NAACP and NHLA indicating how sensitive a candidate is to minority issues were far more predictive of representatives votes on certain issues. *Id.*

47 Neilan Chaturvedi, *Responding to Silence: Asian American Representation through Bill Sponsorship and Co-Sponsorship* (2011 Annual Meeting Paper), AM. POL. SCI. ASS'N 5–6 (last revised Aug. 5, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1902228.

Americans and Latinos, Asian Americans, though exhibiting a reasonable level of political cohesion, largely do not exhibit party loyalty.⁴⁸

An example of Asian political cohesion is the fight to keep an Asian neighborhood together during a redistricting process in New York in the 1990s. Latinos challenged the Twelfth Congressional District in New York, and a group of Asian Americans intervened to argue that the redrawn district should not split up their community.⁴⁹ The community was defined by common neighborhoods, language, level of education, employment in similar industries, use of public transport, and immigration status.⁵⁰ The Court found this argument compelling, and the first constitutionally permissible Asian-influence district was formed. The district remains a multi-racial opportunity district (with 40% Latino and 20% Asian American population).⁵¹

When there are common interests amongst Asian American groups,⁵² it is possible to study whether Asian American legislators effectively represent those interests, and it has been found that they do, indeed, further such interests.⁵³

iv. Minority Representatives as Role Models

Guinier explains role model theory as Black representatives “who convey the message ‘We Have Overcome’ and inspire those not yet overcoming. Thus, in general, Black role models are powerful symbolic reference points for those worried about the continued legacy of past discrimination.”⁵⁴

The most prominent example of a candidate of color inspiring others is, of course, President Obama. The ability of a Black man to be elected to the highest office in the land conveys the message to Black children everywhere that they too can do great things even though they may experience racism along the way. Similarly, Senator Daniel Inouye served as a role model to a generation of Japanese Americans,⁵⁵ as did Mayor Villaraigosa, Senator Rubio, and Congressman Castro for Latinos.

48 See Glenn D. Magpantay, *Asian American Voting Rights and Representation: A Perspective from the Northeast*, 28 FORDHAM URB. L. J. 739, 764 n.163 (2001) (“Political cohesion around candidates can be discerned, but party loyalty is largely absent.”).

49 *Id.* at 766–67.

50 See *id.* at 766–67.

51 New York’s 12th Congressional District in the 1990s is now the 7th District, and is still represented by Nydia Velásquez. The District is 43% Latino and 19% Asian according to the 2013 American Community Survey estimates. See U.S. CENSUS BUREAU, *2013 American Community Survey* (2013), <http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml>.

52 See Magpantay, *supra* note 48, at 768 (explaining that communities of interest can be identified within the Asian American community).

53 See Chaturvedi, *supra* note 47, at 20 (“Asian American legislators represent Asian Americans well.”).

54 GUINIER, *supra* note 35, at 57.

55 See Paul Watanabe, *Remembrance: Daniel Inouye Was My Role Model*, COGNOSCENTI (Dec. 20, 2012), <http://cognoscenti.wbur.org/2012/12/20/daniel-inouye-paul-watanabe>.

v. Improved Civic Participation by People of Color

In 1965, Black voter registration rates were as low as 6.7% in some states.⁵⁶ This was the intended outcome of the white power structure in place. Following the adoption of the VRA, voter registration rates increased. Voter turnout also largely followed a similar trajectory. Guinier theorized in 1994 that this is because there is a key role that “group identity plays in mobilizing political participation and influencing legislative policy.”⁵⁷ She noted also that: “blacks can be encouraged to participate in the political process, the possibility of electing a ‘first’ Black tends to increase election day turnout. Indeed, the courts and commentators have recognized that the inability to elect Black candidates depresses black political participation.”⁵⁸

Studies of each of the minority groups under consideration bear out this hypothesis. For Blacks, this effect was dramatically illustrated in the 2008 election where black turnout eclipsed that of white turnout for the first time,⁵⁹ likely because Black voters wanted to elect the first black President. Additionally, political scientists have found a link between the election of black mayors and greater Black political participation.⁶⁰

For Latinos, a study of Southern California over five years shows that Latino voter turnout increases when Latino voters have a chance to elect their candidate of choice out of a majority-minority district.⁶¹ That boost to turnout increases with each additional overlapping district where electing a Latino is possible: the highest turnout came from Latino voters who lived in overlapping majority-minority districts for State Assembly, State Senate, and U.S. House of Representatives.⁶²

For Asian Americans, Taofang Huang finds that Asian Americans are more likely to vote when an Asian American is a candidate, particularly when the candidate’s ties to a specific Asian country are a prominent part of his or her presentation during a campaign.⁶³

It seems likely that, beyond mayoral races, increased minority representation at the local level will drive minority civic participation. For example, each additional Latino majority-minority district increases turnout by the Latino community. Thus, descriptive representation should increase substantive representation on both ends; the elected official is more likely to take the interests of the minority community

56 *Introduction to Federal Voting Rights Laws*, U.S. DEP’T OF JUST., https://epic.org/privacy/voting/register/intro_c.html (last visited Nov. 16, 2016).

57 GUINIER, *supra* note 35, at 57.

58 *Id.* at 58.

59 See Thom File, *The Diversifying Electorate—Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections)*, U.S. CENSUS BUREAU (May 2013), <http://census.gov/content/dam/Census/library/publications/2013/demo/p20-568.pdf>.

60 See ZOLTAN L. HAJNAL, CHANGING WHITE ATTITUDES TOWARD BLACK POLITICAL LEADERSHIP 1 (2007).

61 Matt A. Barreto, Gary M. Segura & Nathan D. Woods, *The Mobilizing Effect of Majority—Minority Districts on Latino Turnout*, 98 AM. POL. SCI. REV. 65, 74 (2004).

62 *Id.*

63 See Taofang Huang, *Electing One of Our Own: Descriptive Representation of Asian Americans* (2010 Annual Meeting Paper), W. POL. SCI. ASS’N 2, 21, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1580953 (last revised Mar. 31, 2010).

seriously and the community will become more engaged, mobilized, and better able to hold that representative accountable.

vi. Confidence in Government

Jane Mansbridge explains the connection between increased descriptive representation, legitimacy, and confidence in government:

Seeing proportional numbers of members of their group exercising the responsibility of ruling with full status in the legislature can enhance de facto legitimacy by making citizens, and particularly members of historically underrepresented groups, feel as if they themselves were present in the deliberations.⁶⁴

Haynie and Guinier accept this argument, but they clarify that they believe descriptive representatives will only contribute a basic level of trust in political institutions if the minority members actually speak for the communities from which they come.⁶⁵

The benefit of an increased confidence in government will not necessarily only be felt by members of the relevant minority community but may also increase the confidence of elected officials that they have made decisions based on the views of the entire community, rather than just the white majority. There is also a possibility that this confidence could flow over to white voters themselves if they believe that all community members are having their voices heard on local decision-making bodies.

vii. Changing Attitudes to Minority Legislators and Minority Community Members

There is some evidence that Black political leadership can help to break down the “myth that some white kids might have that Blacks [and other minority candidates] can’t serve or shouldn’t be serving.”⁶⁶ For example, Zoltan Hajnal shows that “the transition from white to Black leadership frequently leads to notable shifts in white attitudes and behavior.”⁶⁷ Hajnal argues that this shift in behavior occurs where information about the Black political leadership is credible and widely disseminated such that the white community perceive their black leader to have real

64 HAYNIE, *supra* note 33, at 114 (citing Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent Yes*, 61 J. POL. 628, 650 (1999)).

65 HAYNIE, *supra* note 33, at 114.

66 *Id.* at 63.

67 HAJNAL, *supra* note 60, at 7. Unfortunately, Hajanal finds exceptions to his rule, and Chicago is one of the notable exceptions: “Although Black representation in most cases leads to decreased racial tension and greater acceptance of Black incumbents, there are a select number of cities where racial tension remains high, voting continues to be highly racially polarized, and few new white voters begin to support Black leaders despite years under Black leadership . . . Chicago represents perhaps the most famous case of ongoing white resistance.” *Id.* at 123 (though Hajnal can explain the unique circumstances that set Chicago out from other cities).

control over outcomes and policies, and white community members are therefore more likely to reduce their negative attitudes to black leadership.

At the congressional level, some studies on white voting behavior following Black leadership support Hajnal's findings,⁶⁸ but some find the opposite result, with whites being eight to ten percent less likely to support Black incumbents than white incumbents.⁶⁹ Despite this finding, the number of Black congressional representatives that represent majority white districts has increased from zero in 1960 to six in 2000, representing sixteen percent of all Black representatives.⁷⁰ Though change in the level of racially polarized voting is slow, it seems change has indeed followed from increased examples of Black leadership (in both majority white and majority Black communities).

The number of Latino and Asian American representatives has only started to grow in the past three decades, but the data so far suggest that white voters respond to Latino and Asian American leadership positively. Hajnal finds "there does appear to be a pattern of changing white behavior in response to experience with Latino elected officials. The evidence is clearer for whites who experience Latino leadership than it is for whites who live under Asian American incumbents but in both cases there are signs that white Americans are learning."⁷¹

The effect of minority political leadership on white racial attitudes is therefore one of caution and hope. Though minority representation "cannot solve all or even most of America's racial ills . . . if it can begin to reduce racial divisions in the political arena, then it is a goal well worth pursuing."⁷²

viii. Minority Representation and the Representation of Women

Focusing on minority representation gives us a chance to explore "the interaction and coalition formation that may occur between women and minority groups with corresponding interests" and to find ways to advance representation for both of these underrepresented groups of people.⁷³

A finding that reveals corresponding interests is that the improvement in minority representation over the past few years has largely been driven by women of color. This is particularly true for black elected officials. For example, in 2001, the increase in Black elected officials in office was entirely due to the increase in Black women in office. Since 1998, the number of Black men has actually decreased, and overall (from 1970–2005) black female elected officials

68 *Id.* at 145.

69 *Id.*

70 *Id.* at 146.

71 ZOLTAN HAJNAL, *AMERICA'S UNNEVEN DEMOCRACY* 153 (2010).

72 *Id.* at 161.

73 Michael D. Minta, *Gender, Race, Ethnicity, and Political Representation in the United States*, 8 *POL. & GENDER* 541, 544 (2012).

increased twenty-fold while black male elected officials increased only four-fold.⁷⁴

The fights for gender and racial/ethnic equality should be seen as connected because achieving minority representation is not just about narrowly satisfying the interests of some racial groups. Rather, it is grounded in a view of democracy that says that all of those who are historically or currently disempowered still deserve respect and recognition. This connection has been important in the advances of racial and gender justice: the civil rights movement of the 1960s was dominated by discussions of race, but coalition building allowed protections for gender to be included in the Civil Rights Act of 1964.⁷⁵

II. MINORITY REPRESENTATION IN LOCAL GOVERNMENT

Now that we have set the boundaries for our discussion of what constitutes minority representation and why we may desire to increase it, let us turn our attention to local government representation in particular. The starkest recent example of the importance of local government in the fight for racial equality comes from Ferguson, Missouri.

Many will remember Ferguson only for the shooting and killing of an unarmed, Black teenager, Michael Brown, by a white police officer in 2014.⁷⁶ A large part of the blame for this terrible event was rightly attributed to the racially discriminatory culture within the Ferguson Police Department.⁷⁷ But there are deeper issues. Ferguson, along with St. Louis, is highly segregated not only in housing patterns, but also in the distribution of local power.⁷⁸ Although Ferguson's population is majority Black, it is run by a white mayor and a white police chief, with a police department known for brutality against Black⁷⁹ youth and racist conduct by police officers.

While Ferguson is over sixty-seven percent Black, its city council included only one Black member out of six seats.⁸⁰ In addition, seventy-seven percent of students

74 Carol Hardy-Fanta et al., Race, Gender, and Descriptive Representation: An Exploratory View of Multicultural Elected Leadership in the United States 6 (Sep. 1, 2005) (unpublished manuscript) (on file with the American Political Science Association).

75 See Minta, *supra* note 73, at 544–45.

76 See, e.g., Editorial, *The Death of Michael Brown: Racial History Behind the Ferguson Protests*, N.Y. TIMES (Aug. 12, 2014), <http://www.nytimes.com/2014/08/13/opinion/racial-history-behind-the-ferguson-protests.html> (last visited Aug. 2016).

77 See U.S. DEPT. OF JUST. CIVIL RTS. DIV., *Investigation of the Ferguson Police Department*, (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

78 See *The Death of Michael Brown*, *supra* note 76.

79 This report uses “Black” rather than African American to ensure that people without slave ancestry but who still hail from Africa are included in the analysis. The Census Bureau uses both terms in its work. This report capitalizes “Black” because the terms Latino and Asian are also usually capitalized.

80 Karen Shanton, *The Problem of African American Underrepresentation on Local Councils*, DEMOS.ORG, <http://www.demos.org/publication/problem-african-american-underrepresentation-city-councils> (last visited Mar. 12, 2015).

in the Ferguson-Florissant School District are Black,⁸¹ yet only one school board member out of seven total was Black.⁸² City councils, school boards, and other local government systems can influence city agencies and the allocation of resources in many important ways. For example, if Ferguson's city council looked like Ferguson itself, it could choose to ensure that the police force is racially diverse, better trained to understand racial justice issues, and held accountable for racially disparate treatment and racially discriminatory conduct.

The situation on the ground in Ferguson serves to highlight a truth about local governments across our country: they control many aspects of our daily lives, not just criminal law but also many other policy areas that are crucial for the civil rights agenda. Local government decisions can affect whether a community is integrated,⁸³ whether public employees include people of color,⁸⁴ whether police target people based on race,⁸⁵ whether schools disproportionately suspend and expel Black students,⁸⁶ whether food deserts exist,⁸⁷ whether minority-owned businesses can thrive,⁸⁸ whether people of color's right to vote is disproportionately burdened,⁸⁹

81 David Hunn, *ACLU Alleges Ferguson-Florissant School District Elections Favor White Candidates*, ST. LOUIS POST-DISPATCH (Dec. 18, 2014), http://www.stltoday.com/news/local/education/aclu-alleges-ferguson-florissant-school-district-elections-favor-white-candidates/article_f5e8a48f-c586-5593-9aed-440a353efd86.html.

82 Jessica Bock, *Suspension of Ferguson-Florissant Superintendent Questioned*, ST. LOUIS POST-DISPATCH (Nov. 9, 2013), http://www.stltoday.com/news/local/education/suspension-of-ferguson-florissant-superintendent-questioned/article_d26b81af-7010-55b1-8233-50b33a08bb09.html.

83 Policies that can influence the level of neighborhood integration including redlining (see, e.g., Alexis C. Madrigal, *The Racist Housing Policy That Made Your Neighborhood*, THE ATLANTIC (May 22, 2014), <http://www.theatlantic.com/business/archive/2014/05/the-racist-housing-policy-that-made-your-neighborhood/371439/>), and by contrast, an explicit mission in a community to "achieve meaningful and lasting diversity throughout Oak Park and the region," see *About us*, THE OAK PARK REGIONAL HOUSING CTR., <http://www.oprh.org/news-media-releases-updates/> (last visited Mar. 12, 2015).

84 City policies about standards for hiring can affect diversity in public employees. See, e.g., *Lewis v. City of Chicago*, 643 F.3d 201 (7th Cir. 2011).

85 See, for example, New York's "Stop and Frisk" laws that were found to have disparately impacted the Black community in New York. See generally *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013).

86 See, e.g., *School Discipline and Disparate Impact*, U.S. COMM'N ON CIVIL RIGHTS (2014), http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf (last visited Mar. 12, 2015) (reporting on Fresno's disparate expulsion referrals for people of color).

87 Governor Pat Quinn appropriated \$10 million to go to cities, towns, and villages across Illinois to address the problem of food deserts. City council members had to apply to receive that money, and some used the media in that lobbying effort. Landon Cassaman, *Rockford "Food Desert" Seeks State Funding*, WIFR.COM (Aug. 3, 2012, 9:32 PM), <http://www.wifr.com/home/headlines/Rockford-Food-Desert-Seeks-State-Funding-164970226.html>.

88 For example, Chicago has a Minority and Women-Owned Business (e.g., (M/WBE)) Certification Program that provides contracting opportunities to M/WBE certified companies. *Businesses & Professionals*, CITY OF CHICAGO, <http://www.cityofchicago.org/city/en/ofinterest/bus/mwdbe.html> (last visited March 12, 2015).

89 For example, the Department of Justice was asked to investigate the placement of voting machines in Franklin County. The DOJ found that more registered voters were allocated to a single machine in predominantly Black precincts, and less registered voters per machine in predominantly white precincts (the amount of actual voters for each machine did not show a discriminatory impact). Dan Tokaji, *DOJ: No Discrimination in Ohio Election*, MORTIZ COLLEGE OF LAW: ELECTION LAW @ MORTIZ BLOG (July 5, 2005), <http://moritzlaw.osu.edu/blogs/tokaji/2005/07/doj-no-discrimination-in-ohio-election.html>. In addition, decisions on the allocation of voting machines and election judges can affect

whether first-time offenders are prosecuted for felonies under the criminal justice system,⁹⁰ and where for-profit detention centers will be located,⁹¹ to name a few examples.

Local governments are often overlooked and understudied compared with federal or state governments when it comes to civil rights protections. Local governments contribute to whether we make our society a place where people can thrive economically, politically, and socially, regardless of their race or ethnicity, or whether people of color will face an uphill battle just to live, work, and be educated. Local governments are at the forefront of civil rights issues, and so it is at that level that we should be trying to ensure that minority communities are fairly represented.

Unlike Congress and state legislatures, which can contain many hundreds of legislators, local school boards and city councils are usually comprised of five to fifteen members. Adding even a single minority voice to the deliberations of a small body can help the rest of the members better understand issues from the perspective of the minority community, and that member can raise issues or introduce motions for a vote, without needing to have the support in a legislative committee. Thus, the introduction of one or more people of color to a local council has the potential to make a larger difference at the local level than at the state or congressional level.

A. Descriptive Representation at the Local Level May Increase Descriptive Representation at the National Level

Even if one's ultimate goal is to improve state or federal minority representation, local minority representation is still fundamentally important to that end. Local government representation by minority candidates can "build the bench" of candidates for higher office. Minority representatives at the federal level are more likely than their White peers to ascend through the political ranks by first serving as local elected officials.

An analysis of the background of the House members in the 114th Congress found that while twenty-two percent of White representatives started their political careers as elected representatives in local government, representatives of color were

the length of lines in predominantly Black and white communities. In the 2012 election, Black and Latino voters waited in lines 2 and 1.5 times as long as white voters. Charles Stewart III & Stephen Ansolabehere, *Waiting in Line to Vote*, SUPPORT THE VOTER 11 (July 28, 2013), <https://www.supportthevoter.gov/files/2013/08/Waiting-in-Line-to-Vote-White-Paper-Stewart-Ansolabehere.pdf> (last visited Dec. 2, 2016).

90 The Cook County State's Attorney is an elected position in local government. In March 2011, the Cook County State's Attorney implemented a Deferred Prosecution Program to attempt to divert first time offenders from the justice system. *Deferred Prosecution Program*, TREATMENT ALTERNATIVES FOR SAFE COMMUNITIES, <http://www2.tasc.org/program/deferred-prosecution-program> (last visited Mar. 13, 2015).

91 The Corrections Corporation of America sought to build a for-profit immigration prison in Joliet in 2013. In order for that to go ahead, the Joliet City Council had to approve a special use permit. Ashlee Rezin, *Pressure Against Joliet's Proposed For-Profit Immigrant Detention Center Escalates*, PROGRESS ILL. (May 16, 2013, 7:11 PM), <http://www.progressillinois.com/quick-hits/content/2013/05/16/pressure-against-joliets-proposed-profit-immigrant-detention-center-es>.

much more likely to have started in local government: 29% percent of Asian American representatives, 38% of Black representatives (over 1.5 times as many as white representatives), and 44% of Latino representatives (double the number of white representatives) started their political careers as local government representatives.⁹²

This disparity holds specifically for people of color: there is little difference by gender (twenty-five percent of male and female representatives started in local elected office) and party (twenty-one percent of white Republicans and twenty-four percent of white Democrats started in local elected office).

Therefore, improving local minority representation could create a cadre of trained representatives of color that are ready to go on to state and national office to represent the interests of their communities. In addition, the reluctance of white voters to vote for Black candidates breaks down (even if only to some extent) after experiencing Black leadership.⁹³ Thus, the opportunities for local Black candidates to get elected to higher office, even if the higher offices are not majority-minority communities, improves.

B. Descriptive Representation Improves Substantive Representation at the Local Level

Descriptive representation for people of color at the local level has the potential to significantly improve the lives of communities of color.

At the county level, a minority commissioner can influence whether services and administrative positions will be distributed equitably. For example, in Chilton County, Alabama, during the late 1980s, the county decided which roads got paved and re-paved (as many county boards do). Their system was ad-hoc and resulted in the all-white board of commissioners prioritizing white neighborhoods. Once Bobby Agee, the county's first Black commissioner, was elected in 1988, he was able to implement a systematic and objective way to determine which roads got paved.⁹⁴ As a result, Black communities had their roads paved (and the overall process was more responsive to community needs). The county board also has the power to suggest and appoint administrative personnel. After Bobby Agee was elected, Black representatives were appointed by the county board to administrative board positions.⁹⁵

At the municipal level, descriptive representation for Black Americans has led to an improvement in police and social welfare policies for the Black community. Having a Black mayor is consistently associated with an increase in the number of Black officers on the police force.⁹⁶ A Black mayor also makes it more likely that there

92 All research for this small study was conducted by the author.

93 See HAJNAL, *supra* note 60, at 160–63. (“[B]lack mayoral leadership [can] . . . change white voting behavior, [and] also [] alter white racial attitudes.”).

94 LANI GUINIER, *LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE*, 259–60 (1998).

95 *Id.*

96 See Daniel J. Hopkins & Katherine T. McCabe, *After It's Too Late: Estimating the Policy Impacts of Black Mayoralities in U.S. Cities*, 40 AM. POL. RES. 665, 665–700 (2012); see also Jihong Zhao, Ni He & Nicholas

are police department policies that aim to improve the relationship between police and the over-policed Black communities, such as citizen accountability boards.⁹⁷ Black descriptive representation also leads to better responsiveness of social service agencies to the needs of the Black community, particularly when the program managers and the representatives engage in community networking and learning.⁹⁸

And, at the school board level, school boards that include Latino representatives are more likely to hire Latino school administrators, such as principals and superintendents, who, in turn, hire more Latino teachers. Qualitative⁹⁹ and quantitative¹⁰⁰ studies, including randomized experiments,¹⁰¹ find that the academic achievement of Latinos, as well as non-Latinos, increases when a school has Latino teachers. In addition, a majority of Latinos would prefer for their children to have more Latino teachers.¹⁰²

III. IMPROVING LOCAL MINORITY REPRESENTATION

If we accept that improving minority representation at the local level is a valid goal, then how are we to achieve this improvement? Perhaps everything appears to be able to be changed by litigation or legislative change if one is a lawyer (much like a hammer sees everything as a nail), but I believe that there are great strides to be made through these two methods. The third, complementary, and in many ways a *sine qua non* of legal change, method is to engage in community organizing. That is beyond the scope of my expertise though, so I will leave it to others to comment on the best ways to integrate community organizing into a fully-fledged litigation and legislative advocacy campaign.

A. Litigating over minority vote dilution

The difficulty with using litigation to develop solutions to a complex problem like minority representation is that an impact case will set a precedent based on a unique factual scenario and with a single or limited set of remedies. In the case of minority representation, *Thornburg v. Gingles* was a watershed for minority representation because it set the floor—a base level of representation of people of color in the halls of power—below which the country would not return.¹⁰³

Lovrich, *Predicting the Employment of Minority Officers in U.S. Cities: OLS Fixed-Effect Panel Model Results for African American and Latino Officers for 1993, 1996, and 2000*, 33 J. CRIM. JUST. 377, 377–79 (2005), [http://nuweb.neu.edu/nhe/race and police emp.pdf](http://nuweb.neu.edu/nhe/race%20and%20police%20emp.pdf).

97 See Grace Hall Saltzstein, *Black Mayors and Police Policies*, 51 J. POL. 525, 525–44 (1989).

98 See Belinda Creel Davis, Michelle Livermore & Younghee Lim, *The Extended Reach of Minority Political Power: The Interaction of Descriptive Representation, Managerial Networking, and Race*, 73 J. POL. 494, 497 (2011).

99 David L. Leal, Valerie Martinez-Ebers & Kenneth J. Meier, *The Politics of Latino Education: The Biases of At-Large Elections*, 66 J. POL. 1224, 1229–30 (2004).

100 *Id.* at 1230–31.

101 *Id.* at 1230.

102 *Id.* at 1224.

103 478 U.S. 30 (1986).

Unfortunately, *Gingles* has also come to represent a ceiling. That ceiling prevents the adoption of an election system that would allow for fairer representation for people of color.

The concept of vote dilution was recognized as a constitutional harm in the “one person, one vote” (OPOV) Supreme Court cases of the 1960s.¹⁰⁴ The Court found that an individual’s vote could be diluted if she was in an election district that had a huge disparity in population to another district for election to the same legislature. For example, in *Baker v. Carr*, districts for the state legislature in the urban centers of Tennessee had ten times the number of people as districts in rural areas.¹⁰⁵ This meant that a voter in an urban district had one-tenth the voting power of a voter in a rural area. The court labeled the requirement of rough population equality¹⁰⁶ a OPOV requirement:

[A]ll who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.¹⁰⁷

The OPOV requirement recognizes that an individual’s vote can be diluted by the size of election districts. Minority vote dilution operates in a similar, but more complex way than individual vote dilution, and it describes a group rather than an individual harm.¹⁰⁸ As Pamela S. Karlan explains, “[u]nlike the white suburban plaintiffs in *Reynolds* whose voting strength was diluted because of *where* they lived, the political power of Black citizens is diluted because of *who* they are.”¹⁰⁹

Thus, in 1971, in *Whitcomb v. Chavis*, a group of Black voters in Indiana argued that vote dilution could also occur based on race, rather than geography.¹¹⁰ The plaintiffs argued that by electing multiple legislators in the Marion County area using at-large elections, the Black community was left with “almost no political force

104 See generally *Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

105 *Baker v. Carr*, 369 U.S. 186, 253–267 (1962) (Douglas, J., concurring).

106 The OPOV started as a rough population equality measure, but later was changed to require a population deviation of no more than one person for each congressional district (and at the state legislative and local level, the population requirement only allowed that the largest and smallest districts deviated by no more than 10%). See *Karcher v. Daggett*, 462 U.S. 725, 730–41 (1983) (regarding congressional districts); *Larios v. Cox*, 305 F. Supp. 2d. 1335, 1337 (2004), *aff’d*, 124 S. Ct. 2806 (2004) (citing *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983) (regarding state legislative districts)).

107 *Gray*, 372 U.S. at 379–80.

108 The concept of minority vote dilution was first hinted at in *Fortson v. Dorsey*, 379 U.S. 433 (1965), but not relied upon by the appellees, and so it was only briefly addressed by Justice Brennan writing for the Court. *Id.* at 439 (“It might well be that, designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.”).

109 Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.-C.L. L. REV. 173, 174 (1989).

110 403 U.S. 124 (1971).

or control over legislators because the effect of their vote [was] cancelled out by other contrary interest groups.”¹¹¹ The problem with winner-take-all, at-large elections (those where fifty-one percent of the community can elect one hundred percent of the representatives) is that “a slim majority of voters has the power to deny representation to all others.”¹¹² The Court declined to find that there was in fact a constitutional violation caused by the use of at-large districts in Indiana, but it left open the question of whether, in the right factual scenario, the rights of minority voters might be diluted.

Shortly thereafter, plaintiffs from Texas, in *White v. Regester*, convinced the Supreme Court that there was invidious discrimination in the drawing of the Texas legislative redistricting plan in violation of the Equal Protection Clause of the Fourteenth Amendment.¹¹³ The plaintiffs showed that “the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.”¹¹⁴ The court analyzed a number of practices that prevent political participation by Black voters in Dallas County and Latino voters in Bexar County. These included party slating, poll taxes, cultural barriers, and the use of multi-member districts (MMDs) with at-large, winner-take-all plurality voting.

Another set of plaintiffs tried to build on the theory of minority vote dilution as caused by at-large voting in MMDs from *Regester* to argue that such dilution was occurring in the city of Mobile, Alabama. In *Mobile v. Bolden*, the plaintiffs alleged that the Fourteenth and Fifteenth Amendments, and Section 2 of the VRA, were violated by the City Commission’s election system that elected the three-person Commission at-large, thereby denying the Black population (that constituted 35.4% of the total population) the ability to elect a single candidate.¹¹⁵ The Court held that there was no difference between the Fifteenth Amendment and Section 2 of the VRA, and found that both the Fourteenth and Fifteenth Amendments were not violated because a showing of purposeful discrimination was required for each, and such a purpose was not shown.¹¹⁶

The holding in *Bolden* appeared to make it all but impossible for plaintiffs to overturn redistricting plans or election systems that diluted the minority vote. As Chandler Davidson describes, in the context of an attempted minority vote dilution case in the town of Taylor, Texas (where, despite high Latino turnouts in elections

111 *Id.* at 129.

112 *Fair Representation and the Voting Rights Act: Remedies for Racial Minority Vote Dilution Claims*, FAIRVOTE, <http://www.fairvote.org/assets/Racial-Minority-Representation-Booklet.pdf> (last visited Mar. 14, 2015).

113 412 U.S. 755, 765–66 (1973).

114 *Id.* at 766.

115 446 U.S. 55, 58–59 (1980).

116 *Mobile*, 446 U.S. at 66–68 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971); *Washington v. Davis*, 426 U.S. 229 (1976)).

and Latino candidates running regularly for office between 1967 and 1974, no candidate that was the choice of the minority community was elected):

The decision presented serious problems to the plaintiffs in Taylor, whose at-large system had been established in 1914. The files of the local newspaper only went back to the 1930s, and official city documents relating to the charter revision shed no light on the motives for the change. After much soul searching, the plaintiffs withdrew the suit, at the cost of three years of trial preparation, dashing the minorities lingering hopes that the U.S. Constitution might provide them relief.¹¹⁷

The difficulties *Bolden* created were foremost on the minds of legislators when they amended Section 2 of the VRA in 1982. Congress added paragraph (b) to Section 2 that explained that Section 2(a) could be violated if a “totality of circumstances” test was met, rather than the more stringent purposeful discrimination test of the Fourteenth and Fifteenth Amendments. The totality of the circumstances test means that plaintiffs can present evidence that an election system *in effect* dilutes the minority vote, along with examples of *other types of racial discrimination* that occur in the jurisdiction, rather than having to show that the particular election system was adopted with a racially discriminatory purpose.

The amended Section 2 was used effectively in litigation immediately after 1982, with the seminal case of *Thornburg v. Gingles* in 1986 establishing a three-part test that plaintiffs could meet in order to prove a Section 2 violation even if they could not prove that an election system was instituted for the purpose of discriminating with respect to voting on the basis of race. The *Gingles* test requires the racial, ethnic, or language minority group to prove that it is:

- (1) sufficiently large and geographically compact to constitute a majority in a single-member district;
- (2) politically cohesive; and
- (3) in the absence of special circumstances, that bloc voting by the white majority usually defeats the minority’s preferred candidate.¹¹⁸

The Court will also look at factors identified by the Senate in the 1982 amendment of Section 2. These factors clarify the “totality of circumstances” requirement in Section 2.¹¹⁹ Modern legal strategies to overcome minority vote dilution must still operate within the *Gingles* framework. However, this does not mean that the remedy imposed in *Gingles* (majority-minority SMDs with winner-take-all plurality voting) must be applied wherever a Section 2 violation occurs. In addition, Section 2 litigation is not the only strategy that can be used to remove

117 Chandler Davison, *Minority Vote Dilution: An Overview*, in MINORITY VOTE DILUTION 1, 2 (Chandler Davidson ed., 1984).

118 *Thornburg*, 478 U.S. at 49–51.

119 The list of Senate factors and a brief discussion of how they are used in litigation is available here: *Section 2 of the Voting Rights Act*, U.S. DEPT OF JUST., http://www.justice.gov/crt/about/vot/sec_2/about_sec2.php (last updated Aug. 8, 2015).

minority vote dilution. The remainder of this section compares the *Gingles* remedy to other election systems used in the United States to prevent minority vote dilution.

B. Remedying Minority Vote Dilution: The Problem of Majority-Minority SMDs

The benefits of the *Gingles* remedy are most clear where the fact scenario is similar to that in *Gingles*. That is, where an “at-large scheme consistently, systematically dilutes the voting strength of a geographically isolated racial or ethnic minority.”¹²⁰ There are multiple reasons why this particular scenario is becoming less common, and therefore why systems other than majority-minority SMDs are more likely to protect the voting rights of racial and ethnic minorities. These reasons are discussed below.

i. Decreasing Residential Segregation

America is becoming less residentially segregated.¹²¹

The movement of people of color into relatively white suburban areas causes those suburbs to become more diverse (in that they include people of multiple races and ethnicities) but not necessarily residentially integrated.

Many of the areas that have new populations of color still have almost entirely white representation at the school board or local government level. In many cases this is because at-large districts are used to elect the local board. For example, the Hanover Park, Illinois, town council is all white, yet forty-four percent of the population is Black, Latino, or Asian American.

The consequence of reduced segregation is that majority-minority SMDs cannot be drawn to protect the voting rights of people of color. The *Gingles* remedy only protects geographically compact minority communities. As long as people of color do not make up a majority of new neighborhoods and racially polarized voting persists,¹²² there will be no minority representation on local representative bodies.

ii. Irregular Town Boundaries

Unlike county boundaries, which are mostly square in Illinois, and school board boundaries, which are also fairly smooth, town boundaries are often uneven, winding in and out of communities, along some roads and not others, and very often including unincorporated areas within the town boundary. In order to keep SMDs as contiguous as possible (it may not be possible if the town itself is non-contiguous),

120 Jim Blacksher & Larry Menefee, *At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution*, in MINORITY VOTE DILUTION 203, 233 (Chandler Davidson ed., 1984).

121 Stephanopoulos, *supra* note 3, at 1343–48.

122 Racially polarized voting occurs when one racial or ethnic minority group prefers one candidate or set of candidates and a different racial or ethnic minority group prefers different candidates. For example in Alabama in 2012, white voters voted for President Obama at a rate of about eight percent, while Black voters voted for the President at a rate of around ninety-eight percent. This represents a huge polarity in voting preferences by race.

district boundaries can only be drawn in certain ways, which can prevent the drawing of majority-minority districts.

iii. Lack of Minority Voting Cohesion

There are a number of cities or school boards that have a combined minority population over fifty percent and yet, in at-large elections, all of the elected officials are white. It may be that minority voter turnout is lower than that of white voters. However, it could also be that the minority communities do not vote together to elect candidates of choice, so if the plurality of voters are white and vote cohesively, they will be able to elect all of the candidates for the local board.

iv. Low Turnout or Lack of Candidates

There are some city councils and school boards that are majority-minority or even plurality Black or Latino, and yet they continue to elect an all-white council or board. An explanation for this is lower voter turnout by the minority community. The Joint Center for Political and Economic Studies notes that minority turnout in local elections is worse than white turnout (this does not always hold for federal general elections).¹²³ As long as this situation continues, even with cumulative or ranked choice voting, it will be hard to improve minority representation.

v. The Problem of Prison-Based Gerrymandering

Prison-based gerrymandering occurs because prisoners are counted at their prison addresses by the U.S. Census Bureau, but they cannot actually vote. Thus, if a district is drawn to include a nearby prison, it will consist of far fewer actual eligible voters than a neighboring district (though they have the same total population). The most egregious example in the country is in the city of Anamosa, Iowa, where each City Council ward has around 1,370 people, but one ward has 1,321 prisoners and 58 non-prisoners. This means that 58 people have the voting power of 1,370 for the city council.¹²⁴

In Illinois, the biggest distortion of prison gerrymandering occurs because sixty percent of the prison population comes from Cook County, yet ninety-nine percent of the population is housed and counted in districts outside of Cook County.¹²⁵ This leads to less comparative urban representation and greater rural representation.

vi. Growing Minority Populations

123 KHALILAH BROWN-DEAN, ZOLTAN HAJNAL, CHRISTINA RIVERS & ISMAIL WHITE, JOINT CTR. FOR POL. & ECON. STUD., 50 YEARS OF THE VOTING RIGHTS ACT: THE STATE OF RACE IN POLITICS 12–14, <http://jointcenter.org/sites/default/files/VRA%20report%2C%208.5.15%20%28540%20pm%29%28update%29.pdf> (last visited Mar. 14, 2015).

124 See *Prison Gerrymandering Project*, PRISON POL'Y INITIATIVE, <http://www.prisonersofthecensus.org/impact.html> (last visited Mar. 14, 2001).

125 *Id.*

The Census only occurs every ten years and it is usually accompanied by redistricting (except where at-large elections with winner-take-all voting is used), but throughout the decade people move, citizens turn eighteen, and residents are naturalized. If fair representation systems are used, then the election system can ensure that as soon as a minority community is large enough to elect a candidate of their choice, they can do so. If at-large systems are used, then the jurisdiction does not need to change to SMDs or move district boundaries until it is sued under Section 2 of the VRA or until the next census is released.

vii. Problems with Majority-Minority Districts for the Black Population

Many researchers have found that district-based elections increase Black representation when they replace winner-take-all at-large systems.¹²⁶ Despite this, there are three main criticisms leveled at majority-minority districts for the Black community. First, as a matter of substantive representation, packing Black voters, who are predominantly Democratic, into single districts can create districts in the surrounding areas that are more Republican, resulting in the election of more Republicans to the legislature, which may be less likely to support the interests of the Black community.¹²⁷ Cameron, Epstein, and O'Halloran found in 1996 that the 1990 round of congressional redistricting's focus on using majority-minority districts to ensure that communities of color could elect candidates of choice diluted the minority influence in surrounding areas and led to "an overall decrease in support for minority sponsored legislation."¹²⁸

Cameron, Epstein, and O'Halloran believe that if SMDS are used, there is a tradeoff between increasing the number of minority officeholders and enacting legislation that furthers the interests of the minority community. Their finding held true in the South, where they determined the optimal minority population in any district to be forty-seven percent (rather than over fifty percent as has been imposed

126 See Richard Engstrom & Michael McDonald, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship*, 75 AM. POL. SCI. REV. 344, 344–54 (1981); Richard Engstrom & Michael McDonald, *The Underrepresentation of Blacks on City Councils*, 44 J. POL. 1088, 1089 (1982). See also Theodore Robinson & Thomas Dye, *Reformism and Black Representation on City Councils*, 59 SOC. SCI. Q. 133, 136–37 (1978); Joseph Stewart, Robert England & Kenneth Meier, *Black Representation in Urban School Districts: From School Board to Office Classroom*, 42 W. POL. Q. 287, 291 (1989); ALBERT KARNIG & SUSAN WELCH, BLACK REPRESENTATION AND URBAN POLICY 134–49 (1980); see generally Richard Engstrom & Michael McDonald, *The Effect of At-Large Versus District Elections on Racial Representation in U.S. Municipalities*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 203, 203–25 (G. Bernard & A. Lijphart eds., 1986).

127 See, e.g., Charles Cameron, David Epstein & Sharyn O'Halloran, "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?", 90 AM. POL. SCI. REV. 794, 795 (1996) (finding a tradeoff "between maximizing the number of Black representatives in Congress and maximizing the number of votes in favor of minority-sponsored legislation"); David Epstein et al., *Estimating the Effect of Redistricting on Minority Substantive Representation*, 23 J. L., ECON. & ORG. 499, 505–06 (2007); Christine L. Sharpe & James C. Garand, *Race, Roll Calls, and Redistricting: The Impact of Race-Based Redistricting on Congressional Roll-Call*, 54 POL. RES. Q. 31, 44 (2001).

128 Cameron et al., *supra* note 127, at 794.

by the Courts in Section 2 cases).¹²⁹ Outside of the South, they found that “substantive minority representation is best served by distributing Black voters equally among all districts.”¹³⁰

A second criticism of majority-minority districts, articulated, by Professor Abigail Thernstrom, is that a preoccupation with creating majority Black districts entrenches the racial segregation of minority voters. Thernstrom argues that “minority representation might actually be increased not by raising the number of black officeholders [elected from Black districts] but by increasing the number of officeholders, black or white, who have to appeal to blacks to win.”¹³¹

A version of this argument has been made by Professor Lani Guinier, who argues that “single-member districts may aggravate the isolation of the black representative”¹³² and possibly even lead to Black representatives being viewed as tokens that let the white majority feel that their role in the winning coalition has greater value.¹³³

In addition to opposing the tokenism of minority representation, Guinier highlights that the purpose of the VRA was—and the purpose of civil rights activists should be—minority empowerment, not just minority legislative presence.¹³⁴ She has argued that the current interpretation of the VRA (to protect majority-minority districts seemingly at the expense of all other protections) has “inescapably closed the door’ on the real goal of the civil rights movement, which was to alter the material condition of the lives of America’s subjugated minorities.”¹³⁵ Whether the door is closed is debatable, but the research in *The Color of Representation* shows that remedies other than SMDs will need to be used with more frequency if we are to improve the substantive representation of communities of color.

A third criticism is leveled by the national organization FairVote, which has long argued that one of the main problems with majority-minority districts is that they “require the continuation of some degree of housing segregation that concentrates minority populations within easily drawn boundaries.”¹³⁶ They elaborate:

129 Bartlett v. Strickland, 556 U.S. 1, 17 (2009) (“We find support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration. The rule draws clear lines for courts and legislatures alike. The same cannot be said of a less exacting standard that would mandate crossover districts under § 2.”).

130 Cameron et al., *supra* note 127, at 809.

131 ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 21 (1987); *Voting Rights Trap: The Resegregation of the Political Process*, NEW REPUBLIC, Sept. 1985.

132 GUINIER, *supra* note 35, at 81.

133 *Id.* at 64.

134 *Id.* at 55.

135 *Id.* at 54.

136 Robert Richie, Douglas Amy & Frederick McBride, *New Means for Political Empowerment: Proportional Voting*, POVERTY & RACE RES. ACTION COUNCIL, Nov.–Dec. 2000, at 1, 10, as reprinted in *How Proportional Representation Can Empower Minorities and the Poor*, PROPORTIONAL REPRESENTATION LIBR., <https://www.mtholyoke.edu/acad/polit/damy/articles/empower.htm> (last visited Mar. 14, 2015).

[A SMD system] has been effective for racial minorities and has remedied thousands of minority vote dilution lawsuits and dramatically increased racial minority representation where it has been applied. However, the effectiveness of majority-minority districts as voting rights remedy is dependent upon the geographic concentration of racial minorities. Geographic dispersion can limit majority-minority districts to fewer seats than a given racial minority's share of population. Even where districts provide an effective remedy in the short-term, they may not adequately represent the jurisdiction's diversity after its demography changes. Finally, many racial minority voters will be unable to elect preferred candidates when not living in majority-minority districts.¹³⁷

viii. Problems with Majority-Minority Districts for the Latino Population

SMDs do not increase descriptive representation for Latinos as much as they do for blacks and may actually decrease Latino descriptive representation.

Latinos are not as segregated from whites or from other minority groups as are Blacks.¹³⁸ This means that there are fewer places where it is even possible to draw a Latino majority-minority district. This is one of the major reasons why Latinos are more underrepresented than Blacks. Since the 1980s, Latinos have moved from more-segregated to less-segregated areas, becoming more integrated with both white and Black Americans.¹³⁹

In addition, any attempt to enfranchise minority communities must take into account varying levels of citizenship and political incorporation.¹⁴⁰ Even in communities where there are a significant number of Latinos who are American citizens, they may be still new enough to the country that they lack the social networks and community knowledge to run a successful campaign¹⁴¹ (and the community may be more resistant, especially in local races where candidates often run on a platform of how long they and their families have been in the community). In a city with low levels of citizenship and political incorporation, there may be one viable candidate and just enough Latino citizens across the city to elect that person, with a fair representation electoral system rather than SMDs with winner-take-all plurality voting system providing the only likelihood of that happening.

The scenario of the city with a high number of Latino noncitizens represents a particularly important case for minority representation. In a single-member-district system, each candidate may not have enough Latino citizens to ever be concerned with the interests of Latinos because they do not influence his or her chances for re-election. A system that allowed at least one Latino representative to be elected would then give that population some chance of having a voice.

137 *Fair Representation and the Voting Rights Act: Remedies for Racial Minority Vote Dilution Claims*, *supra* note 112.

138 Paru Shah, *Racing Toward Representation: A Hurdle Model of Latino Incorporation*, 38 AM. POL. RES. 84, 87. (2010).

139 See Stephanopoulos, *supra* note 3.

140 *Id.* at 88–89.

141 *Id.* at 90.

ix. Problems with Majority-Minority Districts for the Asian American Population

SMDs with winner-take-all plurality voting are even more problematic for the Asian American population, because their population is comparatively low throughout the country, making it hard to draw majority Asian American districts in most places.¹⁴² New York City elections provide the clearest example of how SMDs have failed the Asian American population. The use of ranked choice voting in New York City school board elections from 1970 to 1999 led to descriptive representation of Asian Americans, “many with almost exclusive support from Asian American voters.”¹⁴³ This result provided a “stark contrast” with the experiences of Asian American candidates in elections for other legislative bodies representing New York (that do not use ranked choice voting): in the late 1990s, “[e]ven with 800,000 Asian Americans, though there [we]re fifteen Asian American elected officials in the school boards, no Asian ha[d] been elected to the city council, state legislature, or Congress.”¹⁴⁴

C. Remedying Minority Vote Dilution: Fair Representation Systems

Given the myriad of potential problems with using SMDs to improve minority representation, I recommend the use of “fair representation systems” to overcome these boundaries. Fair representation systems used in the United States include cumulative and ranked choice voting (where used with MMDs). Overall, fair representation systems ensure that “a majority cannot control the outcome of every seat up for election. Instead, they ensure that the majority wins the most seats, but guarantee[s] access to representation for those in the minority.”¹⁴⁵

Cumulative voting was used to elect the Illinois House of Representatives for more than a century (1870–1980)¹⁴⁶ and was initially enacted to ensure that the minority party would have representation in a politically polarized state.¹⁴⁷ Cumulative voting is currently used in local elections in Alabama, California, Illinois,

142 California’s 49th state legislative district is the first majority Asian American state legislative district outside of Hawaii. See Daniela Gerson, *California’s First Asian Majority Legislative District*, ALHAMBRA SOURCE (Aug. 17, 2011), <http://www.alhambrasource.org/stories/californias-first-asian-majority-legislative-district>.

143 Magpantay, *supra* note 48, at 739, 773. This history led to the Department of Justice, in 1999, denying preclearance to a state law seeking to replace ranked choice voting for the school boards. Ultimately, school boards were shifted to not being elected at all, which is why ranked choice voting is not used in the city today.

144 *Id.*

145 *Fair Representation and the Voting Rights Act: Remedies for Racial Minority Vote Dilution Claims*, *supra* note 112.

146 *Black Representation Under Cumulative Voting in IL*, FAIRVOTE, <http://archive.fairvote.org/?page=419> (last visited Mar. 14, 2015).

147 *Effectiveness of Fair Representation Voting Systems for Racial Minority Voters*, FAIRVOTE (Jan. 2015), <https://d3n8a8pro7vhmx.cloudfront.net/fairvote/pages/127/attachments/original/1449690096/Fair-Representation-Systems-Voting-Rights.pdf?1449690096>.

New York, South Dakota, and Texas,¹⁴⁸ and ranked choice voting was previously used at the local level in Ohio and New York and is currently used in California, Maine, Minnesota, and Massachusetts.¹⁴⁹ Overall, more than 100 jurisdictions in the United States currently use fair representation voting to elect their representatives.¹⁵⁰

Fair representation systems not only improve many measures of minority representation, but they also lead to improved democratic outcomes generally.

i. Improved Minority Representation

First and foremost, for my purposes, the benefit of fair representation systems is that they allow people of color to elect candidates of their choice, where winner-take-all, at-large systems would, and SMD systems may, prevent them from doing so. As FairVote found, “in a study of 96 elections in 62 jurisdictions with cumulative voting or the single vote, black candidates were elected 96 percent of the time and Latino candidates 70 percent of the time when a black or Latino candidate ran.”¹⁵¹

In New York:

African Americans, [Latinos], and Asian Americans made up 37 to 47 percent of [the] City’s population during the three decades in which it used [ranked choice] voting for its school board elections. The minority groups won 35 percent to 57 percent of these positions, compared to only 5 percent to 25 percent of seats on the city council, which were elected using single-member districts.¹⁵²

During a period when the South elected zero Black representatives to Congress and State legislatures, Illinois’s cumulative voting system meant that at all times from 1894 to 1980 there was at least one Black legislator in the Illinois House (and in most years there were many more than that) despite the Black population in the state averaging roughly fourteen percent throughout that period.¹⁵³

148 Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 835 (2013); *Communities in America Currently Using Proportional Voting*, FAIRVOTE, <http://archive.fairvote.org/?page=2101> (last visited Mar. 14, 2015).

149 *Id.* at 835.

149 *Fair Representation and the Voting Rights Act: Remedies for Racial Minority Vote Dilution Claims*, *supra* note 112. In addition, many corporations in the US (about ten percent of the S&P 500) use cumulative voting to elect their boards, including AON, Toys ‘R’ Us, Walgreen’s, and Hewlett-Packard. *See also Cumulative Voting—A Commonly Used Proportional Representation Method*, FAIRVOTE, <http://archive.fairvote.org/?page=226>.

151 *Effectiveness of Fair Representation Voting Systems for Racial Minority Voters*, *supra* note 147. *See also* David Brockington et al., *Minority Representation Under Cumulative and Limited Voting*, 60 J. OF POL. 1108, 1115 (1998); Steven Hill & Rob Richie, *New Means for Political Empowerment in the Asian Pacific American Community*, 11 HARV. J. ASIAN AM. POL’Y REV. 335, 340 (2001) (citing election of Bobby Agee in Chilton County, AL despite being outspent twenty to one by the highest spending candidate).

152 Stephanopoulos, *supra* note 148, at 849 (citations omitted).

153 *See, e.g.*, Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for Large Cities and Other Urban Places in the United States* 50–51 tbl. 14 (U.S. Census Bureau Population Div., Working Paper No. 76, 2005) (listing statistical population information by demographic for large cities in Illinois from 1840 to 1990); Kathryn M. Harris, *Generations of Pride: African American Timeline, A Selected Chronology*, ILL. HIST. PRESERVATION AGENCY, <https://www.illinois.gov/ihpa/Research/Pages/GenPrideAfAm.aspx> (last visited Nov. 2, 2016) (detailing the chronology of African American presence in Illinois).

Where fair representation systems have been implemented to remedy a Section 2 violation, the system has resulted in communities of color being able to elect their candidates of choice and has improved descriptive representation. This has been shown for the Black, Latino, and Native American communities.¹⁵⁴

Ranked choice voting (RCV) provides additional value for racial and ethnic minorities. Because it creates incentives for candidates to reach out to more voters, it tends to result in less racially polarized campaign tactics and more inclusion for racial minority voters. Even in single-winner, winner-take-all elections, ranked choice voting appears to have an impact. For example, the imposition of ranked choice voting in San Francisco and Oakland led to the first Asian American mayor being elected in San Francisco and to the first Asian American—and first female—mayor being elected in Oakland.¹⁵⁵ In San Francisco, of eighteen offices elected by RCV, sixteen are held by people of color—up from nine when RCV was first used in 2004.¹⁵⁶

The ability of communities of color to elect candidates of their choice in fair representation systems is not limited to groups that are residentially segregated, which, as Nicholas Stephanopoulos has argued, is more equitable because “[s]patially dispersed groups are just as deserving of representation” as segregated ones.¹⁵⁷ This ability also means that all members of a community of color in a jurisdiction can have a say in who is elected to represent that community of color, rather than just those people of color that happen to live in the majority-minority district.

ii. Cross-Racial Coalition Building

As well as improving descriptive representation and allowing communities of color to elect candidates of their choice, fair representation systems have also been shown to foster the construction of cross-racial coalitions among both voters and legislators.¹⁵⁸ This is particularly true for RCV, given that voters have every incentive

154 FairVote’s Amicus Curiae Brief Regarding Proposed Remedial Plans at 17–18, *Montes v. City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014) (No. 12-3108) (citing Richard Engstrom, Cumulative and Limited Voting: Minority Electoral Opportunities and More, 30 ST. LOUIS U. PUB. L. REV. 97, 125 (2010) (describing the first Latino representative)) (citing Robert R. Brischetto & Richard L. Engstrom, *Cumulative Voting and Latino Representation: Exit Surveys in Fifteen Texas Communities*, 78 SOC. SCI. Q. 973, 975 (1997) (describing the first Latino and Native American representatives)) (citing Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 272–73 (describing the first Black representative)).

155 *About the Mayor*, CITY & COUNTY OF S.F., <http://sfmayor.org/about-mayor> (last visited Nov. 18, 2016); Tina Trenkner, *Oakland, Calif. Elects First Female, Asian-American Mayor*, GOVERNING (Mar. 2011), <http://www.governing.com/topics/politics/oakland-california-elects-first-female-asian-american-mayor.html>. *But see* Troy M. Yoshino, *Still Keeping the Faith: Asian Pacific Americans, Ballot Initiatives, and the Lessons of Negotiated Rulemaking*, 6 ASIAN AM. L. J. 1, 19–20, 22 (1999). Yoshino discussing the fact that in many places the Asian American community will be too small to reach the threshold of exclusion. This is less relevant in Illinois because there are local jurisdictions with an Asian American population much greater than the three percent he writes of.

156 Richard DeLeon & Arend Lijphart, *In Defense of Ranked Choice Voting*, SFGATE (Jan. 22, 2013, 6:49 PM), <http://www.sfgate.com/opinion/openforum/article/In-defense-of-ranked-choice-voting-4215299.php>.

157 Stephanopoulos, *supra* note 148, at 847, n.3.

158 FairVote’s Amicus Curiae Brief, *supra* note 154, at 16 (citing Steven J. Mulroy, *Alternative Ways Out: A Remedial Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L.

to rank candidates outside their own racial group (in addition to selecting their preferred candidate in the number one position). Even when voters in a racial minority are below the threshold of exclusion necessary to elect their most preferred candidate, their second choice vote will be sought after by multiple candidates, possibly from a variety of racial, ethnic, and political backgrounds.

iii. Increased Representation for All Political Minorities

Fair representation systems show huge benefits to racial minorities, but they may also “open up the political process for politically cohesive minorities, not just racial minorities.”¹⁵⁹ In addition to the minority political party being able to gain representation, other demographic minorities can also have a better chance at being elected. For example, alternative election systems can lead to greater diversity by gender, age, religion, sexuality, or country of origin, depending on the communities of interest in the jurisdiction.

iv. Reduced Partisan Polarization

Cumulative voting in Illinois historically increased “the variance of the policy views held by both Democratic and Republican members of the state house.”¹⁶⁰ This holds not just historically for Illinois but has also been suggested as a way to reduce polarization across the board in modern America: “[i]f one’s greatest concern in a . . . legislature is partisan gridlock, multi-member districts could potentially ease the partisan feuding by making each party more ideologically diverse.”¹⁶¹

v. Improved civic engagement

Fair representation systems can lead to improved civic engagement by communities of color. For example, a study of cumulative voting “found that their elections feature higher turnout, more active campaigning by candidates, greater mobilization by outside groups, and more contested races than either single-member districts or at-large regimes” and “voters worldwide in preferential systems [for example, ranked choice voting] exhibit greater satisfaction with democracy and are more likely to believe their elections are conducted fairly.”¹⁶²

REV. 1867, 1903 (1999)) (citing Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 297 (1995)).

159 GUINIER, *supra* note 35, at 71.

160 Stephanopoulos, *supra* note 148, at 855.

161 *Id.* (quoting Greg D. Adams, *Legislative Effects of Single-Member Vs. Multi-Member Districts*, 40 AM. J. POL. SCI. 129, 141–42 (1996); *see also* Gary W. Cox, *Centripetal and Centrifugal Incentives in Electoral Systems*, 34 AM. J. POL. SCI. 903, 927 (1990) (“In multimember districts, cumulation promotes a dispersion of competitors across the ideological spectrum.”).

162 Stephanopoulos, *supra* note 148, at 851–52.

vi. Removal of Race Conscious Districting

While many racial justice advocates do not accept that redistricting should avoid being race conscious, there are skeptics in the community and on the Supreme Court¹⁶³ of an over-zealous focus on race in redistricting¹⁶⁴ and in remedying past discrimination generally.¹⁶⁵ For these critics, fair representation systems may be more acceptable than SMD systems because they “do not compel any consideration of race in their design or operation. They promise levels of minority representation comparable to those produced by Section 2, but without any of the ‘dividing’ and ‘segregating’ that are sometimes linked to the provision.”¹⁶⁶

IV. APPLYING THE THEORY: THREE CASE STUDIES

Armed with the knowledge that I could help my community by improving minority representation, in particular through the use of fair representation systems, I set out to find communities to work with on these important issues.

The overwhelming lesson from these efforts was that creating change at the local level is tough but possible. Some of the constraints include that there are limited resources to support local organizing efforts; the central authorities are powerful and able to control, or even manipulate, the ballot initiative process, and litigation is costly and time consuming. In this section, I present three stories from communities that I have worked with on minority representation issues. None can be considered a complete success, but all show that there is some hope for positive change if attorneys and community members work hard together toward common goals.

A. Joliet...The Dice Were Loaded from the Start

Joliet is the fourth largest city in Illinois, with a population of almost one hundred and fifty thousand people.¹⁶⁷ The heart of Joliet is about an hour’s train ride southwest of downtown Chicago. Joliet has seen a large increase in its minority population from 1990 to 2010. As of the 2010 Census, Joliet was approximately fifty-three percent white, twenty-eight percent Latino, sixteen percent Black, and two percent Asian American.¹⁶⁸ It had eight council members, of which two were Black,

163 See *Parents Involved in Cmty. Sch. v. Seattle Schs. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

164 See *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Reno*, 509 U.S. 630 (1993).

165 *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013).

166 *Holder v. Hall*, 512 U.S. 874, 908–12 (1994); Stephanopoulos, *supra* note 148, at 849.

167 *Quick Facts: Joliet City, Illinois*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/1738570> (last visited Nov. 18, 2016).

168 *Voting Age Population by Citizenship and Race (CVAP)*, U.S. CENSUS BUREAU, https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html (last updated Feb. 10, 2016) (All numbers reported in this section are calculated using the following Census demographics: “white:” non-Hispanic white; “Latino:” Hispanic or Latino origin; “Black:” non-Hispanic Black plus non-Hispanic Black+White; “Asian American:” non-Hispanic Asian plus non-Hispanic

and six were non-Hispanic white. The city council was chosen from five single-member districts (of which two were majority-minority) and three council members were elected at-large. I have been privileged to work with the Concerned Citizens of Joliet (CCJ) and Jorge Sanchez of the Mexican American Legal Defense and Educational Fund. Jorge and I have attended multiple local meetings, discussions, education sessions, church events, and fairs to discuss redistricting with the local community. By 2014, Joliet was ready for change.

The CCJ is a multi-generational, multi-ethnic, multi-religious organization that focuses on helping all the people of Joliet—not just the wealthy elites. CCJ worked effectively as a diverse coalition to prevent a for-profit immigration detention prison from being erected in Joliet. High from their victory on this important issue, the group set out to tackle a new issue. The CCJ decided that they could not sufficiently hold their city council accountable for its policy positions and suspected that the redistricting system was to blame.

CCJ sensed that the redistricting system was unfair, with almost all of the city council members living in the tiny (and comparatively wealthy) “Cathedral District”, leaving the south, east, and west sides all without a council member close to them. This resulted, they believed, in an unequal distribution of resources (trash and snow are quickly cleaned up in the center of town, but left for days on the outskirts; the center of town has its parks upgraded while the edge of town has chain link fences and broken playground equipment); and there was a lack of awareness of the concerns of the outlying areas, in particular those that pertain to the Black and Latino communities.

The CCJ developed a campaign “Joliet for 8 districts,” seeking to place an initiative on the ballot asking the city to vote to have eight single-member districts. In 2016, the CCJ submitted their signatures for this proposition for the third time, and for a third time were blocked from the ballot. There have been a series of roadblocks to their community action, well beyond the usual struggles of a meagerly funded volunteer group seeking to create change.

One initial challenge I faced as a practitioner was that the CCJ had already decided that they wanted eight SMDs. I had wanted to articulate the benefits of ranked choice voting and MMDs (at least for the three already at-large seats), but the community found that option to be foreign to its experiences, and the community had already decided that having council members be geographically spread across the town was of prime importance to them. This experience led me to refine the ways I present ranked choice voting discussions to community groups and helped me to understand that there is more to representation than just descriptive and substantive issues—spatial patterns (of communities and candidates) are intertwined with our beliefs about effective representation.

Asian+White. Other races and ethnicities make up the remainder of the population, but are not reported in every case. American Community Survey 2010–14).

i. The Ballot Initiative Strategy

To place an initiative on the ballot in Illinois, a home rule county,¹⁶⁹ a group must gather the number of signatures equal to eight percent of the vote in that jurisdiction for governor in the most recent election. In 2014, when the CCJ first gathered signatures, the local authorities were not able to determine how many signatures they actually required because the gubernatorial vote is collected at the precinct and county level, and the city crosses two counties and splits some twenty precincts.

A local citizen—with connections to the incumbent council members—challenged the signatures gathered by the CCJ in 2014, resulting in the challenger, the CCJ (and Jorge and I with them), and the authorities holding a week of hearings and signature review sessions to determine whether the CCJ had met the statutory signature requirement. The most farcical, and quite possibly unconstitutional, aspect of the whole week was that the local review board (staffed, by Illinois statute, by the mayor, a current city council member, and the city attorney)¹⁷⁰ was informed that we would not be told how many signatures needed to be gathered until the number of signatures had been counted. Somewhat unsurprisingly, it turned out, a week later, that the number of signatures needed was just a few hundred more than those that had been validated. In addition to this, another questionable legal decision was made by the city council member on the local review board: he refused to recuse himself despite the fact he was elected from one of the three at-large positions and therefore subject to be removed if the ballot initiative went ahead and was approved.

Aside from the review board process, the room where signatures were validated quickly degenerated into a power play, as the county staff members claimed that people who had moved away from the address where they signed the petition could not be counted as a valid signature. The Illinois statutes are unclear on this point, so it was left to the local review board to decide how to interpret the law, resulting—again unsurprisingly—with those signatures being considered invalid.

One of the volunteer signature gatherers with the CCJ had toured a local short-term housing facility, Evergreen Terrace, to gather hundreds of signatures. Another CCJ member was a pastor to this community, and the residents there represent exactly the people that CCJ was trying to enfranchise (poor, predominantly minority, often sick and/or struggling with homelessness). Many of these residents of Evergreen Terrace had moved since signing the petition (the signature gathering had been going for around nine months by the time the signatures were reviewed). The review board decision meant that hundreds of signatures from these eligible voters were invalidated.

At the lowest ebb in the signature review week, I sat with one of the Latino leaders of the CCJ as she listened to the staff laugh at the “hard to pronounce names” of her neighbors, get confused as to whether someone was a duplicate signatory

169 ILL. CONST. art. VII § 6(a) (All towns over 25,000 are automatically home rule counties.).

170 10 ILCS § 10-9(3).

because the Latino “names were so similar,” and joke about how they had not bothered to learn Spanish in school.

After this unfair and, frankly, humiliating process, the CCJ pulled themselves back together to try to put the issue on the next ballot, in the local elections for 2015, but with the bulk of signature gathering occurring during the freezing winter months, they were unable to reach the target number of signatures.

In August 2016, the CCJ again submitted nearly four thousand signatures. They still did not know exactly how many signatures were needed because one of the two counties that Joliet sits in refused to respond to multiple letters requesting the target number. The estimate in the previous hearing was around 2,800.

The current mayor of Joliet was previously a council member and he had signed the 2014 petition to place the question on the ballot—he believed the people should get to vote on the question. Somewhat unsurprisingly, the petition was challenged (this time by the county clerk herself), and despite excellent pro bono representation from a large Chicago firm, the CCJ again lost their bid to place the question on the ballot.

In response to the outcry over the third petition being rejected, the Mayor appointed a Latina to the City Council. The person has no connection to CCJ or the communities they represent, and so it remains to be seen whether this will be a step forward or backward for minority representation in Joliet.

ii. Litigation

The demographics have changed in Joliet since 2010. In particular, many of the Latino community has turned 18 or gained citizenship, such that even in 2015, there was a large enough Latino and Black citizen voting age population that if they continued to vote together to elect candidates of their choice, three majority-minority districts could be drawn. There is no doubt that with updated census data, this figure will rise.

It is likely that the CCJ will have a viable Section 2 case if the Latina that was appointed to the Council is not elected to her position (and in particular if she is not elected with evidence of racially polarized voting), but with VRA litigation being so complex, expensive, and time intensive, it is unlikely that the VRA will provide a change for the CCJ members before the next census is taken. The CCJ will need to get the resources for political science experts, discovery, and court fees to show that if the city were divided into eight districts, three would be majority-minority (without race predominating in the drawing of the districts).

It is quite possible that by the time the next full census results are released in 2021, Joliet will be majority-minority—perhaps even using the Citizen Voting Age Population (CVAP). This could result in a bizarre reversal of incentives by the majority white council members. For white voters to be represented at close to proportional level in a majority-minority town, the city council would favor removing the at-large seats. If it came to this, at least the CCJ would have their preference for council members who live closer to their constituents realized, even if it takes nefarious reasoning to get there.

B. An Accidental Win in Blue Island

Blue Island is a small city immediately south of the border of Chicago. It has a population of just over twenty-three thousand, of which twenty-one percent are white, forty-seven percent are Latino, and thirty percent are Black.¹⁷¹ When CVAP is used, the white population grows to twenty-nine percent, the Black population grows to thirty-eight percent, while the Latino population drops to just thirty percent. Blue Island, like Chicago to its north, is still fairly segregated, particularly for the Black community.

i. Pushing for Public Hearings

In 2015, when we¹⁷² met with the Citizens in Action Serving All (CASA) group in Blue Island, there were seven two-member districts constituting their council. Of the fourteen members, two were Latino and two Black. There was no majority Latino district and only two majority Black districts.

We spent a few weekends sitting down with local community members, showing them the mapping capabilities of Maptitude for Redistricting and discussing where they would prefer the district lines to be drawn. We had to consciously remind the excited rooms that it was not likely that we would be able to get the Council to adopt the plan we wanted, but that knowing what the districts are and could be would be helpful in itself.

As we suspected, we were able to draw a plan using the most recent CVAP data, with three majority Black districts and one majority Latino district. We then needed a way to convince the council (or a court) to adopt a new plan. Blue Island does not have home rule, so it was not possible to use a ballot initiative to create change. Strangely, Blue Island had not redrawn its city council districts since 1996, and as two census counts had come and gone, the districts were in violation of the one person, one vote (OPOV) requirement of the federal Constitution.¹⁷³ We were able to use this as leverage to ask the council to hold public hearings to redraw the seven districts, and the CASA group advocated for the plan with four majority-minority districts.

After two months of Council hearings and public hearings of the Council's Redistricting Subcommittee to discuss possible district plans, the City Council surprised no one by voting to adopt its own district plan. The major difference between the CASA plan and the city council plan was that the latter protected incumbents, while the former was drawn without regard for current council members. CASA opposed the protection of incumbents at the public hearings, but the council opted to protect its self-interest in its vote.

171 *Voting Age Population by Citizenship and Race (CVAP)*, *supra* note 168. All numbers are reported for non-Hispanic white, Latino, non-Hispanic Black plus non-Hispanic Black+White. Other races and ethnicities make up the remainder of the population, but are not reported here. American Community Survey 2010–2014

https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html.

172 My colleague Annabelle Harless and I worked with CASA together throughout the work in Blue Island.

173 *Avery v. Midland Cty.*, 390 U.S. 474 (1968).

By good fortune (and the not-unexpected increase in the proportion of Blue Island that is Black or Latino), the new CVAP data (the 2011–15 estimates) was released by the Census Bureau a few days before the council's final vote. CASA was able to tell the council before their vote that even though they disliked that the plan protected incumbents, they were pleased that it too had three majority Black and one majority Latino district. The next election in Blue Island will now include four of seven districts with a majority of people of color. Hopefully the communities of color can respond to this good news by electing their preferred candidates across the city.

ii. Online Public Redistricting

Another notable aspect of our work in Blue Island was that we decided to use a free trial of a service called iRedistrict,¹⁷⁴ to make map drawing available to the community online. iRedistrict's main power as a piece of software is its ability to draw random simulations of districts. We were using it for a slightly different purpose: to allow the public to make changes to the old redistricting plan, or the CASA plan, or to create their own new plan, and to see the demographic effects of such changes in real time.

In addition to using iRedistrict, we placed Keyhole Markup Language (KMZ) files and descriptions of data onto the Google Maps Engine, and thereby made the statistics (and boundaries) of current, and various proposed plans, available to anyone with a network connection (we also displayed these tools at the Redistricting Committee Public Hearings).

The community was reluctant to embrace iRedistrict, likely because the editing aspect of the software had sufficient bugs as to make the map drawing process quite frustrating for the casual user. In total, we only had seven users sign up to use the online map drawing software.

To our surprise though, the Google Maps Engine districts and statistics were viewed over one thousand times and used by local media in their reporting of the case. Each public hearing had around thirty, and at times more than fifty, people in attendance (largely thanks to letter box pamphlets distributed by Mark and Kathy Kuehner of CASA). I believe we showed that there is an interest, even in a small community considering very local issues, in using online tools to better understand local government, and it is likely that this interest can be harnessed and enlarged through online organizing tools.

Overall, Blue Island was a success to the extent that CASA and the community will now have districts that are constitutional and will have the possibility of electing candidates of choice of the minority community to a majority of the council seats. Blue Island also showed the utility of online redistricting tools in community organizing

174 See *iRedistrict®: Smart Redistricting Software for Territory Mapping with Powerful Optimization*, ZILLION INFO, <http://zillioninfo.com/product/iRedistrict> (last visited Nov. 18, 2016) (iRedistrict® is an award-winning redistricting software with powerful optimization algorithms, intuitive user controls, easy editing interface, and customizable reporting. It received two National Science Foundation (NSF) SBIR Awards in 2013 and 2014.).

around this issue. We were not able to prevent council members from focusing on their own self-interest in their vote for new districts, but very few jurisdictions are ever able to achieve such a feat.

C. Crete-Monee School Board Ten Years On

In our research into local redistricting in Illinois, we tried to find success stories—places where minority representation had increased and the community was in a better place because of it. We reviewed all the prior Section 2 cases from Illinois and thought that the Crete-Monee School District case looked particularly promising.

Crete-Monee School District had been sued in the late 1980s¹⁷⁵ over a possible Section 2 violation. By the mid-1990s, the case eventually resulted in a consent decree, and as a result the board started electing Black representatives to the school board.¹⁷⁶ As of March 2017, the school board has three Black and four white members, and the president is an African American.¹⁷⁷

We set up a meeting with Dr. Hall, the president of the school board, to find out all the ways that the diverse board was helping the community. Dr. Hall agreed that the diverse board was better able to ensure racial equity in the school policies and procedures, and the district report card suggests the district is at or just below average on most statewide metrics,¹⁷⁸ but Dr. Hall lamented that the diverse board had not resulted in better racial relations in the community. In 2015, the district successfully defended against a challenge to part of the consent decree, and not-at-all subtle racial overtones were used in local school board election campaigns (one campaign sought to “change the face” of the school board).

V. THE ROAD AHEAD

As long as there are communities willing to push for change to local redistricting practices, we practitioners must make ourselves aware of the best possible strategies and tactics we can use to help communities seek better outcomes.

A. Federal Litigation

Federal Section 2 litigation can be pursued to remedy the most egregious cases of minority vote dilution, where the minority population in question is geographically concentrated.

175 Palmer v. Bd. of Educ., 46 F.3d 682, 683 (7th Cir. 1995).

176 Consent Decree – Agreed Order 08/13/1998, CRETE-MONEE SCHOOL DISTRICT 201-U, <http://www.cm201u.org/index.aspx?nid=4146>.

177 See *Crete-Monee School District 201-U Board of Education*, CRETE-MONEE SCHOOL DISTRICT 201-U, <http://www.cm201u.org/index.aspx?NID=139> (last visited March 6, 2017).

178 See, e.g., *Crete-Monee CUSD 201 U*, ILL. REPORT CARD (2015–2016), <http://illinoisreportcard.com/District.aspx?districtId=56099201U26>.

B. Section 2 Remedies

A jurisdiction found to violate Section 2 is able to choose how it will remedy the violation¹⁷⁹ and, with the approval of the court, can then implement the new system. In many cases, jurisdictions choose to adopt SMDs, but not in every case. Recently, a defendant in Port Chester, New York, was able to implement cumulative voting to remedy a Section 2 violation, over the objection of the plaintiff.¹⁸⁰ Many jurisdictions in Alabama that were forced to change from at-large elections after the long running *Dillard* litigation chose to adopt cumulative or single voting in the 1980s and 1990s.¹⁸¹

Thus far, no jurisdiction has chosen to adopt ranked choice voting in response to a Section 2 violation. However, it was requested (and approved by the court) as a remedy to a potential Military and Overseas Voter Empowerment Act (MOVE Act) violation in Alabama in 2013,¹⁸² and it was used for overseas voters in a similar way in four additional states in 2014 (Arkansas, Louisiana, Mississippi, and South Carolina).¹⁸³

Pam Karlan has argued since 1989 that Section 2 remedies can be innovative and non-traditional.¹⁸⁴ She explains:

Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies . . . Congress squarely stated that a court faced with a violation of Section 2 must 'exercise its traditional equitable powers so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.' A court faced with a violation 'cannot authorize a remedy . . . that will not with certitude completely remedy the Section 2 violation.'¹⁸⁵

Courts have rejected remedies that have been proposed by defendants and explained how options provided by the plaintiff will remedy the section violation better,¹⁸⁶ but ultimately the defendant is able to determine the remedy for a Section 2 violation. The remedies in Alabama included not only cumulative voting but also an increase in the number of commissioners from four to seven and the institution of a system whereby the commission chairmanship would rotate between commissioners,

179 Harper v. City of Chicago Heights, 223 F.3d 593, 599–600 (7th Cir. 2000).

180 United States v. Vill. of Port Chester, 704 F. Supp. 2d 411, 448–49 (S.D.N.Y. 2010).

181 Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 263–66 (1995).

182 United States v. Alabama, 778 F.3d 926 (11th Cir. 2015).

183 Dania N. Korkor, *Overseas Voters from 5 States to Use Ranked Choice Voting Ballots in 2014 Congressional Election*, FAIRVOTE BLOG (Apr. 17, 2014), <http://www.fairvote.org/research-and-analysis/blog/overseas-voters-from-5-states-to-use-ranked-choice-voting-ballots-in-2014-congressional-election/>.

184 Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.- C.L. L. REV. 173, 218–19 (1989).

185 *Id.* at 219.

186 See *Dillard v. Crenshaw Cty.*, 831 F.2d 246, 250–253 (11th Cir. 1987).

allowing a Black commissioner to occasionally be chairman, if one had been elected.¹⁸⁷ These provisions were implemented upon the recommendation of a “special master,” a magistrate with the federal court. The Supreme Court’s finding in *Holder v. Hall* has now limited the ability of a court to impose a remedy requiring an increase in the number of districts in an election jurisdiction in response to a Section 2 violation,¹⁸⁸ but there has been no limitation on the type of election system that can be used to remedy a Section 2 violation.

The most promising avenue to use to argue for fair representation systems comes from the myriad of cases that have dealt with the question of imposing a remedy to a statewide redistricting violation. In these cases, defendants have argued that particular proposed remedial plans do not fully remedy the constitutional or statutory error. The remedial phase of redistricting cases is within the court’s equitable jurisdiction, and since 1972 the Supreme Court has recognized that the “scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”¹⁸⁹ Though broad, “[t]he remedial powers of an equity court . . . are not unlimited.”¹⁹⁰ It is the court’s duty to navigate between seeking a remedy to an unconstitutional redistricting plan and minimizing the disturbance of legitimate state policies.¹⁹¹

There are cases where courts have explicitly overruled the imposition of remedies by the legislature, and these cases should be used to push for fair representation remedies. In one case, the reason the Court chose to draw its own plan was because the Court found that “[i]n its record of doggedly clinging to an obviously unconstitutional plan, the Legislature has left us no basis for believing that, given yet another chance, it would produce a constitutional plan.”¹⁹² In that case, the Court explained that it could not “turn a blind eye on the record of the Legislature.”¹⁹³

In addition to the difficulties at the remedies phase, additional difficulties of federal Section 2 litigation include:¹⁹⁴

- “[v]oting rights suits are actually among the most time- and labor-intensive of all actions brought before the federal courts;”¹⁹⁵
- attorneys’ fees do not necessarily follow from a victory and the cost of litigating a Section 2 case is extremely high; and

187 Dillard v. Chilton Cty. Comm’n, 495 F.3d 1324, 1327 (11th Cir. 2007).

188 Holder v. Hall, 512 U.S. 874 (1994).

189 Sixty-Seventh Minn. State Senate v. Beens, 406 U.S. 187, 191 (1972) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)).

190 Id. (citing Whitcomb v. Chavis, 403 U.S. 124, 199 (1971)).

191 Id. at 202.

192 Hays v. State of La., 936 F. Supp. 360, 372 (W.D. La. 1996).

193 Id.

194 See Paige Epstein, *Addressing Minority Vote Dilution Through State Voting Rights Acts* (U. Chi. Pub. Law & Legal Theory, Working Paper No. 474, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2422915; see also Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55 (2013).

195 Stephanopoulos, *supra* note 148, at 850.

- the defendant is allowed to choose how to remedy a violation and so can implement a new election system that meets a bare minimum requirement of representation of the minority population.

C. State Voting Rights Acts

Given the potential difficulties associated with federal Section 2 litigation, implementing a state voting rights act (and then suing in state courts) may be a better alternative in some states.

California has instituted a remedy to alleviate some of the problems of Section 2 litigation by enacting a California Voting Rights Act (CVRA) that makes it cheaper and easier to prove that a local government's election system impermissibly dilutes the votes of the minority community. The CVRA does not require fair representation remedies, but such systems could be imposed as a remedy in future state acts.¹⁹⁶

An additional benefit of developing a state level jurisprudence on minority vote dilution is that it can fill the gaps left in the current Section 2 jurisprudence. For example, the *Gingles* criteria for Section 2 liability are based on the assumption that SMDs are the appropriate benchmark for minority vote dilution when, in fact, the SMD requirement effectively overlooks the dilution of non-compact minority populations. As a result, a place where a crossover district can be drawn (districts where a racial minority votes as a bloc with a small amount of support from the white majority, resulting in the candidate of choice of the racial minority being elected) will not establish liability under Section 2 and so cannot be required by federal law.

State Voting Rights Acts can be tailored to local needs, but in all cases if they include provisions that explicitly allow for fair representation systems to be imposed in response to a violation, and if they make the proving of a violation less burdensome than the federal VRA, then they will be a useful tool in the fight for improved minority representation in local government.

CONCLUSION

Striving for fair representation systems in local government is an important way to promote minority representation, and thereby fulfill the promise of our democracy. I encourage all practitioners to use the ideas and arguments in this paper to improve local government across the country.

196 For example, Santa Clarita chose to adopt cumulative voting as a settlement to a CVRA lawsuit. Drew Spencer, "California City of 180,000 to Provide Cumulative Voting Rights" FairVote Press Release (March 12, 2014), [http://www.fairvote.org/newsletters-media/e-newsletters/california-city-of-180000-to-provide-cumulative-voting-rights-/](http://www.fairvote.org/newsletters-media/e-newsletters/california-city-of-180000-to-provide-cumulative-voting-rights/) (last visited March 15, 2015). Note, though, that jurisdictions found liable under Section 2 VRA can also choose to adopt cumulative voting, but they cannot be required to do so.