IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, ROGER ANCLAM, EMILY BUNTING, MARY LYNNE DONOHUE, HELEN HARRIS, WAYNE JENSEN, WENDY SUE JOHNSON, JANET MITCHELL, ALLISON SEATON, JAMES SEATON, JEROME WALLACE, and DONALD WINTER, Plaintiffs, v. GERALD C. NICHOL, THOMAS BARLAND, JOHN FRANKE, HAROLD V. FROEHLICH, KEVIN J. KENNEDY, ELSA LAMELAS, and TIMOTHY VOCKE, Defendants.	)	No. 15-cv-421-bbc

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DECLARATION OF PETER GUYON EARLE

I, Peter Guyon Earle, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am one the attorneys representing Plaintiffs in the above captioned action. I make this declaration based upon my personal knowledge and in support of the Plaintiffs' Opposition to the Defendants' Motion for Summary Judgment.

2. Attached as Exhibit A is a true and correct copy of the article Nicholas O. Stephanopoulos *Our Electoral Exceptionalism*, 80 U. Chi. L. Rev. 769 (2013).

3. Attached as Exhibit B is a true and correct copy of the article Ellen D. Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act*, 39 U. Mich. J.L. Reform 643 (2006).

4. Attached as Exhibit C is a true and correct copy of the article Jason Stein & Patrick Marley, *GOP Redistricting Maps Make Dramatic Changes*, Milwaukee Journal-Sentinel, July 8, 2011.

5. Attached as Exhibit D is a true and correct copy of the article Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593 (2002).

6. Attached as Exhibit E is a true and correct copy of the article Richard H. Pildes, *The Theory of Political Competition*, 85 Va. L. Rev. 1605 (1999).

7. Attached as Exhibit F is a true and correct copy of page 119 of Jason Stein & Patrick Marley, *More Than They Bargained For: Scott Walker, Unions, and the Fight for Wisconsin* (2013).

8. Attached as Exhibit G is a true and correct copy of a table relied on by defense expert Sean Trende to produce his expert report, called "dataset2.csv."

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 22nd day of January, 2016.

/s/ Peter Earle

PETER G. EARLE

Our Electoral Exceptionalism

Nicholas O. Stephanopoulos†

Election law suffers from a comparative blind spot. Scholars in the field have devoted almost no attention to how other countries organize their electoral systems, let alone to the lessons that can be drawn from foreign experiences. This Article begins to fill this gap by carrying out the first systematic analysis of redistricting practices around the world. The Article initially separates district design into its three constituent components: institutions, criteria, and minority representation. For each component, the Article then describes the approaches used in America and abroad, introduces a new conceptual framework for classifying different policies, and challenges the exceptional American model.

First, redistricting institutions can be categorized based on their levels of politicization and judicialization. The United States is an outlier along both dimensions because it relies on the elected branches rather than on independent commissions and because its courts are extraordinarily active. Unfortunately, the American approach is linked to higher partisan bias, lower electoral responsiveness, and reduced public confidence in the electoral system.

Second, redistricting criteria can be assessed based on whether they tend to make districts more heterogeneous or homogeneous. Most of the usual American criteria (such as equal population, compliance with the Voting Rights Act, and the pursuit of political advantage) are diversifying. In contrast, almost all foreign requirements (such as respect for political subdivisions, respect for communities of interest, and attention to geographic features) are homogenizing. Homogenizing requirements are generally preferable because they give rise to higher voter participation, more effective representation, and lower legislative polarization.

Lastly, models of minority representation can be classified based on the geographic concentration of the groups they benefit and the explicitness of the means they use to allocate legislative influence. Once again, the United States is nearly unique in its reliance on implicit mechanisms that only assist concentrated groups. Implicit mechanisms that also assist diffuse groups—in particular, multimember districts with limited, cumulative, or preferential voting

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I am grateful to all of the people whose helpful comments have contributed to this project—and taught me so much about electoral practices around the world. Their ranks include Daniel Abebe, Michel Balinski, David Butler, Bruce Cain, Ray Christensen, John Courtney, Rosalind Dixon, Christopher Elmendorf, Joey Fishkin, James Gardner, Andrew Geddis, Tom Ginsburg, Bernard Grofman, Rick Hasen, Aziz Huq, Ron Johnston, Pamela Karlan, Arend Lijphart, Iain McLean, Michael Murphy, Graeme Orr, Richard Pildes, Eric Posner, Sai Prakash, David Schleicher, David Strauss, and Mark Tushnet. My thanks also to the workshop participants at the American Society of Comparative Law's annual conference, Columbia Law School, the UC Irvine Symposium on Election Law, and The University of Chicago, where I presented earlier versions of the Article.

rules—are typically superior because they result in higher levels of minority representation at a fraction of the social and legal cost.

INTRODUCTION

In July 2011, Texas's Republican governor signed into law the congressional redistricting plan that previously had been

passed by the Republican-dominated legislature.[1] In a state in which President Barack Obama captured 44 percent of the vote in 2008, the plan was expected to produce twenty-six Republican-leaning districts and ten Democratic-leaning districts.[2] The plan also had to comply with just a handful of legal criteria. Its districts had to have the same population, the predominant motive for their formation could not be racial, and they could not violate either of the Voting Rights Act's[3] (VRA) key provisions.[4]

Both before and after the plan's passage, litigation inundated courthouses in Texas and Washington, DC. More than two dozen lawsuits were filed, mostly by aggrieved Democrats and minority groups, alleging an array of constitutional and statutory infractions.[5] At the urging of the Department of Justice, one district court, in the District of Columbia, enjoined the plan from going into effect.[6] A different district court, in San Antonio, designed the districts that were actually used in the 2012 elections—though only after the panel's first effort was invalidated by the Supreme Court.[7]

Texas's experience in the 2010 cycle exemplifies all three elements of what I call the "American model" of redistricting. First, with respect to institutions, the elected branches of the state government wield the power to draw district lines—and may exercise this authority on any basis, including political advantage. However, the elected branches' decisions are then subject to rigorous scrutiny by the courts. Second, with respect to

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1 See *Texas Redistricting 2011* (Texas Legislative Counsel), online at http://www.tlc.state.tx.us/redist/pdf/Redistricting%20101_web.pdf (visited May 11, 2013).

2 See Lorraine C. Miller, *Statistics of the Presidential and Congressional Election of November 4, 2008* 58 (Clerk of the House of Representatives July 2009), online at http://artandhistory.house.gov/congress/111/2008election.pdf (visited May 11, 2013); Ross Ramsey, *Updated: Perry Adds Redistricting to Agenda*, Texas Weekly (The Texas Tribune May 31, 2011), online at http://www.texastribune.org/texas-redistricting/redistricting/updated-perry-adds-redistricting-to-agenda (visited May 11, 2013).

3 Voting Rights Act of 1965, Pub L No 89-110, 79 Stat 437, codified as amended at 42 USC § 1973 et seq.

4 See National Conference of State Legislatures (NCSL), *Redistricting Law 2010* 126 (2009).

5 See Justin Levitt, *All about Redistricting: Professor Justin Levitt's Guide to Drawing the Electoral Lines; Litigation in the 2010 Cycle* (Loyola Law School 2012), online at http://redistricting.lls.edu/cases-TX.php#TX (visited May 11, 2013).

6 *Texas v United States*, 831 F Supp 2d 244, 246–47 (DDC 2011) (denying Texas's motion for summary judgment in suit for preclearance pursuant to VRA).

7 See *Perry v Perez*, 132 S Ct 934, 940–44 (2012) (holding that district court improperly substituted its own district plan for that of legislature and remanding); *Perez v Perry*, 2012 WL 4094933, *1–2 (WD Tex) (denying motion to stay implementation of interim plan and adopting Plan C235 for 2012 election).

criteria, the only universal requirements are equal population, the ban on racial gerrymandering, and compliance with the VRA. But the equal population mandate is enforced extremely strictly, especially for congressional districts. And third, with respect to minority representation, its level is set through ad hoc litigation in conjunction with review by the Department of Justice. Lawsuits and bureaucrats determine in which districts minority groups will be able to elect the candidates of their choice.

As familiar as the American model may be to us, it is highly unusual—indeed, exceptional—compared to its analogues around the globe. In all other liberal democracies, constituencies are crafted by independent commissions, not politicians, and the courts play a minimal (and highly deferential) role in the process. The equal population requirement is also applied less stringently abroad, but it is supplemented by a host of other criteria: for instance, respect for political subdivisions, respect for communities of interest, and attention to geographic features. And minority representation is sometimes ignored in other countries, sometimes addressed through explicitly race-conscious mechanisms, and sometimes achieved by multimember districts with clever voting rules. But it is never realized through the uniquely American combination of extensive grassroots litigation and centralized administrative review.

On several occasions, Supreme Court justices have expressed interest in how the rest of the world handles the thorny topic of redistricting. Chief Justice Earl Warren once referred to the British approach as "interesting and enlightening,"[8] while Justice Stephen Breyer more recently catalogued some of "the systems used by other countries utilizing single-member districts."[9] Despite the Court's curiosity, however, almost no literature exists on the comparative aspects of district design.[10] Many political scientists have written about electoral systems in their

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8 *Reynolds v Sims*, 377 US 533, 567 n 44 (1964).

9 *Vieth v Jubelirer*, 541 US 267, 363 (2004) (Breyer dissenting). See also *Baker v Carr*, 369 US 186, 305–06 (1962) (Frankfurter dissenting) (discussing British approach to redistricting).

10 See Lisa Handley, *A Comparative Survey of Structure and Criteria for Boundary Delimitation*, in Lisa Handley and Bernie Grofman, eds, *Redistricting in Comparative Perspective* 265, 265 (Oxford 2008) ("[T]here has been no systematic, comparative study of constituency delimitation laws and practices conducted to date."). Professor Lisa Handley's study is the most helpful work that I have located, thanks to its invaluable descriptions of the redistricting institutions and criteria used by different countries. However, the study does not seek either to classify or to assess redistricting models. See id.

entirety,[11] and a few election law scholars have incorporated some comparative analysis into works that are otherwise focused on the American experience.[12] But there has not yet been any sustained examination of the choices that countries face in organizing and regulating the redistricting process.

In this Article, I provide such an examination. My first goal is conceptual—to introduce frameworks for classifying and better understanding the redistricting models that are employed around the world. With respect to institutions, I identify two key taxonomic dimensions: the involvement of the elected branches in the task of district design, and the vigor with which the courts supervise this activity. In recent years, levels of *politicization* and *judicialization* have been highly correlated. The courts have tended to intervene aggressively where, as in America, political actors are responsible for shaping districts. But they have usually held their fire where independent commissions are in charge. In addition, almost all recent policy shifts have been from high politicization and high judicialization to lower levels on both fronts. There seems to be an emerging global consensus in favor of commissions and against the elected branches as well as the courts.

Next, with respect to criteria, I divide them into two categories based on their implications for constituencies' internal composition. Most American requirements, such as equal population

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[11] See Louis Massicotte, André Blais, and Antoine Yoshinaka, *Establishing the Rules of the Game: Election Laws in Democracies* 4 (Toronto 2004) (noting that "[t]here is a vast literature on electoral systems" and that "[i]t is one of the most developed subfields of the discipline"). See, for example, Lawrence LeDuc, Richard G. Niemi, and Pippa Norris, eds, *Comparing Democracies: Elections and Voting in Global Perspective* 7 (Sage 1996); Vernon Bogdanor and David Butler, eds, *Democracy and Elections: Electoral Systems and Their Political Consequences* vii (Cambridge 1983) ("Our aim in *Democracy and Elections* has been to analyze electoral systems in their political context."); Bernard Grofman and Arend Lijphart, eds, *Electoral Laws and Their Political Consequences* 1–4 (Agathon 1986); Arend Lijphart, *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies 1945–1990* 1 (Oxford 1994) (aiming "to analyse the operation and the political consequences of electoral systems, especially the degree of proportionality of their translation of votes into seats and their effects on party systems"); Matthew Soberg Shugart and Martin P. Wattenberg, eds, *Mixed-Member Electoral Systems: The Best of Both Worlds?* 2 (Oxford 2001).

[12] See, for example, Christopher S. Elmendorf, *Representation Reinforcement through Advisory Commissions: The Case of Election Law*, 80 NYU L Rev 1366, 1385–1405 (2005) (discussing advisory commissions used by foreign countries); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv L Rev 593, 629–30 n 145 (2002) (discussing foreign courts' emphasis on the value of electoral competition); Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 Harv L Rev 28, 78–80 (2004) (discussing foreign redistricting institutions).

and compliance with the VRA, are *diversifying* because they tend to make districts more heterogeneous in terms of demography, socioeconomic status, and ideology. Conversely, almost all other common criteria—respect for political subdivisions, attention to means of communication and travel, consistent population density, and so forth—are *homogenizing* because they tend to produce districts whose residents resemble one another in key respects. The intrinsic makeup of constituencies is significant both for its own sake and because of its connection to the distribution of views in the legislature. Districts that are individually heterogeneous typically give rise to a legislature that is more homogeneous, while individually homogeneous districts typically generate a more diverse legislature.

Lastly, with respect to minority representation, I present two axes that can be used to assess different countries' approaches: whether only *concentrated* minority groups are assisted or also *diffuse* groups; and whether legislative seats are allocated *explicitly* or *implicitly* to these groups. In America, the VRA applies only to dense minority populations and it allocates seats to them implicitly—that is, the statute does not set any specific level of minority representation. In several other countries, parallel electoral systems or party slating requirements ensure a legislative presence for all minority groups, including dispersed ones, through explicit race-conscious mechanisms. The representation of concentrated groups via explicit means is a rarer policy choice, but it is sometimes accomplished through reserved seats in particular locations. And diffuse groups are often allocated seats implicitly through multimember districts that use limited, cumulative, or preferential voting rules.

My second aim in this Article is normative—not just to categorize redistricting models but also to evaluate them. In brief, my position is that the exceptional American model is deeply flawed along all three dimensions of district design. With respect to institutions, the crucial problem with the American approach of high politicization and high judicialization is that courts are less effective than commissions at mitigating the agency costs of redistricting. According to a growing literature, commission-crafted plans exhibit lower partisan bias, higher electoral responsiveness, and higher voter participation than do plans

drawn by legislatures and then monitored by courts.[13] The low-politicization, low-judicialization position is also attractive because it allows courts to extricate themselves from the political thicket without incurring any democratic harms in the process.

Next, with respect to criteria, several scholars (myself included[14]) have found that heterogeneous districts—the kind produced by America's diversifying requirements—are linked to lower participation, less effective representation, and greater legislative polarization. Districts drawn pursuant to homogenizing criteria have the opposite consequences and are also more conceptually consistent with an electoral system that is founded on the principle of territorial representation. If districts are to be drawn geographically, it is preferable that they correspond to actual geographic realities,[15] the most important of which is the spatial clustering of the population.[16]

Lastly, with respect to minority representation, the VRA ignores diffuse groups, generates large volumes of bitter litigation, and fails to achieve a proportional minority presence in the legislature. It is true that more explicit policies such as reserved seats or party slating requirements would likely be unconstitutional. But implicit methods of seat allocation that take into account geographically dispersed groups—that is, the innovative voting schemes used abroad in conjunction with multimember districts—would seem to hold great promise. They would enable all groups, not just concentrated ones, to secure approximately proportional representation, and they would do so without triggering lawsuits or even recognizing race explicitly.

This Article proceeds in comparative fashion not only because the Court is interested in this sort of analysis but also because there is much that we can learn by looking beyond our borders.[17] District design is an issue that many countries have

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[13] Partisan bias refers to the divergence in the share of seats that each party would win given the same share of the statewide vote. Electoral responsiveness refers to the rate at which a party gains or loses seats given changes in its statewide vote share. See Andrew Gelman and Gary King, *Enhancing Democracy through Legislative Redistricting*, 88 Am Polit Sci Rev 541, 544–45 (1994).

[14] See Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 Harv L Rev 1903, 1941–48 (2012).

[15] See Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U Pa L Rev 1379, 1389–97 (2012).

[16] See Stephanopoulos, 125 Harv L Rev at 1940 n 188–89 (cited in note 14) (finding very high spatial autocorrelation scores for array of demographic and socioeconomic factors).

[17] See Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 Am J Comp L 947, 956 (2008) (noting that "the key benefit of comparison is that it allows U.S.

confronted, and there is no reason to blind ourselves to the lessons of their experiences. However, not all jurisdictions' policy choices are relevant here. I take territorial districting as a given,[18] which means that I omit from my analysis nations that employ large multimember districts with party-list proportional representation (such as much of continental Europe). What I am left with is a moderate number of countries and subnational entities, many but not all from the British Commonwealth, that use single-member or small multimember districts.[19] These are the jurisdictions that actually need to redraw their districts at reasonably frequent intervals—and that may therefore have something useful to contribute to the American debate.[20]

With the 2010 cycle currently drawing to a close, now is a particularly good time to revisit the peculiar manner in which American constituencies are crafted. This is also a timely moment for self-reflection because reform is in the redistricting air as never before. In 2010, the country's most populous state, California, transferred the power to draw district lines from political actors to an independent commission,[21] and New York,[22] Ohio,[23]

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courts to gain insights about the moral conclusions of a large number of relatively independent constitutional decision-makers"); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L J 1225, 1308 (1999).

[18] I do so because the American commitment to territorial districting is so strong that prescriptions that call it into question are highly implausible. See Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 Tex L Rev 1589, 1602–05 (1993); Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 Mich L Rev 483, 502 (1993).

[19] More precisely, I examine jurisdictions that use either (1) single-member districts or (2) multimember districts with limited, cumulative, or preferential voting rules. Because these voting rules become cumbersome when the number of members per district is high, the districts around the world that employ the rules are typically small in magnitude. I also consider US states, counties, and cities when their policies diverge from the usual American model. When discussing all of these jurisdictions, I am mindful of Professor Mark Tushnet's admonition that "we can learn from experience elsewhere only to the extent that we avoid too much detail about that experience." Tushnet, 108 Yale L J at 1308 (cited in note 17). I provide the factual context that I consider to be necessary for each case, but I try to avoid becoming overly enmeshed in each jurisdiction's unique circumstances.

[20] See Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 Am J Comp L 125, 133–34 (2005) (discussing how to select cases in comparative legal analysis). See also David Butler and Bruce E. Cain, *Reapportionment: A Study in Comparative Government*, 4 Electoral Stud 197, 197 (1985) (selecting similar cases in one of only extant studies of comparative redistricting).

[21] See Cal Const Art XXI. See also Nicholas O. Stephanopoulos, *Communities and the California Commission*, 23 Stan L & Pol Rev 281, 293–302 (2012) (assessing record of new California commission with respect to preservation of geographic communities of interest).

and Texas[24] have recently considered similar proposals. Florida allowed the elected branches to retain their authority, but enacted an array of new requirements (most of them homogenizing) that politicians must now follow.[25] And the VRA itself was renewed by Congress in 2006[26] but now faces serious challenges to one of its core provisions,[27] meaning that minority representation in America is also in a state of unusual flux.

The Article proceeds in three Parts, addressing in turn each of the central issues of district design: first, the institutions that are involved in the process; second, the criteria that are used to shape constituencies; and third, the mechanisms that exist to provide representation to minority groups.[28] Each Part is organized identically, beginning with a brief description of practices in America and abroad, then introducing a new framework for classifying redistricting models, and ending with a critique of America's electoral exceptionalism. The conclusion considers

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[22] S6698, 235th Leg, Reg Sess (NY 2012) (proposing in Senate a resolution to initiate constitutional amendment process in order to establish an independent redistricting commission); A9526, 235th Leg, Reg Sess (NY 2012) (proposing same resolution in Assembly).

[23] In Ohio, this proposal was a ballot initiative labeled "Issue 2," which failed to win voter approval. *Voters First Ohio: People, Not Politicians* (Voters First), online at http://votersfirstohio.org (visited May 11, 2013) (providing home page for initiative aiming to establish redistricting commission in Ohio); Ohio Secretary of State, *Proposed Amendment to the Ohio Constitution: State Ballot Issues Information for the November 6, 2012 General Election* *2–5 (Sept 21, 2012) online at http://www.sos.state.oh.us/sos/upload/ballotboard/2012/2012stateissues.pdf (visited May 11, 2013); Ohio Secretary of State, *State Issue 2: Redistricting Proposal; November 6, 2012*, online at http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2012Results/20121106issue2.aspx (visited May 11, 2013) (providing voting results on Issue 2).

[24] SB 22, 82d Leg, Reg Sess (Tex 2011) (proposing establishment of Texas Congressional Redistricting Commission). This bill was passed by the Texas Senate on June 22, 2011. *History: SB 22* (Texas Legislature Online), online at http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=821&Bill=SB22 (visited May 11, 2013) (providing full legislative and voting history of bill).

[25] See Fla Const Art III, §§ 16, 20, 21 (including as new criteria compactness and respect for existing political and geographic boundaries).

[26] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub L No 109-246, 120 Stat 577, codified at 42 USC § 1973.

[27] See *Northwest Austin Municipal Utility District Number One v Holder*, 557 US 193, 205–06 (2009) (declining to reach merits of constitutional challenge to § 5 of VRA); *Shelby County, Alabama v Holder*, 679 F3d 848, 852–53 (DC Cir 2012), cert granted, 133 S Ct 594 (2012) (upholding § 5 against constitutional challenge).

[28] The Article does not dwell on the *linkages* between these elements of district design, for instance, how the institutions responsible for redistricting affect district composition or how multimember districts alter the consequences of district homogeneity and heterogeneity. I leave these interesting (and difficult) questions for another day.

some of the ways in which reforms of the American system might actually be achieved.

I. INSTITUTIONAL ACTORS

The most fundamental question faced by any country whose districts must periodically be redrawn is which institutions should be involved in the redrawing. Should the task be left to the elected branches, just like any other matter? Or should it be entrusted to a specialized body composed of judges, professors, bureaucrats, and the like? Should the courts rigorously assess district plans for compliance with applicable legal norms? Or should they defer to the judgment of the line drawers (whoever they might be)?

In this Part, I first summarize the redistricting roles that different institutional actors play in different countries. In America, both the elected branches and the courts are extremely active participants, while in most other jurisdictions, independent commissions are responsible for designing districts and the judiciary is largely absent from the stage. Next, I identify two dimensions along which nations' institutional choices can be classified: the politicization and the judicialization of the redistricting process. These dimensions can be used both to sort the policies that are currently in place around the world and to track policy changes over time. Finally, I argue that the low-politicization, low-judicialization model is preferable to the American approach. It is more effective at curbing the agency costs of redistricting, and it allows the courts to exit a domain in which their presence is often fraught with controversy.

A. Global Models

1. America.

For most of American history, political actors in each state had almost exclusive control over redistricting. Independent commissions did not exist anywhere in the country,[29] and a 1946 Supreme Court decision rendered most disputes over district boundaries nonjusticiable—beyond the adjudicative capabilities of the federal courts.[30] A few venturesome state courts occasionally

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[29] See Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J L & Polit 331, 346 (2007).

[30] See *Colegrove v Green*, 328 US 549, 551–52 (1946).

subjected district plans to scrutiny,[31] but as a general matter there was no check on the power of the elected branches.[32]

This regime ended in 1962 with the launch of what became known as the "reapportionment revolution."[33] From this date onward the judiciary became progressively more involved in evaluating (and sometimes even designing) district plans. First the Supreme Court required districts within each state to contain the same population;[34] next the Court barred racial vote dilution as a constitutional matter;[35] then Congress created a statutory cause of action for vote dilution;[36] then the Court sought to regulate the ubiquitous practice of political gerrymandering;[37] and finally the Court prohibited the crafting of constituencies with race as the predominant motive.[38] The state courts became much more aggressive during this period as well, deploying doctrines that sometimes mirror and sometimes diverge from the federal requirements.[39] As a consequence, all American redistricting now takes place under either direct judicial supervision or the shadow of potential judicial intervention. In the 2010 cycle, for example, more than 190 lawsuits were filed in 41 states, resulting in 11 states' plans being invalidated and 9 states' plans being drawn by the courts.[40]

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[31] See, for example, *Denney v Basler*, 42 NE 929, 931 (Ind 1896); *Baird v Board of Supervisors of Kings County*, 33 NE 827, 832 (NY 1893); *Brown v Saunders*, 166 SE 105, 111 (Va 1932).

[32] See Seth Warren Whitaker, Note, *State Redistricting Law:* Stephenson v. Bartlett *and the Judicial Promotion of Electoral Competition*, 91 Va L Rev 203, 203 (2005).

[33] See *Baker v Carr*, 369 US 186, 230–37 (1962) (distinguishing *Colegrove* and holding reapportionment disputes to be justiciable). See generally Gary W. Cox and Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution* (Cambridge 2002).

[34] See *Reynolds v Sims*, 377 US 533, 561, 567 (1964); *Wesberry v Sanders*, 376 US 1, 14, 17–18 (1964).

[35] See *White v Regester*, 412 US 755, 765–66, 769–70 (1973).

[36] See Voting Rights Act Amendments of 1982 § 3, Pub L No 97-205, 96 Stat 131, 131, codified as amended at 42 USC § 1973a. Prior to 1982, the statutory cause of action for vote dilution was identical to the constitutional claim. See *City of Mobile, Alabama v Bolden*, 446 US 55, 60–61 (1980) (Stewart) (plurality).

[37] See *Davis v Bandemer*, 478 US 109, 113 (1986). See also *Vieth v Jubelirer*, 541 US 267, 278–81 (2004) (Scalia) (plurality) (rejecting standard offered in *Bandemer* and leaving political gerrymandering cause of action in doctrinal limbo).

[38] See *Shaw v Reno*, 509 US 630, 657–58 (1993).

[39] See James A. Gardner, *Foreword: Representation without Party—Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 Rutgers L J 881, 925–55 (2006) (discussing history of state court doctrine and more recent state court efforts to combat gerrymandering).

[40] See Levitt, *Litigation in the 2010 Cycle* (cited in note 5).

Although the judiciary's increasing involvement is the most important institutional development of the last half-century, another notable trend is the transfer of line-drawing authority from political actors to commissions in a minority of states.[41] Commissions are now responsible for designing state legislative districts in thirteen states and congressional districts in seven states.[42] Most of these bodies are bipartisan in composition, some are deliberately skewed in favor of the majority party, and two (Arizona's and California's) are more or less independent.[43] Interestingly, commission-drawn plans fare somewhat better in litigation than plans enacted by the elected branches. Over the last four cycles, 76 percent of commission-drawn plans were upheld by the courts, compared to 65 percent of conventional plans.[44]

2. Abroad.

Most countries with territorial districts *used* to redistrict in the same fashion as pre-1962 America—through political actors free from judicial oversight. Canada, for example, redrew its parliamentary districts nine times between 1872 and 1964, and "[w]ithout exception, each [effort] was carefully managed by the government of the day, whether Conservative or Liberal, in its

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[41] See Stephanopoulos, 23 J L & Polit at 332–33, 342–43, 345–78 (cited in note 29) (discussing reasons for success or failure of popular initiatives aimed at establishing redistricting commissions); Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 Yale L J 1808, 1813 (2012).

[42] See NCSL, *Redistricting* at 161–62 (cited in note 4). California began employing a commission for congressional districts after this report's publication. See Cal Const Art XXI. For present purposes, I consider redistricting boards to be equivalent to commissions.

[43] See NCSL, *Redistricting* at 163–71 (cited in note 4). See also Cain, 121 Yale L J at 1813–20 (cited in note 41) (discussing various commission models used in United States).

[44] See *Redistricting Plan Success Rates: Legislatures vs. Commissions* (Redistricting and Elections Committee for the National Conference of State Legislatures Jan 9, 2008), online at http://www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/success_rates.htm (visited May 11, 2013). See also Christopher C. Confer, *To Be about the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 Kan J L & Pub Pol 115, 131–32 (Winter 2003–04); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 Tex L Rev 1643, 1689–90 (1993); Jonathan Winburn, *Does It Matter if Legislatures or Commissions Draw the Lines?*, in Gary F. Moncrief, ed, *Reapportionment and Redistricting in the West* 137, 149 (Lexington 2011) (finding that use of bipartisan commission resulted in statistically significant improvement in judicial success rate in 2000 cycle); Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L Rev 77, 124–26 (1985).

own interest."[45] Similarly, redistricting in nineteenth- and early twentieth-century Britain was an "extremely political activit[y], with constituency boundaries drawn up . . . to promote the majority party's electoral interests."[46] However, no liberal democracy still employs this model. Today the only nations that allow the elected branches to draw district lines, untrammeled by any court-imposed limits, are more authoritarian states such as Cameroon, Kyrgyzstan, Malaysia, and Singapore.[47]

No liberal democracy employs the *current* American approach (in noncommission states) either, although several jurisdictions did so until fairly recently. In France, for instance, political actors were responsible for redistricting prior to 2010,[48] and their decisions were closely monitored by the *Conseil constitutionnel* (the French constitutional court). Between 1986 and 2010, the *Conseil* held that the French constitution includes an equal population requirement;[49] invalidated a statute that authorized large population deviations in the name of "considerations of general interest";[50] and twice instructed the French

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45 John C. Courtney, *From Gerrymanders to Independence: District Boundary Readjustments in Canada*, in Handley and Grofman, eds, *Redistricting* 11, 12 (cited in note 10). See also Royal Commission on Electoral Reform and Party Financing, 1 *Reforming Electoral Democracy* 10, 138 (Minister of Supply and Services Canada 1991); R.K. Carty, *The Electoral Boundary Revolution in Canada*, 15 Am Rev Can Stud 273, 276–79 (1985).

46 D.J. Rossiter, R.J. Johnston, and C.J. Pattie, *The Boundary Commissions: Redrawing the UK's Map of Parliamentary Constituencies* 2 (Manchester 1999). See also Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* 23–25, 36 (Federation 2010) (discussing redistricting processes used in past by Australian states); Royal Commission on the Electoral System, *Report: Towards A Better Democracy* 133 (1986) (same for New Zealand); Handley, *A Comparative Survey* at 267 (cited in note 10) ("During the nineteenth century . . . the drawing of constituency boundaries was the responsibility of the legislature.").

47 See Handley and Grofman, eds, *Redistricting* at appendix B (cited in note 10) (listing institutions involved in redistricting in multiple countries). See also Joel S. Fetzer, *Election Strategy and Ethnic Politics in Singapore*, 4 Taiwan J Dem 135, 142–47 (2008); Jeremy Grace, *Malaysia: Malapportioned Districts and Over-Representation of Rural Communities* (ACE Electoral Knowledge Network), online at http://aceproject.org/ace-en/topics/bd/bdy/bdy_my (visited May 11, 2013).

48 See David Butler and Bruce Cain, *Congressional Redistricting: Comparative and Theoretical Perspectives* 117, 125–28 (Macmillan 1992); Michel Balinski, *Redistricting in France under Changing Electoral Rules*, in Handley and Grofman, eds, *Redistricting* 173, 178–79, 183–84 (cited in note 10); Richard S. Katz, *Malapportionment and Gerrymandering in Other Countries and Alternative Electoral Systems*, in Mark E. Rush, ed, *Voting Rights and Redistricting in the United States* 245, 255 (Greenwood 1998).

49 See Conseil Constitutionnel, Décision No 86-208 DC (July 2, 1986) (France). See also Balinski, *Redistricting in France* at 182 (cited in note 48) (describing this decision as "a strong warning concerning the definition of districts").

50 Conseil Constitutionnel, Décision No 2008-573 (Jan 8, 2009) (France).

Parliament to redraw all of the country's districts.[51] In Japan, likewise, redistricting was a political exercise prior to 1994,[52] and the Japanese Supreme Court repeatedly entered the fray to address issues of population inequality. On at least four occasions, the Court held that malapportioned lower house plans, featuring interdistrict population deviations as high as 400 percent, "could not be considered reasonable" and were therefore unconstitutional.[53]

In Ireland as well, constituencies were designed by the legislature and then reviewed by the judiciary prior to 1980.[54] During this period, Irish redistricting was "characterized by overt partisanship, attracting bitter and heartfelt opposition,"[55] and the High Court struck down a district plan that resulted in particularly "grave inequalities of parliamentary representation."[56]

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[51] See Conseil Constitutionnel, *Observations about Elections of 2007* (July 7, 2005) (France); Conseil Constitutionnel, *Observations about Legislative Elections of June 9 and 16, 2002, May 21, 2003* (France). However, the *Conseil*'s aggressiveness should not be overstated, as it has also backed down from confrontations with the Parliament on several occasions. See Balinski, *Redistricting in France* at 183, 186 (cited in note 48).

[52] See Ray Christensen, *Redistricting in Japan: Lessons for the United States*, 5 Japanese J Polit Sci 259, 263 (2004); Toshimasha Moriwaki, *The Politics of Redistricting in Japan: A Contradiction between Equal Population and Respect for Local Government Boundaries*, in Handley and Grofman, eds, *Redistricting* at 107, 111 (cited in note 10). Japan employed multimember districts with a single nontransferable vote prior to 1994. Id at 107. These districts were small enough (with three to five members each) that they had to be redrawn at regular intervals. See Christensen, 5 Japanese J Polit Sci at 259–63 (cited in note 52).

[53] 30 Minshu 233 (Saikō Saibansho, Apr 14, 1976) (Japan). See also 47 Minshu 67 (Saikō Saibansho, Jan 20, 1993) (Japan); 39 Minshu 1100 (Saikō Saibansho, July 17, 1985) (Japan); 37 Minshu 1243 (Saikō Saibansho, Nov 7, 1983) (Japan); J. Mark Ramseyer and Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 Am Polit Sci Rev 331, 336 (2001) (noting that sixty-nine lower court opinions in Japan have dealt with malapportionment issues). However, the Japanese Supreme Court refrained from questioning the validity of the elections held under the malapportioned district plans, and it tolerated population disparities as high as three to one in other cases. See Christensen, 5 Japanese J Polit Sci at 263 (cited in note 52).

[54] John Coakley, *Electoral Redistricting in Ireland*, in Handley and Grofman, eds, *Redistricting* at 155, 160–62 (cited in note 10).

[55] Id at 160. See also Andrew McLaren Carstairs, *A Short History of Electoral Systems in Western Europe* 207–09 (George Allen 1980); Katz, *Malapportionment* at 249, 254–55 (cited in note 48). Ireland employs multimember districts with a single transferable vote. As in Japan, these districts are small enough (with three to five members each) that they must regularly be redrawn. See Coakley, *Electoral Redistricting in Ireland* at 158–59 (cited in note 54).

[56] *O'Donovan v Attorney General*, IR 114, 150 (High Ct 1961) (Ireland). The Irish Supreme Court's one decision in this period, however, was not quite as aggressive. See *In the Matter of Article 26 of the Constitution and in the Matter of the Electoral (Amendment) Bill, 1961*, 1 IR 169, 183 (S Ct 1961) (Ireland) ("The decision as to what is practicable [with respect to population equality] is within the jurisdiction of the [Parliament].").

Lastly, several Canadian provinces either severely limited the discretion of their commissions or did not use commissions at all prior to 1996.[57] Certain of these provinces—Alberta, British Columbia, and Prince Edward Island—were the only ones to have their district plans called into question by the courts.[58] As the Alberta Court of Appeal put it, a lower "level of deference is appropriate when the author of the boundary is some [entity] . . . who is not insulated from partisan influence, and who may be tempted to engage in some traditional political games."[59]

If foreign jurisdictions now embrace neither the historical nor the current American model, to what approach *do* they subscribe? The nearly universal answer is that they use independent redistricting commissions whose plans are subject to highly deferential judicial review. This is the policy that all of the major Commonwealth countries have adopted: Australia, Bangladesh, Britain, Canada, India, New Zealand, Nigeria, and Pakistan.[60] This is also the policy adopted by, among others, Albania, Belarus, Germany, Indonesia, Lithuania, Mexico, and the Ukraine.[61] And this is the policy to which France, Ireland, Japan, and the last few Canadian provinces switched after deciding to abandon redistricting by political actors.[62]

Under this model, commissions are typically composed of nonpartisan government officials, judges, or academics, who receive their positions either ex officio or by appointment. For example, Australia's and New Zealand's commissions are made up mostly of technocrats such as surveyors, statisticians, and electoral officers,[63] while Britain and Canada's rely more heavily on

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57 See Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 Election L J 425, 426 (2006) (highlighting Parliament's establishment of Law Commission of Canada in 1996, which began examining Canadian election law and promoting national reform).

58 See *Reference re Electoral Divisions Statutes Amendment Act, 1993*, 119 DLR 4th 1, 2 (Alberta App 1994) (Canada) ("1994 Alberta Reference Case"); *Dixon v British Columbia (Attorney-General)*, 59 DLR 4th 247, 284 (BC S Ct 1989) (Canada); *MacKinnon v Prince Edward Island*, 101 DLR 4th 362, 399 (PEI S Ct 1993) (Canada).

59 *1994 Alberta Reference Case*, 119 DLR 4th at 19.

60 See Handley and Grofman, eds, *Redistricting* at appendix B (cited in note 10).

61 See id.

62 See id at appendix A–B.

63 The Australian commission for each state is initially composed of the federal electoral commissioner, the state electoral officer, the state surveyor-general, and the state auditor-general, and is then augmented with two additional members of the federal election commission. See Commonwealth Electoral Act 1918 §§ 60(2), 70(2) (Australia). The New Zealand commission is composed of the surveyor-general, the government statistician, the chief electoral officer, the chairperson of the local government commission,

appointees such as judges and professors.[64] Some nations use a single commission to design all of their districts (for instance, France, Japan, and New Zealand[65]), while other nations employ multiple commissions, each responsible for a particular subnational jurisdiction (for instance, Australia, Britain, and Canada[66]). Each Australian state and Canadian province actually has *two* commissions, one for districts in the national parliament, the other for districts in the state or provincial legislature.[67]

Certain commissions are only in charge of redistricting (as in most Commonwealth countries), while other commissions supervise the entire electoral system (as in Indonesia, Mexico, and the Ukraine).[68] Almost all commissions provide extensive opportunities for concerned parties to comment on proposed district plans.[69] And commissions' final plans sometimes are binding without the need for further government action (as in Australia, India, and New Zealand), and sometimes require legislative approval before becoming law (as in Britain, Canada, and France).[70] Where legislative approval is required, however, it is

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two representatives of political parties, and a chairperson appointed by the governor-general. See Electoral Act 1993 § 28(2) (New Zealand).

64 The Canadian commission for each province is composed of a judge appointed by the chief justice of the province and two members appointed by the speaker of the House of Commons. See Electoral Boundaries Readjustment Act, RSC 1985, ch E-3, §§ 4–6 (Canada). The commission for each country in the United Kingdom is composed of the Speaker of the House of Commons, one appointed judge, and two members appointed by the Secretary of State. See Parliamentary Constituencies Act, 1986, sch 1 (UK).

65 See Balinski, *Redistricting in France* at 182 (cited in note 48); Moriwaki, *The Politics of Redistricting in Japan* at 108 (cited in note 52); Alan McRobie, *An Independent Commission with Political Input: New Zealand's Electoral Redistribution Practices*, in Handley and Grofman, eds, *Redistricting* at 27, 28 (cited in note 10).

66 See Rod Medew, *Redistribution in Australia: The Importance of One Vote, One Value*, in Handley and Grofman, eds, *Redistricting* at 97, 99 (cited in note 10); Ron Johnson, Charles Pattie, and David Rossiter, *Electoral Distortion Despite Redistricting by Independent Commissions: The British Case, 1950–2005*, in Handley and Grofman, eds, *Redistricting* at 205, 207 (cited in note 10); John C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* 94 (McGill-Queen's 2001).

67 See John C. Courtney, *Electoral Boundary Redistributions*, in Malcolm Alexander and Brian Galligan, eds, *Comparative Political Studies: Australia and Canada* 45, 48 (Pitman 1992).

68 See Handley and Grofman, eds, *Redistricting* at appendix B (cited in note 10).

69 See generally Boundary Commission for England, *Fifth Periodical Report* (Crown 2007) (discussing comments received with respect to proposed English districts); Delimitation Commission of India, 1 *Changing Face of Electoral India: Delimitation 2008* 3–9 (2008) (same with respect to Indian districts); Irish Constituency Commission, *Report on Dáil and European Parliament Constituencies 2007* 9, 14–36 (2007) (same with respect to Irish districts); New Zealand Representation Commission, *Report of the Representation Commission 2007* 6–9, 12–13, 36–146 (2007) (same with respect to New Zealand districts).

70 See Handley and Grofman, eds, *Redistricting* at appendix B (cited in note 10).

essentially a formality—as Professor Christopher Elmendorf has noted, "Legislatures almost uniformly accede to the recommendations of nonpartisan districting commissions."[71]

In all countries where districts are redrawn by independent commissions, the courts have taken a strikingly deferential stance toward the commissions' output. There *has* been litigation in these countries, but it has almost always resulted in judgments upholding the challenged plans, often accompanied by effusive statements about the commissions' expertise and the respect to which their decisions are entitled. In Canada, for instance, the Supreme Court rejected an equal population challenge to a Saskatchewan plan, holding that the Canadian Charter requires "effective representation" for constituencies rather than perfect population equality.[72] The Court added that district plans should not be disturbed unless "reasonable persons applying the appropriate principles . . . could not have set the electoral boundaries as they exist."[73] In the United Kingdom, similarly, the Court of Appeal rebuffed an attack on the 1954 plan for England, reasoning that judges are not "competent . . . to determine and pronounce on whether a particular line which had commended itself to the commission was . . . the best line or the right line."[74] A lawsuit against the 1982 plan for England also failed, with the court remarking that the commission's decisions should be reversed only if they were ones "to which no reasonable commission could have come."[75]

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71 Elmendorf, 80 NYU L Rev at 1388 (cited in note 12).

72 *Reference re Provincial Electoral Boundaries (Sask)*, 2 SCR 158, 177–78, 183–84, 194–96 (S Ct 1991) (Canada) ("1991 Saskatchewan Reference Case").

73 Id at 189 (discussing role of courts), quoting *Dixon*, 59 DLR 4th at 267. See also *Raiche v Canada (Attorney General)*, 1 FCR 93, 108 (Fed Ct 2005) (Canada) ("[T]he courts will therefore respect the choices made by the commissions if their decisions are defensible."); John C. Courtney, *Commissioned Ridings* at 173 (cited in note 66) ("By transferring the power to design constituency boundaries to independent electoral boundary commissions, Canadian legislators have effectively headed off . . . [a] plethora of court challenges."); Ronald E. Fritz, *Challenging Electoral Boundaries under the Charter: Judicial Deference and Burden of Proof*, 5 Rev Const Stud 1, 1, 33 (1999).

74 *Harper v Secretary of State for the Home Department*, [1955] Ch 238, 251 (1954) (Eng).

75 *Regina v Boundary Commission for England*, [1983] 1 QB 600, 627, 637 (1983). See also *Hammersmith BC v Boundary Commission for England*, reported in Times (London) 4 (Dec 15, 1954) (stating that evaluation of commission's decisions was a matter that "seemed entirely unsuited to judicial intervention"); Rossiter, Johnston, and Pattie, *Boundary Commissions* at 95, 114 (cited in note 46). Of course, the British courts' deference is also attributable to the doctrine of parliamentary sovereignty, which requires that the commissions' decisions be upheld unless they violate the statutes that created the bodies in the first place.

Lawsuits against district plans have failed as well in Australia,[76] India,[77] and New Zealand.[78] More interestingly, recent litigation has been unsuccessful in the jurisdictions—France, Ireland, Japan, and certain Canadian provinces—that used to feature high levels of political and judicial involvement in redistricting. In France, the *Conseil constitutionnel* upheld the country's first commission-crafted plan in 2010, describing approvingly the commission's methodology and noting that the *Conseil* does not possess the same "general power of judgment and decision" as the commission.[79] In Japan, all equal population challenges to lower house plans have been rejected since the Demarcation Council was established in 1994.[80] In Ireland, the High Court refused to expedite the redistricting process in the wake of a 2006 census, ruling instead that the Constituency Commission should draw the lines so that "the constituencies as enacted into law have [a] high degree of public confidence."[81] And in Prince Edward Island, the only Canadian province that has had district plans disputed both before and after adopting a commission, the court in the more recent decision dismissed a series of claims and then went out of its way to offer its "opinion [that] the process here was fair."[82]

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[76] See *McGinty v Western Australia*, 186 CLR 140, 178–79 (High Ct 1996) (Australia) (Brennan) (denying a constitutional challenge); *McKinlay v Commonwealth*, 135 CLR 1, 33–35 (High Ct 1975) (Australia) (Barwick) (plurality) (summing up Chief Justice Garfield Barwick's views about "suits brought to test the validity" of the relevant legislation); Orr, *The Law of Politics* at 42–44 (cited in note 46).

[77] See *Election Commission of India v Ghani*, 6 SCC 721, ¶ 2, 10 (S Ct 1995) (India); *Kothari v Delimitation Commission*, 1 SCR 400, ¶ 11 (S Ct 1967) (India) (holding that a commission plan "is to have the force of law and not to be made the subject matter of controversy in any court").

[78] See *Timmins v Governor-General*, 2 NZLR 298, 302 (High Ct 1984) (New Zealand) ("The Court has no jurisdiction to inquire into the merits of the decisions of the Commission adjusting electoral boundaries.").

[79] Conseil Constitutionnel, Décision No 2010-602, 68 (Feb 18, 2010) (France).

[80] See *Claim on the Invalidation of the Election*, 61 Minshu ___ (Saikō Saibansho June 13, 2007) (Japan); *Case to Seek Invalidity of Election*, 53 Minshu 1441 (Saikō Saibansho Nov 10, 1999) (Japan); *Case to Seek Nullification of Election*, 49 Minshu 1443 (Saikō Saibansho June 8, 1995) (Japan). But see 65 Minshu ___ (Saikō Saibansho Mar 23, 2011) (Japan) (urging legislature to alter rule requiring each prefecture to have at least one seat, in order to make districts more equal in population).

[81] *Murphy v Minister for Envt, Heritage & Local Govt*, IEHC 185, ¶¶ 7.5, 10.1 (High Ct 2007) (Ireland).

[82] *Charlottetown (City) v Prince Edward Island*, 142 DLR 4th 343, 352 (PEI S Ct 1996) (Canada).

B. Politicization and Judicialization

These brief summaries of different jurisdictions' practices show that three types of institutions are involved in redistricting around the world: the elected branches of government, commissions of one kind or another, and the courts. The first two of these, of course, are essentially substitutes for each other; there is no need for commissions if political actors draw district lines, and vice versa. The three institutions can therefore be situated along two key axes: the *politicization* and the *judicialization* of the redistricting process.[83] The process is politicized when the elected branches have exclusive or predominant authority over how districts are designed. Conversely, the process is depoliticized (and bureaucratized) when commissions are responsible for crafting constituencies. Of course, commissions themselves can be located at different positions along the politicization spectrum. Commissions made up of elected officials are the least insulated from political considerations; commissions whose members are appointed and whose plans require legislative approval fall somewhere in the middle; and commissions whose members are nonpartisan technocrats and whose plans are enacted automatically are the most independent.[84]

Judicialization also varies along a spectrum. At one end are jurisdictions where the courts are barred from evaluating district plans and have almost never been asked to do so by aggrieved parties. At the other end are jurisdictions where redistricting litigation is common and the courts stand ready to invalidate plans that, in their view, violate constitutional or other legal rules. And in the middle are jurisdictions where litigation is infrequent but not unheard of, and where the courts are willing to engage with the merits of redistricting claims but unlikely ultimately to find them persuasive.

These two axes are useful individually, but they have more analytical bite when considered in tandem. Below I use the axes to construct matrices that illuminate the policy choices that

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[83] Another potential axis is the *centralization* of the redistricting process. The process is centralized when a single commission designs all of a country's districts, and decentralized when a separate commission is responsible for redistricting in each subnational jurisdiction. I do not discuss this axis further because it does not seem to have significant implications for the measures of democratic health that I discuss below in Part I.C. That is, there is no evidence that centralization (or lack thereof) is relevant to commission performance.

[84] See Cain, 121 Yale L J at 1817–19 (cited in note 43) (analyzing politicization dimension at length).

different jurisdictions have made, both currently and historically, with respect to redistricting institutions. The matrices show that politicization and judicialization are not separate phenomena, but rather closely interrelated aspects of any model of district design. To focus on only one axis at a time, as much of the literature has done,[85] is to miss a good deal of the institutional picture.

1. Current policies.

Figure 1 below is a matrix in which politicization is captured by the vertical dimension and judicialization is captured by the horizontal dimension. Although finer gradations are possible, for the sake of simplicity each axis is divided into just two subcategories: low and high politicization, and low and high judicialization. In addition, only the policies *currently* in place in different jurisdictions are displayed. Jurisdictions' specific positions within each quadrant are based on my (admittedly subjective) assessments of their laws, practices, and judicial decisions.

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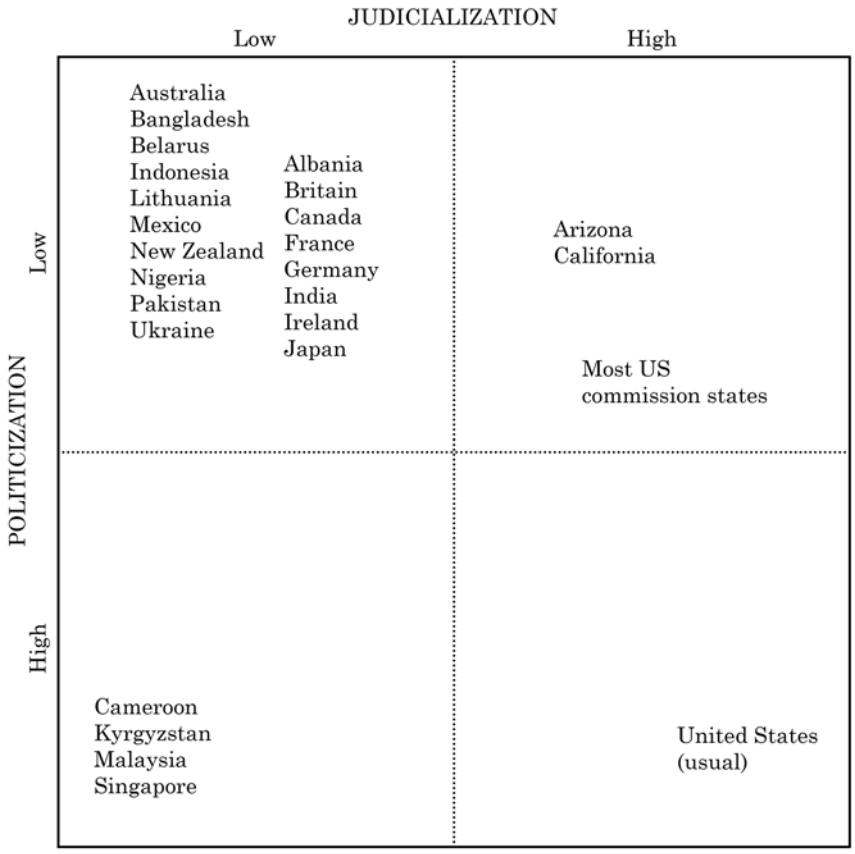
[85] See, for example, Butler and Cain, 4 Electoral Stud at 206–11 (cited in note 20) (focusing analysis of districting regimes on politicization); Erin Daly, *Idealist, Pragmatists, and Textualists: Judging Electoral Districts in America, Canada, and Australia*, 21 BC Intl & Comp L Rev 261, 262 (1998) (finding "different results [to be] largely attributable to" the differences in judicialization between electoral systems).

FIGURE 1. CURRENT REDISTRICTING MODELS



As is obvious from Figure 1, three of the four possible matrix positions are highly unpopular today. The only countries in the high-politicization, low-judicialization space, with political actors shaping districts without judicial oversight, are relatively authoritarian states such as Kyrgyzstan and Malaysia.[86] With its extremely high levels of both political and judicial involvement, the United States is the only nation in the high-politicization, high-judicialization space.[87] And American states

[86] See Brent T. White, *Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies*, 43 Cornell Intl L J 307, 348–49 (2010); Randall Peerenboom, *Show Me the Money: The Dominance of Wealth in Determining Rights Performance in Asia*, 15 Duke J Comp & Intl L 75, 76 (2004).

[87] The reason the United States is not further to the right along the judicialization axis is that the courts have largely refrained from adjudicating political gerrymandering

that employ commissions are the only jurisdictions in the low-politicization, high-judicialization space. However, the level of judicialization is arguably lower in these states than in their peers, thanks to the lower success rate of litigation against commission-crafted plans.[88] In addition, the level of politicization in these states is still higher than in most foreign countries, because partisan and bipartisan commissions are not very well insulated from the political process. Only Arizona and California have commissions whose independence is comparable to that of most foreign line-drawing bodies.[89]

The second point illustrated by Figure 1 is that almost all liberal democracies currently belong in the low-politicization, low-judicialization space, with commissions designing districts without much judicial supervision. Countries' positions *within* this space reflect how independent their commissions are and how deferential their courts have been. For example, Australia and New Zealand have especially autonomous commissions, with nonpartisan officials designated ex officio and district plans that become law automatically.[90] The court decisions in these countries have also been very respectful of the choices that the commissions have made. Conversely, the British, Canadian, French, and Japanese commissions are somewhat less independent since their members are appointed by political actors and their plans require legislative approval.[91] These countries' court decisions have been more frequent and substantively intrusive as well (even after the recent redistricting reforms in France and Japan[92]).

What accounts for the fact that every liberal democracy is in either the low-politicization, low-judicialization space or the

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claims. See note 37. There is thus room for the American redistricting process to become still more judicialized.

88 See note 44 and accompanying text.

89 See Cain, 121 Yale L J 1819 (cited in note 43). Arizona's and California's commissions may most closely resemble their foreign counterparts with respect to insulation from the political process, but it is Iowa's system, which relies in the first instance on the nonpartisan technocrats of the Legislative Services Bureau, that is most analogous to foreign approaches in terms of staffing. See Iowa Code §§ 42.5–42.6.

90 Two of the seven members of New Zealand's commission (a clear minority of the body) are representatives of political parties. See note 63. See also Commonwealth Electoral Act 1918 § 59(1) (Australia) (declaring that redistributions "shall commence" whenever the commission directs); Electoral Act 1993 § 38 (New Zealand).

91 Handley and Grofman, eds, *Redistricting* at appendix B (cited in note 10).

92 Balinski, *Redistricting in France* at 182 (cited in note 48); Moriwaki, *The Politics of Redistricting in Japan* at 112 (cited in note 52).

high-politicization, high-judicialization space? A likely answer is that the agency costs[93] associated with the high-politicization, low-judicialization space are intolerable. (Or, rather, that the costs are now tolerated only in countries that are not fully democratic.) When political actors have the unfettered authority to redistrict, they typically produce districts that are highly malapportioned, that seek to benefit one party at the expense of others, and that fail to provide sufficient opportunities for minority representation.[94] Unconstrained political actors, in other words, systematically pursue their own interests instead of those of the broader public, which include districts of roughly equal size that treat both parties and minority groups fairly. These costs were all incurred in pre-1962 America,[95] and they were also endured in every other country that used to allow the elected branches to design districts without judicial oversight.[96] As Professor John Courtney observed about pre-1964 Canada, "Biases against urban and in favor of rural voters were common to all provinces," and "federal redistributions amounted to little more than acts of political expediency."[97]

The appeal of the low-politicization, low-judicialization and high-politicization, high-judicialization positions, then, is that they promise to reduce the agency costs of redistricting. Courts can require districts to have the same population, they can reject attempts to dilute minority representation, and in theory they can invalidate gerrymanders that advantage either a single party or incumbents of both parties (though in practice they have not done so).[98] Similarly, commissions can be staffed with

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93 Agency costs arise whenever the interests of the principal (in this case, the public) diverge from the interests of the agent (here, the actor responsible for redistricting). Institutions are often designed so as to minimize agency costs. See Tom Ginsburg and Eric A. Posner, *Subconstitutionalism*, 62 Stan L Rev 1583, 1585, 1587–88 (2010) (using agency costs to analyze state constitutional design). See also D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv L Rev 671, 706 (2013) ("Political representation presents a complex agency problem and, unsurprisingly, gives rise to agency costs.").

94 See, for example, Courtney, *District Boundary Readjustments in Canada* at 15–18 (cited in note 45).

95 See Cox and Katz, *Elbridge Gerry's Salamander* at 4, 13, 52, 59–60 (cited in note 33) (discussing malapportionment and partisan bias in pre-1962 America).

96 See notes 45–46 and accompanying text.

97 Courtney, *Commissioned Ridings* at 20, 23 (cited in note 66). See also Fetzer, 4 Taiwan J Dem at 142–47 (cited in note 47) (describing redistricting abuses by political actors in present-day Singapore). See Grace, *Malaysia* (cited in note 47) (same in present-day Malaysia).

98 See notes 34–38 and accompanying text (briefly summarizing the main lines of American redistricting doctrine).

nonpartisan members who are personally unaffected by redistricting and then instructed to design districts based on criteria such as equal population, equitable representation for minority groups, and partisan fairness. Both courts and commissions can thus limit the divergence between the interests of the public and the policies that actually emerge from the redistricting process. As Professors Tom Ginsburg and Eric Posner have put it, "Judicial review provides [one] distinct device for monitoring" the behavior of agents, but "other monitoring devices, including . . . commissions," can improve the fit between public policy and the public interest as well.[99]

This agency cost perspective also explains why the low-politicization, high-judicialization space is nearly empty. Since the harms of unconstrained line drawing by political actors can be alleviated *either* judicially or bureaucratically, there is no need to involve *both* courts and commissions in the redistricting process. Put another way, the judiciary can exit the stage once commissions are established because there is no realistic threat that properly designed commissions will carry out the problematic policies—malapportionment, partisan and bipartisan gerrymandering, and minority vote dilution—for which the elected branches are known. We may therefore expect jurisdictions in the low-politicization, high-judicialization space to migrate over time to the low-politicization, low-judicialization space. Indeed, there is evidence that such a migration is already underway in the minority of American states that currently employ commissions.[100]

2. Changes over time.

Although it is interesting to speculate about future policy shifts, the politicization-judicialization matrix can also be deployed to track *past* changes in the redistricting models used by different jurisdictions. Figure 2 below includes the same two axes as Figure 1, but it displays approaches that used to be in place (in italics) in addition to current policies (in bold). It also

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[99] Ginsburg and Posner, 62 Stan L Rev at 1590–91 (cited in note 93). See also Pildes, 118 Harv L Rev at 44 (cited in note 12) (noting that both courts and independent commissions can help address the "constantly looming pathology of democratic systems"); Kim Lane Scheppele, *Congress in Comparative Perspective: Parliamentary Supplements (or Why Democracies Need More Than Parliaments)*, 89 BU L Rev 795, 810 (2009).

[100] See note 44 and accompanying text.

lists only jurisdictions that have undergone major shifts in how they design districts, not all jurisdictions. And, for ease of exposition, it does not identify where within each quadrant each jurisdiction is located.[101]

FIGURE 2. PAST AND PRESENT REDISTRICTING MODELS

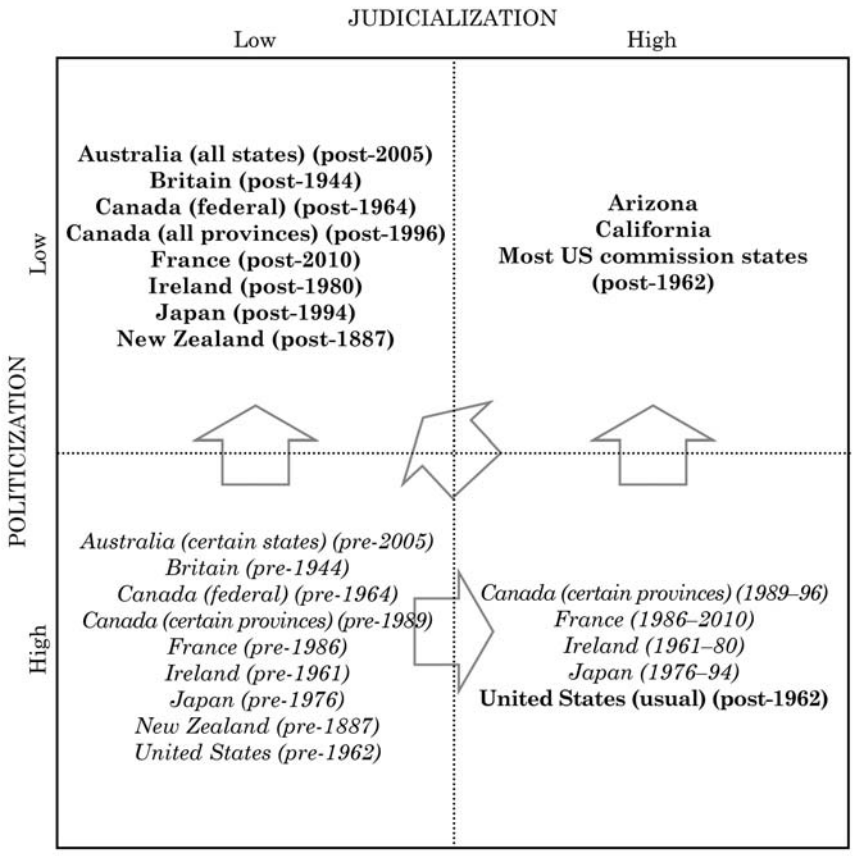

Figure 2 shows that when jurisdictions initially abandoned unconstrained line drawing by political actors, they moved to either the low-politicization, low-judicialization or high-politicization, high-judicialization spaces. Certain Australian

[101] Two additional points: First, I consider jurisdictions to be highly judicialized if they had a court decision that invalidated a district plan during the relevant time period. Second, I deem jurisdictions that used commissions in the past but limited their discretion through criteria that resulted in malapportionment in favor of rural areas (for example, Alberta, British Columbia, Queensland, South Australia, Western Australia) to be in the high-politicization, high-judicialization quadrant, not in the low-politicization, high-judicialization quadrant.

states, Britain, Canada, and New Zealand established commissions and thus largely excluded both the elected branches and the courts from the redistricting process. On the other hand, certain Canadian provinces, France, Ireland, Japan, and the United States did not adopt commissions but rather experienced surges in their levels of judicial involvement. As noted earlier, no liberal democracy still remains in the original high-politicization, low-judicialization space.[102]

Figure 2 also depicts the policy shifts that have taken place away from the high-politicization, high-judicialization space. Certain American states instituted commissions but remain subject to significant (though perhaps lessening) judicial supervision, and thus find themselves in the low-politicization, high-judicialization space. In addition, certain Canadian provinces, France, Ireland, and Japan adopted commissions in recent years, and have not had their district plans invalidated by the courts since doing so. They now comprise part of the long list of jurisdictions in the low-politicization, low-judicialization space.[103] The only jurisdictions still remaining in the high-politicization, high-judicialization space, of course, are most American states.

Figure 2 further illustrates that, on the politicization axis, all of the movement across the world has been from higher to lower levels. No liberal democracy has ever embraced a commission only later to dismantle it.[104] Lastly, Figure 2 suggests that a shift from high- to low-judicialization can occur only if accompanied by a shift from high- to low-politicization. The courts cannot be removed from the redistricting process unless the elected branches also are removed. If political actors retain their line-drawing authority, then the courts must retain their power of oversight as well—or else a jurisdiction would find itself back in the untenable high-politicization, low-judicialization space.

Again, all of these policy changes are explicable in terms of agency costs. Liberal democracies eventually depart from the

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[102] See Part I.A.

[103] It is admittedly somewhat of a judgment call whether these Canadian provinces, France, Ireland, and Japan are now in the low-politicization, high-judicialization space or in the low-politicization, low-judicialization space. Because these jurisdictions' plans have not been struck down since they adopted commissions, I place them in the low-politicization, low-judicialization space. See note 101.

[104] See Butler and Cain, *Congressional Redistricting* at 124 (cited in note 48) (noting the "sustained international trend toward keeping incumbent legislators out of the redistricting process and relying more on neutral commissions").

high-politicization, low-judicialization space because the costs associated with it are unbearably high. They tend to leave the high-politicization, high-judicialization space because its costs, while lower, are still substantially higher than those of the two low-politicization positions.[105] And the few jurisdictions in the low-politicization, high-judicialization space may be moving toward the low-politicization, low-judicialization space because extensive judicial involvement does not reduce costs very much when political actors already have been excluded from the process of district design.

Of course, the relative magnitude of agency costs is not a sufficient explanation for jurisdictions' movement from one policy position to another. The agents that are the principal beneficiaries of agency slack in this domain—that is, the elected branches—typically must approve all policy changes. They typically do *not* approve changes that harm their own interests, no matter how great the resulting benefits to the public might be. The point here is only that when policy shifts do occur in the realm of redistricting, they tend to result in reductions in agency costs. In other words, when political actors are either circumvented or compelled to accept alterations to the status quo, the new policies tend to be superior to the old ones from the perspective of the public. Policy change in this arena is usually synonymous with policy improvement.

C. Rethinking the American Approach

The positions taken by other jurisdictions, as well as the changes over time in these positions, have implications for the exceptional American model. In particular, they suggest that the majority of American states, currently located in the high-politicization, high-judicialization space, would benefit by moving to the low-politicization, low-judicialization space. Below I present the case for such a policy shift, drawing on political science findings about both the United States and foreign jurisdictions, and then consider a number of potential objections. The argument on behalf of redistricting commissions is not a new one,[106] but it has not previously been made using detailed comparative and empirical evidence.

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[105] See Part I.C.

[106] See, for example, Confer, 13 Kan J L & Pub Pol at 123–33, 138 (cited in note 44); Issacharoff, 116 Harv L Rev at 644–48 (cited in note 12). I should also note that I focus here on the *normative* case for commissions. I do not devote much attention to what

I note that I do not attempt here (or in the Article's two subsequent normative sections) to defend a particular theory of representative democracy. My aim, rather, is to show that my policy prescriptions are compatible with a wide range of theoretical perspectives. For example, both advocates of unbiased elections[107] and believers in the primacy of electoral responsiveness[108] should be able to agree that independent commissions produce better district maps than political actors. Similarly, whether one is normatively committed to high participation, accurate representation, or low polarization, one should prefer homogenizing line-drawing criteria to diversifying requirements.[109] And multimember districts with alternative voting rules should be appealing not only to those who oppose race-conscious government action but also to those who support proportional representation for minority groups.[110] Of course, my prescriptions are not consistent with *every* plausible democratic theory. But they are consistent with a good number of them, which is more than can be said for many other proposals in this area—or for the status quo.

1. Less politics, less law.

Two points in favor of the low-politicization, low-judicialization space are that it is preferred by almost every foreign jurisdiction and that almost all recent policy movement has been in its direction. Of course, what Professor Mark Tushnet refers to as the "nose-counting o[f] bottom-line results" provides little reason, standing alone, for American states to alter their redistricting practices.[111] But it is surely probative that liberal

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Professor Heather Gerken has dubbed the "here to there" problem in election law, that is, how to actually *enact* beneficial policy reforms. See Heather K. Gerken, *Getting from Here to There in Election Reform*, 34 Okla City U L Rev 33, 33–34 (2009). See also Stephanopoulos, 23 J L & Polit at 342–45 (cited in note 29) (addressing "here to there" problem in context of redistricting initiatives).

[107] See, for example, Gelman and King, 88 Am Polit Sci Rev at 543, 553–54 (cited in note 13); Bernard Grofman and Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after* LULAC v. Perry, 6 Election L J 2, 5–6 (2007).

[108] See, for example, Issacharoff, 116 Harv L Rev at 598–600 (cited in note 12); Richard H. Pildes, *The Constitution and Political Competition*, 30 Nova L Rev 253, 254–56 (2006).

[109] See Part II.C.

[110] See Part III.C.

[111] Mark Tushnet, *How (and How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 SLU L J 671, 673 (2005).

democracies in every corner of the globe have decided, again and again, to embrace commissions and to exclude the elected branches and the courts from the task of district design. As Professor Rosalind Dixon has noted, the more countries that independently adopt a given policy, the more likely it is that this policy is superior in some meaningful sense.[112]

A more substantive reason to prefer the low-politicization, low-judicialization position is that, by definition, the judiciary is less involved in redistricting when judicialization is low. American judges[113] and scholars[114] have long complained that it is unseemly, perhaps even illegitimate, for the courts to invalidate district plans that have been duly enacted by political actors. The courts have no choice but to remain in the political thicket as long as otherwise intolerable agency costs are generated by the involvement of the elected branches. But judicial intervention can cease, or at least decline dramatically, when independent commissions are made responsible for designing districts pursuant to specified criteria. In this case, no wide gap between public policy and the public interest is likely to arise, and the courts can stay their hand without worrying about the democratic consequences of their inaction.[115]

With respect to the other key axis, politicization, there are two reasons why lower levels are preferable to higher levels, the

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[112] See Dixon, 56 Am J Comp L at 956–57 (cited in note 17); Rosalind Dixon and Eric A. Posner, *The Limits of Constitutional Convergence*, 11 Chi J Intl L 399, 413 (2011) (arguing that countries should change their policies "when other states with similar demographic and social conditions have a different [policy] norm that produces a better outcome, and those other states are sufficiently numerous").

[113] See, for example, *Vieth*, 541 US at 301 (Stevens) (plurality) (arguing against "regular insertion of the judiciary into districting"); *Holder v Hall*, 512 US 874, 892 (1994) (Thomas concurring); *Colegrove*, 328 US at 556 (1946) (Frankfurter) (plurality) ("Courts ought not to enter this political thicket.").

[114] See, for example, Daniel H. Lowenstein and Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L Rev 1, 4, 75 (1985); Nathaniel Persily, *In Defense of Foxes Guarding Hen Houses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv L Rev 649, 680–81 (2002); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum L Rev 1325, 1325–30 (1987).

[115] See Courtney, *Commissioned Ridings* at 152, 173 (cited in note 66) (noting that use of commissions in Canada has enabled courts to avoid becoming involved in redistricting litigation); Rave, 126 Harv L Rev at 733 (cited in note 93) (arguing that courts should deferentially review redistricting decisions made by independent commissions). However, it would be unwise to remove the courts *entirely* from the redistricting process. There is at least a theoretical possibility that commissions will be hijacked by political actors or will make irrational line-drawing decisions. It would therefore seem sensible to retain something like judicial review of commission actions for arbitrariness or capriciousness.

first related to intent, the second to results. The point about intent is simply that properly designed commissions will not *deliberately* seek to draw district lines that discriminate against a particular party. If a district plan is considered gerrymandered when it is "deliberately engineered so as to favor one political party over another," in the words of a major 1989 Canadian decision, then gerrymandering cannot be carried out by a commission.[116] And if one of the agency costs of redistricting is the disillusionment fostered by the perception that political actors are manipulating boundaries in order to advance their own interests, then this cost cannot be incurred in a system in which an independent body is responsible for district design. Not surprisingly, public opinion polls show that American voters are more likely to believe that redistricting is conducted fairly in states that use commissions,[117] and voter knowledge and turnout are higher in these states as well.[118]

The argument about results is also easy to articulate—commissions in fact produce district plans with lower agency costs than do political actors—but requires more in the way of empirical corroboration. Here I have two kinds of costs in mind, both commonly assessed by political scientists and pertaining to plans' actual electoral consequences. The first is a high level of *partisan bias*, that is, the divergence in the share of seats that each party would win given the same share of the overall vote in a jurisdiction. For example, if the left-wing party would win 48 percent of the seats with 50 percent of the vote (in which case the right-wing party would win 52 percent of the seats), then a district plan would have a right-wing bias of 2 percent. High bias is usually thought to be undesirable because it means that the electoral system treats parties differently in terms of the conversion of votes to seats.

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[116] *Dixon v British Columbia (A.G.)*, 59 DLR 4th 247, 259 (BC S Ct 1989) (Canada). See also *Vieth*, 541 US at 271 n 1 (Scalia) (plurality) (also defining political gerrymandering in terms of illicit intent).

[117] See Joshua Fougere, Stephen Ansolabehere, and Nathaniel Persily, *Partisanship, Public Opinion, and Redistricting*, 9 Election L J 325, 335 (2010) (finding that 45 percent of voters in commission states who have opinions about redistricting believe that redistricting is carried out fairly, compared to 25 percent in states where legislature is responsible for designing districts).

[118] See James B. Cottrill, *Redistricting Reform and Political Efficacy: Do Non-legislative Approaches to Redistricting Enhance Voter Engagement and Participation?* *16–19 (Annual Meeting of the Midwest Political Science Association, Apr 12–15, 2012) (on file with author) (presenting regression results that indicate positive impact of independent commissions on voter knowledge and various measures of voter participation).

The second potential cost is a low level of *electoral responsiveness*, that is, the rate at which a party gains or loses seats given changes in its overall vote share. For instance, if the left-wing party would win 10 percent more seats if it received 5 percent more of the vote, then a plan would have a responsiveness of 2.00. Low responsiveness is typically deemed problematic because it means that changes in public opinion do not translate into sufficiently large changes in legislative representation.[119]

With respect to bias, several studies have found that commission-crafted plans are more symmetric in their treatment of the major parties than are plans devised by partisan actors. Professor Bruce Cain and others recently calculated the biases of fifty legislative chambers in twenty-six American states based on the results of the 2002 elections.[120] The median bias was 4.7 percent in states that use commissions, compared to 8.6 percent in states that allow the elected branches to draw district lines.[121] Similarly, Professors Andrew Gelman and Gary King analyzed the results of US state legislative elections between 1968 and 1988, and concluded that bipartisan plans (including those devised by commissions) had biases about 2 percentage points lower than did partisan plans.[122]

Abroad, Professor Simon Jackman demonstrated that South Australia and Queensland experienced dramatic drops in their levels of bias after instituting commissions, respectively, in 1975 and 1992.[123] Specifically, bias in these Australian states declined

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[119] See Gelman and King, 88 Am Polit Sci Rev at 544–45 (cited in note 13) (defining bias and responsiveness). Reducing bias all the way to zero is unproblematic. However, very high rates of responsiveness are undesirable because they result in large changes in seat shares despite only small shifts in vote shares. Fortunately, the responsiveness scores discussed here are not nearly high enough to raise such concerns.

[120] This data is on file with the author. The twenty-six states that Professor Cain and others analyzed account for about 75 percent of the country's population.

[121] These calculations are on file with the author. See also Bruce E. Cain, John I. Hanley, and Michael P. McDonald, *Redistricting and Electoral Competitiveness in State Legislative Elections* *13 (working paper, Apr 13, 2007) (on file with author) (finding that bias decreased in all nine states that used bipartisan commissions in 2000 cycle).

[122] See Gelman and King, 88 Am Polit Sci Rev at 552 (cited in note 13); Vladimir Kogan and Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans*, 4 Cal J Polit & Pol art 2, 22–24 (Jan 2012), online at http://www.degruyter.com/view/j/cjpp.2012.4.issue-1/1944-4370.1197/19444370.1197.xml?format=INT (visited May 11, 2013) (presenting seat-vote curves that show close to zero bias for new commission-drawn plans in California, compared to substantial pro-Democratic bias for old plans).

[123] See Simon Jackman, *Measuring Electoral Bias: Australia, 1949–93*, 24 Brit J Polit Sci 319, 345 (1994).

from almost 20 points to no more than 6 points.[124] In Quebec, likewise, according to Professor Alan Siaroff's calculations, bias fell by approximately 50 percent after the province adopted a commission in 1972.[125] And in Japan, Professor Ray Christensen determined that the electoral system "show[ed] very little discernible bias" after the 1994 reforms were enacted,[126] while Professor King showed that the system had been quite biased during the forty preceding years, particularly against the Communist Party.[127]

The story is similar with responsiveness. Professor Cain's figures indicate that US commission states had a median responsiveness of 1.22 in the 2002 elections, compared to 1.04 in political-actor states.[128] Professors Gelman and King found that bipartisan plans were more responsive than partisan plans by a margin of about 0.25 during the 1968–88 period.[129] Professor Jackman's list of the ten lowest responsiveness scores recorded in Australia from 1949 to 1993 is mostly comprised of plans from South Australia (pre-1975) and Western Australia (which used a commission but sharply limited its discretion prior to 2005).[130] Conversely, the ten highest scores come primarily from jurisdictions that employed commissions throughout this era, such as Victoria and the federal electoral system.[131] And responsiveness

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[124] See id at 344–45. See also Butler and Cain, 4 Electoral Stud at 205 (cited in note 20) (noting the minimal bias of the 1984 Australian reapportionment). Queensland and South Australia not only entrenched independent commissions when they reformed their electoral systems, but also abolished redistricting criteria that previously had resulted in significant malapportionment in favor of rural areas. See Jackman, 24 Brit J Polit Sci at 344–45 (cited in note 123); Graeme Orr and Ron Levy, *Electoral Malapportionment: Partisanship, Rhetoric and Reform in the Shadow of the Agrarian Strong-Man*, 18 Griffith L Rev 638, 639, 649, 659 (2009).

[125] See Alan Siaroff, *Electoral Bias in Quebec Since 1936*, 4 Can Polit Sci Rev 62, 66–67 (2010) (using slightly different method to calculate bias).

[126] Christensen, 5 Japanese J Polit Sci at 268 (cited in note 52).

[127] See Gary King, *Electoral Responsiveness and Partisan Bias in Multiparty Democracies*, 15 Legis Stud Q 159, 173 (1990).

[128] These calculations are on file with the author. See also Cain, Hanley, and McDonald, *Redistricting and Electoral Competitiveness* at *13 (cited in note 121).

[129] See Gelman and King, 88 Am Polit Sci at 543, 549 (cited in note 13). See also Kogan and McGhee, 4 Cal J Polit & Pol at 26 (cited in note 122) (showing increases in responsiveness for new commission-drawn plans in California).

[130] See Jackman, 24 Brit J Polit Sci at 350 (cited in note 123); Office of the Electoral Distribution Commissioners, *2011 Electoral Distribution for the State of Western Australia* 1–4 (2011) (describing 2005 changes to redistricting criteria in Western Australia).

[131] See Jackman, 24 Brit J Polit Sci at 350 (cited in note 123). In addition, Australia's and Britain's constituencies generally have exhibited normal party vote distributions, in contrast to the bimodal distributions that have been more common in the United States. Normal party vote distributions indicate higher responsiveness than bimodal

has roughly *doubled* in Japan in the wake of its 1994 reforms, from 1.56 in the 1958–86 period[132] to approximately three today.[133]

American political scientists have also studied the implications of commission-drawn plans for *competitiveness* (a concept related but not identical to responsiveness), with somewhat ambiguous results. Professors Jamie Carson and Michael Crespin found that commissions had a positive impact on the proportion of districts that were won by less than 20 points in the 1992 and 2002 congressional elections, even controlling for a host of other relevant variables.[134] Similarly, Professor James Cottrill determined that incumbent vote share in congressional races was lower between 1982 and 2008 in commission states, and that it declined markedly after these states adopted commissions.[135] However, these findings lost their statistical significance after Professor Cottrill controlled for other relevant variables.[136] And Professor Seth Masket and others examined state legislative election results in 2002, and concluded that bipartisan commissions did not make races more likely to have had a margin of victory of less than 10 points (though they did make them more likely to have been contested).[137]

In a nutshell, then, the case for the low-politicization, low-judicialization position is as follows: It is far more popular worldwide than any other approach (and still growing in popularity). It

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distributions. See G. Gudgin and P.J. Taylor, *Seats, Votes, and the Spatial Organisation of Elections* 132, 167 (Pion Limited 1979).

[132] See King, 15 Legis Stud Q at 173 (cited in note 127).

[133] See Christensen, 5 Japanese J Polit Sci at 269–70 (cited in note 52) (displaying seat-vote curves for 1996, 2000, and 2003 elections, with slopes close to three).

[134] Jamie L. Carson and Michael H. Crespin, *The Effect of State Redistricting Methods on Electoral Competition in United States House of Representatives Races*, 4 State Polit & Pol Q 455, 461–62 (2004).

[135] See James B. Cottrill, *The Effects of Non-legislative Approaches to Redistricting on Competition in Congressional Elections*, 44 Polity 32, 37–40 (2012). Professor Cottrill also reported that experienced challengers are more likely to run and incumbents are more likely to be defeated in commission states. Id.

[136] See id at 44–47.

[137] See Seth E. Masket, Jonathan Winburn, and Gerald C. Wright, *The Gerrymanderers Are Coming! Legislative Redistricting Won't Affect Competition or Polarization Much, No Matter Who Does It*, 45 Polit Sci & Pol 39, 41–42 (2012). See also Cain, Hanley, and McDonald, *Redistricting and Electoral Competitiveness* at *15 (cited in note 121) (finding that 2002 state legislative races in commission states were more competitive by some metrics and less competitive by others); Peter Miller and Bernard Grofman, *Redistricting Commissions in the Western United States*, *27–29 (working paper, Foxes, Henhouses, and Commissions Symposium at the University of California–Irvine Law School, Sept 2012) (on file with author) (finding that commission usage in western states had unclear implications for competitiveness in congressional races).

enables the courts to exit a domain in which their presence is often controversial. It prevents district plans from being devised with the intent to harm a particular party. And the plans that it generates are in fact less biased, more responsive, and perhaps more competitive than those fashioned by political actors. Next, I consider a number of the objections that scholars have posed to redistricting commissions, again relying where possible on evidence from around the world.

2. Objections.

The most common argument against independent commissions is that they cannot actually be made independent. Commission members may have partisan predilections, just like anybody else, and they must ultimately obtain their positions through the decisions of political actors. Politics simply cannot be removed from the redistricting process.[138] This argument is belied by the experiences of the foreign countries that have now used commissions to draw district lines for several decades. Despite having political cultures no less contentious than our own, and despite employing selection mechanisms that are not perfectly insulated from politics, these countries' commissions have developed impressive reputations for independence and impartiality. For example, a British court has lauded that country's commissions as "independent and non-political";[139] an Irish court has expressed its "confidence in the fact that constituency boundaries have been drawn [by commissions] in an even handed way,"[140] and Canada's foremost redistricting scholar has observed that "[s]ince they were first established in the 1960s, commissions have guarded their independence jealously."[141]

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[138] See, for example, Elmendorf, 80 NYU L Rev at 1378–79 (cited in note 12); Lowenstein and Steinberg, 33 UCLA L Rev at 73 (cited in note 114); Persily, 116 Harv L Rev at 674 (cited in note 114) ("[I]t is almost impossible to design institutions to be authentically nonpartisan and politically disinterested.").

[139] *Regina v Boundary Commission for England*, [1983] 1 QB at 615. See also Boundary Commission for England, *A Guide to the 2013 Review* 9 (2011) ("The BCE is an independent and impartial body."); Ron Johnston, et al, *From Votes to Seats: The Operation of the UK Electoral System Since 1945* 93 (Manchester 2001); Iain McLean, *Apportionment and the Boundary Commission for England*, 11 Electoral Stud 293, 306 (1992) (referring to the "jealously preserved independence of the Boundary Commissions").

[140] *Murphy*, IEHC 185 at ¶ 7.5. See also Coakley, *Electoral Redistricting in Ireland* at 164 (cited in note 54); Katz, *Malapportionment* at 255 (cited in note 48).

[141] John C. Courtney, *Parliament and Representation: The Unfinished Agenda of Electoral Redistributions*, 21 Can J Polit Sci 675, 677 (1988). See also Charles Paul Hoffman, *The Gerrymander and the Commission: Drawing Electoral Districts in the*

The argument about the inevitability of political infiltration also overlooks some of the procedural devices that can be used to safeguard the independence of commissions. As noted earlier, Australia and New Zealand do not allow political actors to appoint commission members, but rather staff the bodies primarily with nonpartisan technocrats who receive their positions ex officio.[142] Equally promisingly, Arizona and California create large pools of qualified potential members, from whose ranks the actual commissioners are selected either by legislative leaders (in Arizona's case) or by lottery (in California's).[143] Furthermore, it may not matter very much whether political influences are fully extirpated from the district-drawing process. As long as commissions in fact produce plans that are less biased and more responsive than those of the elected branches—as the evidence indicates is the case[144]—it is not too worrisome that partisan sentiments may still linger within the hearts of certain commission members.

The electoral outcomes of commission-drawn plans are actually the focus of another argument against commissions, associated primarily with Professors Daniel Lowenstein and Jonathan Steinberg. These two scholars claim that commissions in Australia, Britain, and New Zealand have systematically (albeit unintentionally) discriminated against the Labor parties by

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United States and Canada, 31 Manitoba L J 331, 348–49 (2005). As for the claim that there is something unique about the United States that makes it impossible for American commissions to be independent, see Lowenstein and Steinberg, 33 UCLA L Rev at 73 (cited in note 114), it is contradicted by the fact that several American states (including California) *do* have such commissions. It plainly is not impossible to find individuals in America (such as professors, retired judges, bureaucrats, and even ordinary citizens) who can be trusted to draw district boundaries without trying to help one party or another. In addition, one might expect commissions to be more independent of the political process where the stakes of their decisions are lower. The stakes *are* lower for American commissions, at both the state and federal levels, because their decisions only affect the composition of the legislative branch—and not, as in a parliamentary system, the makeup of the government as a whole.

142 See note 63 and accompanying text. See also Beth Bowden and Lloyd Falck, *Redistribution and Representation: New Zealand's New Electoral System and the Role of the Political Commissioners*, in Iain McLean and David Butler, eds, *Fixing the Boundaries: Defining and Redefining Single-Member Electoral Districts* 147, 164 (Dartmouth 1996); McRobie, *New Zealand's Electoral Redistribution Practices* at 27 (cited in note 65).

143 See Ariz Const Art IV, part 2, § 1; Cal Gov Code § 8252. See also Cain, 121 Yale L J at 1824 (cited in note 41) ("It is hard to imagine a more complete effort to squeeze every ounce of incumbent and legislative influence out of redistricting than the [new California commission].").

144 See notes 120–37 and accompanying text.

packing their supporters in urban districts.[145] However, Professors Lowenstein and Steinberg make their case entirely on the basis of data from the 1950s to the 1980s showing that the Australian, British, and New Zealand plans all had mild anti-Labor biases on the order of 1 to 3 percent.[146] They do not compare these plans' biases to those that existed *before* commissions were adopted in these countries,[147] nor do they compare them to biases in jurisdictions that do not use commissions—which are often much higher.[148] Commissions therefore cannot be blamed for the results that Professors Lowenstein and Steinberg bemoan. In addition, more recent plans in all three countries either have not been biased at all (in New Zealand's case),[149] or have been skewed *in favor* of the Labor parties (in the Australian and British cases).[150] There is thus nothing like a permanent right-wing gerrymander in any of these jurisdictions.

A final argument against commissions, made most eloquently by Professor Nathaniel Persily, is that redistricting is a matter of public policy just like any other. District boundaries "create service relationships between representatives and constituents" and "fit into larger public policy programs," and their demarcation should therefore remain within the legislative ambit.[151] It is true, of course, that district design cannot be wholly separated from issues that no one would want to remove from the control of political actors. But the implications of district design for these issues can be—and routinely are—taken into account by commissions. Around the world, commissions do not

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145 See Lowenstein and Steinberg, 33 UCLA L Rev at 71–73 (cited in note 114).

146 See id at 70–71.

147 See Jonathan Rodden, *The Geographic Distribution of Political Preferences*, 13 Ann Rev Polit Sci 321, 332 (2010) (noting that redistricting biases against leftist parties have existed in many countries "going back to the turn of the century").

148 See, for example, Gelman and King, 88 Am Polit Sci Rev at 556–57 (cited in note 13) (listing biases for US state legislative plans, many of which exceed 3 percent); Jackman, 24 Brit J Polit Sci at 350 (cited in note 123) (listing ten Australian plans with biases above 8 percent).

149 This is because New Zealand adopted a form of proportional representation in 1993 that effectively makes it impossible for substantial biases to arise. See Royal Commission on the Electoral System, *Report* at 43 (cited in note 46) (discussing changes to New Zealand's electoral system).

150 See Jackman, 24 Brit J Polit Sci at 346 (cited in note 123) (showing that more recent Australian plans have been biased in favor of Labor Party); Ron Johnston, David Rossiter, and Charles Pattie, *Disproportionality and Bias in the Results of the 2005 General Election in Great Britain: Evaluating the Electoral System's Impact*, 16 J Elections, Pub Op & Parties 37, 39 (2006) (same for Britain).

151 Persily, 116 Harv L Rev at 679 (cited in note 114).

blindly shape constituencies on the basis of abstract criteria, but rather receive information about all sorts of policy considerations (often from politicians) before finalizing their decisions. For instance, the Australian, British, Canadian, Indian, Irish, New Zealand, and Pakistani commissions all hold extensive hearings, allow interested parties to comment on draft maps, and respond explicitly to submitted statements, before issuing their final plans.[152] Relevant policy concerns by no means go unheard in this process.

The deeper problem with the redistricting-as-public-policy argument, though, is that it ignores the agency costs that are the reason why reformers want to withdraw the line-drawing power from the elected branches in the first place. In most issue domains, political actors' own electoral fortunes are not inherently in tension with optimal societal outcomes, and so the divergence between public policy and the public interest can be limited to manageable levels. In the redistricting arena, however, generations of experience indicate that politicians will create malapportioned districts, attempt to handicap their opponents, and dilute minority representation when they are left to their own devices. They may *also* consider matters of legitimate public policy, but this benefit is swamped by the large agency costs that are almost invariably incurred.

District design is thus analogous to monetary policy, another task that almost every liberal democracy assigns to an independent body instead of to the elected branches. Interest rates unquestionably implicate issues that are the bread and butter of ordinary politics. But through their links to inflation, unemployment, and economic growth, they also exert a sizeable influence on the likelihood that politicians will win reelection. The fear that politicians will manipulate interest rates for self-serving reasons is precisely why central banks are now responsible for monetary policy throughout the world, and the same

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[152] See note 69 and accompanying text. See also Orr, *The Law of Politics* at 34 (cited in note 46) (discussing extensive public consultation process in Australia); Rossiter, Johnston, and Pattie, *The Boundary Commissions* at 225–331 (cited in note 46) (same for Britain); Bowden and Falck, *Redistribution and Representation* at 159 (cited in note 142) (explaining how two partisan members of New Zealand commission "bring political information . . . to the senior public servants" and "provid[e] the necessary oil in the gears of the electoral machine"); John C. Courtney, *Redistricting: What the United States Can Learn from Canada*, 3 Election L J 488, 493 (2004) (noting that Canadian "commissioners are mindful of the need to construct districts using familiar administrative structures (health or education districts, rural municipalities, counties, and the like)").

logic applies squarely to redistricting. The case for independent commissions is essentially the same as the case for the Federal Reserve.[153]

II. REDISTRICTING CRITERIA

If the first crucial question confronted by every country with territorial districts is *who* should draw them, the second is *how* they should be drawn. In other words, of the many possible redistricting criteria—equal population, respect for political subdivisions, respect for communities of interest, compactness, and so forth—which ones should actually be used to shape constituencies? I begin this Part by summarizing the criteria that are currently employed in America and abroad. In America, equal population and various race-related provisions are the only universal requirements, though many states impose additional obligations. Abroad, the equal population mandate is not nearly as rigid, but it is supplemented by a host of requirements that relate to jurisdictions' underlying political geography.

Next, I divide redistricting criteria into two categories based on their implications for districts' internal composition. Most of the universal American requirements are diversifying because they tend to make districts more heterogeneous in terms of demography, socioeconomic status, and ideology. Conversely, almost all other common criteria are homogenizing because they typically give rise to districts whose residents resemble one another in key respects. Finally, I argue that homogenizing requirements are preferable in most cases. Both in theory and empirically, districts drawn pursuant to these criteria are linked to higher voter participation, more effective representation, and, in the aggregate, lower legislative polarization.

A. Global Models

1. America.

Nowhere in the world is the equal population requirement enforced more strictly than for congressional districts in the United States. Thanks to a series of Supreme Court decisions between the 1960s and 1980s, congressional districts within

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[153] Consider Scheppele, 89 BU L Rev at 819 (cited in note 99) (arguing that independent central banks are necessary because "parliaments are persistently tempted to inflate their way toward robust economic performance").

each state must have "as nearly as is practicable" the same population.[154] In the most recent cycle for which data is available, twenty-eight states reported interdistrict population deviations of fewer than *ten people*.[155] The doctrine is only slightly more relaxed for state legislative districts. They are typically permitted a total population range of up to 10 percent,[156] but even within this range they may be invalidated if their interdistrict deviations are not justified by legitimate state interests.[157]

The other universal American requirements all relate to race, and are discussed in more detail in Part III below. Under the Equal Protection Clause,[158] deliberate racial vote dilution is prohibited,[159] as is the construction of districts with race as the predominant motive (that is, racial gerrymandering).[160] The districts the Court has struck down as racial gerrymanders have mostly been odd-looking majority-minority constituencies that combined dissimilar communities of minority voters.[161] Under § 2 of the VRA, *unintentional* vote dilution is banned as well.[162] In practice, this means that large and geographically concentrated minority groups are usually entitled to districts in which they can elect the candidates of their choice.[163] The VRA also includes another provision, § 5, that requires certain jurisdictions (mostly in the South) to obtain preclearance from the Department of Justice or a federal court before their district plans can go into effect.[164] Plans are precleared when they neither are

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154 *Wesberry v Sanders*, 376 US 1, 7–8 (1964). See also *Karcher v Daggett*, 462 US 725, 730–31 (1983); *White v Weiser*, 412 US 783, 790 (1973).

155 See NCSL, *Redistricting* at 57–58 (cited in note 4).

156 See, for example, *Brown v Thomson*, 462 US 835, 842 (1983); *Connor v Finch*, 431 US 407, 418 (1977). Total population range refers to the percentage gap between the least and most populated districts in a plan, relative not to each other but rather to the ideal population size. For example, if the ideal population size is 100 people, the least populated district has 75 people, and the most populated district has 125 people, then the total population range is 50 percent (not 66.7 percent).

157 See, for example, *Cox v Larios*, 542 US 947, 949–50 (2004) (Stevens concurring) (affirming district court invalidation of Georgia plan that fell within 10 percent range but whose population deviations were politically motivated).

158 US Const Amend XIV, § 1.

159 See, for example, *Rogers v Lodge*, 458 US 613, 622–27 (1982); *White v Regester*, 412 US 755, 765–70 (1973).

160 See, for example, *Miller v Johnson*, 515 US 900, 916 (1995); *Shaw v Reno*, 509 US 630, 649 (1993).

161 See Stephanopoulos, 160 U Pa L Rev at 1419–21 (cited in note 15).

162 See VRA § 2, 79 Stat at 737, codified at 42 USC § 1973.*!*

163 See *Thornburg v Gingles*, 478 US 30, 48–51 (1986) (Brennan).

164 See 42 USC § 1973c(a).

intended to discriminate against minority groups nor result in a reduction in minority representation.[165]

Beyond these universal (or, in § 5's case, regional) requirements, states also impose many of their own criteria on how districts are drawn. These criteria are found in constitutions, statutes, and even nonbinding guidelines, and they apply to state legislative districts about twice as often as to congressional districts.[166] In rough order of popularity, they include contiguity, respect for political subdivisions, compactness, respect for communities of interest, preservation of prior district cores, prohibitions on incumbent protection, prohibitions on partisan intent, and competitiveness.[167] State law may therefore add nothing at all to the generally applicable federal requirements (as, for example, with Texas's congressional districts).[168] Or state law may include elaborate regulations that markedly alter the redistricting process (as, for instance, with Florida's state legislative districts, which must be compact, must respect political subdivisions, must not favor or disfavor a political party or an incumbent, and must not reduce minority representation).[169]

2. Abroad.

Like the United States, all foreign jurisdictions that periodically redraw their districts abide by equal population requirements of one kind or another.[170] However, these foreign requirements are never as strict as the American mandate for congressional districts, and in only a handful of cases—most notably, Australia,[171] New Zealand,[172] and, since 2011, the United Kingdom[173]—are they even as rigorous as the American policy for state legislative districts. Permissible population ranges

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165 See 42 USC § 1973c(b).

166 See NCSL, *Redistricting* at 172–217 (cited in note 4) (listing all state law redistricting criteria as of 2009).

167 See id.

168 See id at 210 (showing that no state law requirements apply to design of Texas congressional districts).

169 See Fla Const Art III, § 21.

170 See Handley, *A Comparative Survey* at 273 (cited in note 10).

171 See Commonwealth Electoral Act 1918, §§ 63A, 73(4) (Australia) (permitting projected total population range of up to 7 percent at three years and six months after the plan's enactment).

172 See Electoral Act 1993, § 36 (New Zealand) (permitting total population range of up to 10 percent).

173 See Parliamentary Voting System and Constituencies Act 2011, part 2, § 11 (UK) (permitting total population range of up to 10 percent).

around the world are more commonly on the order of 20 percent (e.g., Belarus, the Ukraine), 30 percent (e.g., the Czech Republic, Germany), 40 percent (e.g., Papua New Guinea, Zimbabwe), or 50 percent (e.g., Canada, Lithuania)[174]—where they are specified at all, which they often are not.[175] Also notably, certain Australian states and Canadian provinces make exceptions to their regular rules for large and sparsely populated districts. For example, population ranges of up to 100 percent are allowed for northern districts in Alberta[176] and Saskatchewan,[177] while Queensland[178] and Western Australia[179] add "phantom" voters to the populations of districts in their vast and almost empty interiors.

Foreign jurisdictions' more relaxed approach to population equality is also evident in their judicial decisions on the subject. In the United States, legal challenges to malapportioned districts began succeeding in droves in the 1960s, thus triggering the reapportionment revolution. Abroad, in contrast, the majority of lawsuits complaining about unequal district population have failed—rejected by courts in no mood to emulate the American example.[180] In Australia, for instance, the High Court

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[174] See *Equal Population in Redistricting* (ACE Electoral Knowledge Network), online at http://aceproject.org/ace-en/topics/bd/bdb/bdb05/bdb05a (visited May 11, 2013). See also David Samuels and Richard Snyder, *The Value of a Vote: Malapportionment in Comparative Perspective*, 31 Brit J Polit Sci 651, 660–61 (2001) (providing malapportionment figures for 78 countries). Canada allows districts outside the 50 percent range if "extraordinary" circumstances apply. See Electoral Boundaries Readjustment Act, RSC 1985, ch E-3, § 15(2) (Canada).

[175] See Handley, *A Comparative Survey* at 273 (cited in note 10) ("Close to 75 percent of the countries surveyed report no specific limit regarding the extent to which constituencies are permitted to deviate from the population quota.").

[176] See Electoral Boundaries Commission Act, RSA 2000, ch E-3, § 15(2) (Alberta 2000) (Canada). Alberta formerly specified the numbers of urban, rural, and "rurban" hybrid districts that had to be drawn. See *Reference re: Order in Council O.C. 91/91 in Respect of the Electoral Boundaries Commission Act (1991)*, 86 DLR 4th 447, ¶¶ 6–8 (Alberta App) (Canada) ("1991 Alberta Reference Case").

[177] See *1991 Saskatchewan Reference Case*, 2 SCR 158, ¶ 44 (S Ct 1991) (Canada). Saskatchewan also formerly specified the numbers of urban and rural districts to be drawn.

[178] See Electoral Act 1992, § 45 (Australia Queensland). See also Graeme Orr, Bryan Mercurio, and George Williams, *Australian Electoral Law: A Stocktake*, 2 Election L J 383, 391 (2003).

[179] See Electoral Act 1907, § 16G (Western Australia). Western Australia formerly specified the numbers of metropolitan and nonmetropolitan districts to be drawn. See *McGinty v Western Australia*, 186 CLR 140, 165 (High Ct 1996) (Australia) (Brennan).

[180] The main exceptions have been in jurisdictions where political actors formerly were responsible for district design, such as France, Ireland, Japan, and certain Canadian provinces. See notes 48–59 and accompanying text.

upheld the federal electoral system (which then permitted a 20 percent population range) in 1975,[181] as well as Western Australia's regime (whose largest district was then about three times the size of its smallest) in 1996.[182] The court observed that Australian states had never followed a policy of strict population equality,[183] and that nationwide referenda aimed at enacting the one-person, one-vote rule had twice been rebuffed.[184] The court concluded that "equality of numbers within electoral divisions" simply is not "an essential concomitant of a democratic system."[185]

In Britain, similarly, the Court of Appeal held in 1983 that, under the then-applicable statute, the equal population requirement was less important than several other criteria.[186] According to the court, "the guidelines designed to achieve the broad equality of electorates . . . have been deliberately expressed by the legislature in such manner as to render them subordinate to [other] guidelines."[187] And in Canada, the Supreme Court explicitly declined in 1991 to "adopt the American model" of perfect population equality.[188] Instead, the court declared that "parity of voting power . . . is not the only factor to be taken into account in ensuring effective representation," and then identified additional criteria that it hoped would "ensure that our legislative assemblies effectively represent the diversity of our social mosaic."[189]

What are these non-population factors that foreign jurisdictions value so highly? In an oft-cited passage, the Canadian Supreme Court named "geography, community history, community

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[181] See *McKinlay v Commonwealth*, 135 CLR 1, 33 (High Ct 1975) (Australia) (Barwick).

[182] See *McGinty*, 186 CLR at 165 (Brennan).

[183] See *McKinlay*, 135 CLR at 20 (Barwick).

[184] See *McGinty*, 186 CLR at 245–46 (McHugh).

[185] See *McKinlay*, 135 CLR at 45 (Gibbs). See also Nicholas Aroney, *Democracy, Community, and Federalism in Electoral Apportionment Cases: The United States, Canada, and Australia in Comparative Perspective*, 58 U Toronto L J 421, 465 (2008).

[186] See *Regina v Boundary Commission for England*, [1983] 1 QB 600, 635–37 (1983).

[187] Id at 629. Also interestingly, Britain's equal population requirement was amended almost as soon as it was enacted in order to eliminate its numerical restriction on the permissible population range—a restriction, 50 percent, that was itself quite lax. See *Baker v Carr*, 369 US 186, 305 (1962) (Frankfurter dissenting); Rossiter, Johnston, and Pattie, *The Boundary Commissions* at 83 (cited in note 46).

[188] See *1991 Saskatchewan Reference Case*, 2 SCR at ¶ 34. See also *Dixon v British Columbia (AG)*, 59 DLR 4th 247, ¶ 85 (BC S Ct 1989) (Canada) (holding that Charter does not "introduce the ideal of absolute voter parity embraced by the American courts").

[189] *1991 Saskatchewan Reference Case*, 2 SCR at ¶¶ 28, 31. See also Daly, 21 BC Intl & Comp L Rev at 261 (cited in note 85).

interests and minority representation," while adding that "the list is not closed."[190] More systematically, Professor Lisa Handley recently surveyed sixty countries that use territorial districts, finding that they employ the following non-population criteria (in rough order of popularity): respect for political subdivisions, attention to geographic features, attention to means of communication and travel, respect for communities of interest, attention to population density, compactness, minority representation, and contiguity.[191] These criteria are not overly different from the ones applied by certain American states.[192] The principal contrasts are that geographic features, means of communication and travel, and population density are largely absent from American law, while the American preoccupation with minority representation is not shared by most foreign jurisdictions.[193]

Of the foreign criteria, two in particular warrant further discussion. First, respect for political subdivisions is often a much more significant requirement abroad than in even the American states that abide by it.[194] In pre-2011 Britain, for example, county and borough boundaries were considered essentially inviolable.[195] District lines almost never traversed them,

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[190] *1991 Saskatchewan Reference Case*, 2 SCR at ¶ 31. See also *McGinty*, 186 CLR at 186–87 (Dawson) (quoting this passage).

[191] See Handley and Grofman, eds, *Redistricting* at appendix C (cited in note 10). In addition, a few countries designate (or used to designate) districts for members of particular social or economic groups. See Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* 233–34 (Hong Kong 1997) (discussing "functional" constituencies reserved for certain economic sectors in Hong Kong); Marian Sawer, *Representing Trees, Acres, Voters and Non-voters: Concepts of Parliamentary Representation in Australia*, in Marian Sawer and Gianni Zappalà, eds, *Speaking for the People: Representation in Australian Politics* 36, 41 (Melbourne 2001) (discussing former university seats in Australia and Britain).

[192] See note 166 and accompanying text.

[193] More trivially, contiguity is generally required in the United States but is rarely mandated abroad.

[194] Beyond Britain and Japan, France and Ireland have relatively strict subdivision preservation requirements as well. See Conseil Constitutionnel, Décision No 2008-573, *7 (Jan 8, 2009) (France) (discussing French rule that cantons with fewer than 40,000 inhabitants not be divided); Electoral Act, 1997, Act No 25/1997, § 6(2)(c) (Ireland) (stating that "breaching of county boundaries shall be avoided as far as practicable").

[195] See Butler and Cain, *Congressional Redistricting* at 119 (cited in note 48); R.J. Johnston, *Constituency Redistribution in Britain*, in Grofman and Lijphart, eds, *Electoral Laws and Their Political Consequences* 277, 279–80 (cited in note 11). In 2011, the Conservative-led coalition revised Britain's redistricting criteria so that population equality now takes precedence over respect for political subdivisions. See Parliamentary Voting System and Constituencies Act 2011, part 2, § 11 (UK); Ron Johnston and Charles Pattie, *From the Organic to the Arithmetic: New Redistricting/Redistribution Rules for the United Kingdom*, 11 Election L J 70, 70 (2012).

even if substantial improvements in population equality could have been achieved, and the Court of Appeal stated outright that "[t]he requirement of electoral equality is . . . subservient to the requirement that constituencies shall not cross county or London borough boundaries."[196] In Japan, likewise, each prefecture is entitled to at least one parliamentary member and no district can include portions of more than one prefecture. The rationale for this policy, in the words of the Japanese Supreme Court, is that prefectures are "unit[s] with historical, economic, social integrity and substance and with a political unity,"[197] which "have a significant place in the life of the people and their feeling."[198]

Second, respect for communities of interest is also taken more seriously abroad than in the United States. In Canada, for instance, not only does the federal electoral system and every province require community boundaries to be followed,[199] but their importance has been stressed by both the Supreme Court[200] and a special 1991 commission on electoral reform.[201] As the commission put it, "The efficacy of the vote is enhanced to the degree that constituencies represent the shared interests of local communities."[202] Community-oriented arguments also account for about 50 percent of all comments submitted to Canadian redistricting commissions—80 percent if claims about history and

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196 *Boundary Commission for England*, [1983] 1 QB at 622 (describing relationship between population equality and respecting government boundaries).

197 *Case to Seek Nullification of an Election*, 52 Minshu 1373 (Saikō Saibansho, Sept 2, 1998) (Japan).

198 *Claim for the Invalidity of an Election*, 53 Minshu 1704 (Saikō Saibansho, Nov 10, 1999) (Japan). See also id (noting that "when further dividing prefectures into constituencies . . . [smaller] administrative divisions such as cities, towns and villages . . . are to be considered"); Moriwaki, *Politics of Redistricting in Japan* at 111 (cited in note 52) ("The importance of local government boundaries has traditionally been asserted by both voters and politicians.").

199 See Courtney, 3 Election L J at 493 (cited in note 152); Alan Stewart, *Community of Interest in Redistricting*, in David Small, ed, *Drawing the Map* 117, 134 (Dundurn 1991) ("The federal legislation treats community of interest as the *basic* redistricting concept, with all the other factors cited above . . . subsumed within it as component factors.") (emphasis in original).

200 See note 190 and accompanying text.

201 See Royal Commission on Electoral Reform and Party Financing, 1 *Reforming Electoral Democracy* at 9, 136–37, 149, 157–58 (cited in note 45).

202 Id at 149. See also British Columbia Electoral Boundaries Commission, *Preliminary Report* 12 (2007) ("[E]ach community needs the opportunity to choose the people who speak for it in the legislature, and to hold them accountable in democratic elections.").

geography are counted too.[203] Similarly, in Australia, Britain, Germany, India, Ireland, New Zealand, and Pakistan, commissions focus heavily on communal considerations when they design districts, as do concerned parties when they comment on proposed plans.[204] As Professor Nicholas Aroney has observed, "A close examination of the electoral systems of most modern democracies shows that . . . representation of discrete communities . . . continues in varied forms."[205]

B. Diversifying Versus Homogenizing Criteria

1. The centrality of district composition.

A key goal of the above redistricting criteria (both in America and abroad) is to limit the ability of line drawers to engage in gerrymandering. If districts must be designed so that they are contiguous, compact, respectful of political subdivisions and communities of interest, and attentive to geographic features, population density, and means of communication and travel,[206] then the hope is that they will not be able concurrently to discriminate in favor of particular parties or candidates. In the

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[203] See Courtney, *Commissioned Ridings* at 135 (cited in note 66); Stewart, *Community of Interest in Redistricting* at 151–68 (cited in note 199). The popularity of communities of interest is also revealed by Alberta's effort in the 1990s to mandate the creation of "rurban" districts that merged rural and urban areas. See note 176. The province's commission was unable to agree on a plan that included such districts, and a court commented that "the people of Alberta simply would not accept the idea that agrarian and non-agrarian populations would both feel adequately represented in the same constituency." *1994 Alberta Reference Case*, 119 DLR 4th 1, 17 (Alberta App) (Canada). See also Keith Archer, *Conflict and Confusion in Drawing Constituency Boundaries: The Case of Alberta*, 19 Can Pub Pol 177, 189 (1993).

[204] See note 69 (providing examples of commission reports focused on communal considerations). See also Rod Medew, *Redistribution in Australia: The Importance of One Vote, One Value*, in Handley and Grofman, eds, *Redistricting* at 97, 103 (cited in note 10) ("[C]ommunities of interest attract a great deal of attention during the public objection process in Australia."); Butler and Cain, 4 Electoral Stud at 200 (cited in note 20) ("Britain has put respect for communities . . . on more of a pedestal."); Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 194 (Duke 1997) ("[E]very [German] district must be a balanced and coherent entity."); McRobie, *An Independent Commission* at 36 (cited in note 65) ("The community of interest criterion is one that the [New Zealand] public sees as highly important.").

[205] Aroney, 58 U Toronto L J at 422 (cited in note 185). See also Michael Maley, Trevor Morling, and Robin Bell, *Alternative Ways of Redistricting with Single-Member Seats: The Case of Australia*, in McLean and Butler, eds, *Fixing the Boundaries* 119, 138 (cited in note 142) ("Of all the criteria, community of interest is probably the one which is most reflected one way or another in the electoral laws of countries.").

[206] See note 191 and accompanying text (listing foreign redistricting criteria in rough order of popularity).

words of the Australian High Court, "The requirements are necessary in order . . . to avoid any unnatural divisions of the kind which are found in gerrymandering."[207]

Redistricting criteria, however, serve not only to deter gerrymandering but also to realize distinctive democratic visions.[208] The rules for how districts are drawn shape constituencies' internal complexions, which in turn shape the makeup of the legislature as a whole—and thus the very character of representative democracy. A crucial mechanism through which criteria exercise this influence is district *diversification* or *homogenization*. Certain criteria, that is, tend to produce districts whose residents differ markedly from one another along demographic, socioeconomic, and ideological dimensions. Conversely, other requirements typically give rise to districts whose residents are relatively similar along these axes.

Why does district diversity matter?[209] At the level of the constituency, composition is important because it helps determine whether local political life will be conflictual or consensual. Districts whose residents vary widely in terms of politically salient factors are usually marked by internal debate and disagreement. Constituents cannot easily concur on candidates or policies when their attitudes diverge in fundamental ways.[210] On the other hand, districts whose residents resemble one another in key respects are normally more harmonious places (at least politically). There is less reason for electoral discord when constituents agree on most policy questions.[211]

District diversity also matters because of its connection to the makeup of the legislature. When most districts are internally heterogeneous with regard to some factor of interest, the

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[207] *McKinlay*, 135 CLR at 37 (McTiernan and Jacobs). See also *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 S3d 597, 639 (Fla 2012); *Hickel v SE Conference*, 846 P2d 38, 45 (Alaska 1992) ("The requirements of contiguity, compactness and socio-economic integration were incorporated by the framers of the reapportionment provisions to prevent gerrymandering.").

[208] Another goal of certain redistricting criteria, especially those relating to race, is to increase the level of minority representation. I discuss this goal in Part III.

[209] I do not distinguish in this Article between "top-line diversity," that is, the overall or aggregate heterogeneity of an entity's population, and "spatial diversity," or the variability of an entity's geographic subunits. See Stephanopoulos, 125 Harv L Rev at 1910–17 (cited in note 14) (discussing the two concepts). Since the two forms of diversity are usually correlated, the distinctions between them are not relevant here. See id at 1915.

[210] See James A. Gardner, *How to Do Things with Boundaries: Redistricting and the Construction of Politics*, 11 Election L J 399, 407 (2012).

[211] See Gardner, 37 Rutgers L J at 960–61 (cited at note 39).

legislature as a whole tends to be more homogeneous along this dimension. More of the factor's variation is captured *within* districts, leaving less to be expressed *among* districts.[212] Conversely, when most districts are internally homogeneous, the legislature is typically more diverse—more reflective of "the ends as well as the middle, the spread as well as the median of the political distribution," as Professor Heather Gerken has put it.[213] Along with this diversity comes conflict; societal cleavages predictably manifest themselves at the legislative level, resulting in a more antagonistic form of elite politics.

2. Classifying the criteria.

Despite the importance of district composition, redistricting criteria have never been analyzed in terms of their implications for it. In fact, redistricting criteria have rarely been analyzed in the first place. Scholars have often argued that they are indeterminate and cannot in fact constrain gerrymandering,[214] but little academic attention has been paid to their intended functions or the theories that underlie them. In this Subsection, I therefore classify the line-drawing requirements that are used in America and abroad, based on whether they tend to make districts more internally heterogeneous or homogeneous. As Figure 3 below indicates, most of the universal American criteria are diversifying, while almost all of the requirements employed abroad (as well as in certain US states) are homogenizing.[215]

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[212] See Gardner, 11 Election L J at 408 (cited in note 210).

[213] See Heather K. Gerken, *Second-Order Diversity*, 118 Harv L Rev 1099, 1161 (2005).

[214] See, for example, Bruce E. Cain, *Simple vs. Complex Criteria for Partisan Gerrymandering: A Comment on Niemi and Grofman*, 33 UCLA L Rev 213, 214–16 (1985); Grofman, 33 UCLA L Rev at 79–93 (cited in note 44); Lowenstein and Steinberg, 33 UCLA L Rev at 12–35 (cited in note 114).

[215] Figure 3 flags the universal American criteria and lists other criteria in rough order of their popularity abroad. See note 191 and accompanying text.

FIGURE 3. REDISTRICTING CRITERIA

Diversifying Criteria	Homogenizing Criteria
Equal population (universal United States)	Ban on racial gerrymandering
Voting Rights Act (universal United States)	Respect for political subdivisions
Political advantage (near-universal United States)	Geographic features
	Means of communication and travel
	Respect for communities of interest
	Population density
	Compactness
	Contiguity

Beginning with the equal population mandate, the more strictly it is enforced, the more heterogeneous districts must be in order to comply with it. When constituencies need to have only roughly the same population, as in most foreign countries, they can be crafted pursuant to the many criteria that promote district homogeneity. But when equal population is made the paramount objective of redistricting, as for American congressional districts, most other criteria must be sacrificed in the pursuit of perfect population equality. Odd shapes must be created, subdivision and community boundaries must be crossed, and geographic features must be neglected.[216] Consistent with this logic, Micah Altman found that US congressional districts' breaches of county, town, and neighborhood borders skyrocketed in the wake of the reapportionment revolution.[217] Similarly, the number of British counties and boroughs that are divided

[216] See Johnston, et al, *Votes to Seats* at 61 (cited in note 139) (arguing that British commission "had been forced to recommend the complete dismemberment . . . of many unified communities" during brief period when it had to comply with stricter equal population requirement); Bruce E. Cain, Karin Mac Donald, and Michael McDonald, *From Equality to Fairness: The Path of Political Reform since* Baker *v.* Carr, in Thomas E. Mann and Bruce E. Cain, eds, *Party Lines: Competition, Partisanship, and Congressional Redistricting* 6, 8 (Brookings 2005); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv J L & Pub Pol 103, 112 (2000).

[217] See Micah Altman, *Traditional Districting Principles: Judicial Myths vs. Reality*, 22 Soc Sci Hist 159, 187 (1998).

between different districts increased dramatically after a permissible population range of 10 percent was imposed in 2011.[218]

Next, the key provisions of the Voting Rights Act, § 2 and § 5, are diversifying because the majority-minority districts that they require are usually heterogeneous with respect to both race and other politically salient factors.[219] That majority-minority districts are diverse with respect to race is obvious as long as the minority group's share of the population is not much higher than 50 percent—which it rarely is in American congressional districts. For example, America's twenty-six majority-black districts in the 2000 cycle had an average black population of 59 percent, and the most heavily black district in the country (Illinois's Second) was only 69 percent black.[220]

The reason why majority-minority districts are also typically diverse with respect to *non*-racial factors is that dissimilar minority communities often need to be combined in order to muster a district-wide majority;[221] and then these groups often

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[218] See Boundary Commission, *A Guide to the 2012 Review* at 11 (cited in note 139) ("The mandatory nature of [the new equal population requirement] . . . means that it will be necessary for constituencies to cross a number of external local authority boundaries."); David Rossiter, Ron Johnston, and Charles Pattie, *Representing People and Representing Places: Community, Continuity and the Current Redistribution of Parliamentary Constituencies*, 66 Parliamentary Affairs *19 (forthcoming 2013), online at http://pa.oxfordjournals.org/content/early/2012/07/03/pa.gss037.full.pdf (visited May 11, 2013) (noting that thirty-seven out of sixty-eight proposed districts in London cross borough lines, compared to ten out of seventy-three current districts).

[219] See 42 USC §§ 1973(a)–(b), 1973c(b). The same is true for the constitutional prohibition on intentional racial vote dilution, which operates in relatively similar fashion as § 2 of the VRA. See note 35 and accompanying text. It is also important to note that the formation of a racially heterogeneous majority-minority district often results in the formation of adjacent districts that are more racially homogeneous. The adjacent districts often must be "bleached" in order to assemble enough minority members in the majority-minority district. See Gerken, 118 Harv L Rev at 1132 n 86 (cited in note 213).

[220] This data is on file with the author, covers the five-year period from 2005 to 2009, and is from the 2009 release of the American Community Survey (ACS). See *American Community Survey: 2009 Data Release* (US Census Bureau Dec 14, 2010), online at http://www.census.gov/acs/www/data_documentation/2009_release (visited May 11, 2013). Interestingly, before the VRA was amended in 1982 to make it easier to bring vote dilution claims, districts were often "packed" with very high concentrations of minority voters. See Bernard Grofman and Lisa Handley, *Preconditions for Black and Hispanic Congressional Success*, in Wilma Rule and Joseph F. Zimmerman, eds, *United States Electoral Systems: Their Impact on Women and Minorities* 31, 35 (Praeger 1992) (showing that *seven* districts in 1980 cycle were more than 70 percent African American).

[221] However, the VRA may not require majority-minority districts to be created if the minority communities that must be joined are *too* dissimilar. See *League of United Latin American Citizens v Perry*, 548 US 399, 432–34 (2006) (rejecting district that combined urban Hispanics in Austin with rural Hispanics along Mexican border).

need to be joined with miscellaneous "filler people"[222] in order to hit the district population target. A common kind of majority-minority district, especially in the South, is one that merges underprivileged urban and rural blacks with more affluent suburban whites. It should therefore come as no surprise that America's twenty-six majority-black districts in the 2000s were substantially more diverse than their peers with respect to crucial factors *other* than African American background, such as socioeconomic status, urban versus suburban location, and Hispanic ethnicity.[223]

While the VRA generally has a diversifying effect on district composition, the other universal American race-related requirement, the prohibition on racial gerrymandering, operates in the opposite direction. As it has been construed by the Supreme Court, the ban renders unconstitutional odd-looking majority-minority districts that combine highly disparate minority communities. For instance, a North Carolina district that joined blacks in "tobacco country, financial centers, and manufacturing areas,"[224] and a Georgia district that "connect[ed] the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County,"[225] were both invalidated by the Court.[226] The ban thus removes from the table some of the highly diverse majority-minority districts that states might otherwise create in order to comply with the VRA. It sets an upper limit on

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[222] T. Alexander Aleinikoff and Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 Mich L Rev 588, 601 (1993).

[223] In an earlier work, I used ACS data as well as factor analysis to determine the factors that best account for residential patterns in the United States. Socioeconomic status, urban versus suburban location, and Hispanic ethnicity are the three most important such factors, followed by African American background. See Stephanopoulos, 125 Harv L Rev at 1939 (cited in note 14). The 26 majority-black districts in the 2000s had an average spatial diversity score of 0.80 for socioeconomic status, compared with 0.75 for all other districts; an average score of 0.92 for urban versus suburban location, compared with 0.85 for all other districts; and an average score of 0.69 for Hispanic ethnicity, compared to 0.57 for all other districts. See id at 1988 table 4. See also Scott Clifford, *Reassessing the Unequal Representation of Latinos and African Americans*, 74 J Polit 903, 906–08 (2012) (finding that as districts become more heavily African American or Hispanic they also become more ideologically heterogeneous).

[224] *Shaw*, 509 US at 635–36.

[225] *Miller*, 515 US at 908.

[226] Conversely, districts with more homogeneous minority populations have generally been upheld by the Court. See *Easley v Cromartie*, 532 US 234, 250 (2001); *Lawyer v Department of Justice*, 521 US 567, 581 (1997).

the amount of heterogeneity that will be tolerated within districts' minority populations.[227]

The final criterion that generally guides redistricting in America is not a legal requirement but rather a time-honored (though democratically troublesome) practice: the pursuit of political advantage. In a recent article, Professors Adam Cox and Richard Holden explain that the optimal partisan gerrymandering strategy is inherently diversifying.[228] Line-drawers maximize the number of seats won by their party when they construct districts that "match slices" of very different voters—51 percent diehard Republicans, say, combined with 49 percent hardcore Democrats.[229] Such districts are highly diverse by definition with respect to ideology. Given the many demographic and socioeconomic differences between the parties, they are inevitably diverse along other dimensions as well.

Consistent with Professors Cox and Holden's analysis, the partisan bias of congressional plans in the 2000s tended to rise in tandem with the plans' average level of district diversity (at least for higher diversity levels).[230] Likewise, notorious French gerrymanders prior to the country's 2010 reforms "avoid[ed] overly sociologically homogeneous districts" and included many "mixtures of rural and urban zones."[231] Highly diverse US plans in the 2000s were also linked to low electoral responsiveness—the hallmark of a *bipartisan* (or incumbent-protecting) gerrymander.[232]

So much, then, for the universal American criteria, all of which are diversifying other than the ban on racial gerrymandering. What about the requirements that are in place in foreign jurisdictions (as well as in certain American states)? First, the most common of these requirements, respect for political subdivisions, is homogenizing for the simple reason that subdivisions themselves tend to be homogeneous. One body of scholarship finds that suburbs usually consist of residents who are strikingly

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[227] Notably, in both its racial gerrymandering and racial vote dilution cases, the Court has only been concerned about heterogeneity *within* districts' minority populations. The Court has shown no interest in differences *between* districts' minority and nonminority populations. See Stephanopoulos, 125 Harv L Rev at 1929–30 (cited in note 14).

[228] Adam B. Cox and Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U Chi L Rev 553, 567–72 (2011).

[229] Id at 567.

[230] See Stephanopoulos, 125 Harv L Rev at 1964–67 (cited in note 14) (referring to spatial diversity).

[231] Balinski, *Redistricting in France* at 178 (cited in note 48) (describing Gaston Defferre's guiding principles for redistricting).

[232] See Stephanopoulos, 125 Harv L Rev at 1964–67 (cited in note 14).

similar in their race, income, age, education, and profession.[233] As Professor Gregory Weiher has written, suburban boundaries facilitate the "sorting of the population into geographically defined groups by salient characteristics such as race and socioeconomic status."[234] Another body of scholarship relies on the similarities of subdivision residents to assign towns and neighborhoods to different categories based on their key attributes.[235] Such categorization would not be feasible if subdivisions were not so internally consistent. The upshot of this work is that the more congruent districts are with subdivisions (especially smaller ones), the more homogeneous the districts will tend to be.

The homogenizing logic is even more straightforward for the requirement that districts correspond to communities of interest. Communities are typically *defined* as populations that possess similar social, cultural, and economic interests. As the redistricting commission for Victoria has stated, "Communities of interest are groups of people who share a range of common concerns," which arise "where people are linked with each other geographically . . . or economically. . . . [or] because of similar circumstances."[236] Alternatively, in the words of Prince Edward Island's commission, communities are "areas where people have similar living standards, have access to the same work opportunities, [and] have similar needs in the social areas of education and health care."[237] Obviously, if communities are characterized

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[233] See, for example, Gregory R. Weiher, *The Fractured Metropolis: Political Fragmentation and Metropolitan Segregation* 100–01 (SUNY 1991); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 Colum L Rev 346, 353–54 (1990); Jerry Frug, *The Geography of Community*, 48 Stan L Rev 1047, 1047 (1996); Douglas S. Massey and Nancy A. Denton, *Suburbanization and Segregation in U.S. Metropolitan Areas*, 94 Am J Soc 592, 593–94 (1988).

[234] Weiher, *The Fractured Metropolis* at 190 (cited in note 233).

[235] See, for example, Bernadette Hanlon, *A Typology of Inner-ring Suburbs: Class, Race, and Ethnicity in U.S. Suburbia*, 8 City & Community 221, 231–42 (2009); Brian A. Mikelbank, *A Typology of U.S. Suburban Places*, 15 Housing Pol Debate 935, 949–57 (2004); Thomas J. Vicino, Bernadette Hanlon, and John Rennie Short, *Megalopolis 50 Years On: The Transformation of a City Region*, 31 Intl J Urb & Regional Rsrch 344, 357–61 (2007).

[236] Victoria Electoral Boundaries Commission, *Legislative Council Redivision Report* iii ¶ 17 (2005) (Australia).

[237] Prince Edward Island Electoral Boundaries Commission, *Report of the P.E.I. Electoral Boundaries Commission* 18 (2004). See also Cal Const Art XXI, § 2(d)(4) (defining community of interest as "a contiguous population which shares common social and economic interests"); *Zachman v Kiffmeyer*, No C0-01-160, *3 (Minn Special Redistricting Panel Dec 11, 2001), online at http://www.mncourts.gov/documents/0/Public/Court_Information_Office/redistrictingpanel/Final_Legislative_Order.pdf (visited May 11, 2013) (defining communities

above all by their homogeneous interests, then districts that coincide with them will be homogeneous as well.[238]

Several other common foreign requirements (the ones providing that geographic features, means of communication and travel, and population density be taken into account) are best understood as guidelines to help line-drawers identify communities of interest. According to the Canadian Supreme Court, "geographic boundaries" such as rivers and mountain ranges "form natural community dividing lines and hence natural electoral boundaries."[239] Similarly, communities often develop around transport links, including highways, railroads, and waterways, that enable people to engage in social and economic intercourse.[240] And the reason why population density is a common criterion is the widespread view that urban and rural areas are distinct communities that should not be merged within the same districts. As New Brunswick's commission has noted, "Historically in Canada, the tendency has been to avoid the creation of electoral districts with an urban and rural mix."[241] All of these subsidiary standards therefore promote district-community congruence—and, like the community-of-interest requirement from which they stem, exert a homogenizing influence on district composition.

The last two criteria, contiguity and compactness, also exert a homogenizing influence, albeit only mildly so. Contiguity is not

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of interest as "groups of . . . citizens with clearly recognizable similarities of social, geographic, political, cultural, ethnic, economic, or other interests").

238 See Maley, Morling, and Bell, *Alternative Ways of Redistricting* at 138 (cited in note 205) ("In Australia, 'community of interest' . . . . has been viewed as a prescription that divisions should ideally be internally homogeneous.").

239 *1991 Saskatchewan Reference Case*, 2 SCR at ¶ 55. See also *1991 Alberta Reference Case*, 86 DLR 4th at ¶ 40; Delimitation Commission of India, 1 *Changing Face of Electoral India* at II (cited in note 69) (noting that communities can be "defined geographically or by physical features like mountains, forests, [and] rivers").

240 See Courtney, *Commissioned Ridings* at 215 (cited in note 66) (describing proposed Canadian legislation that defined communities of interest partially in terms of "access to means of communication and transport"); Victoria Electoral Boundaries Commission, *Legislative Council* at iii ¶ 16 (cited in note 236) ("Means of travel, traffic arteries and communications can tie a community together.").

241 Federal Election Boundaries Commission for New Brunswick, *Report* 12 (2003), online at http://www.elections.ca/scripts/fedrep/newbruns/report/13000report_e.pdf (visited May 11, 2013). See also *1994 Alberta Reference Case*, 119 DLR 4th at 17 ("[T]he people of Alberta simply would not accept the idea that agrarian and non-agrarian populations would both feel adequately represented in the same constituency."); Victoria Electoral Boundaries Commission, *Legislative Council* at iv ¶ 20 (cited in note 236) ("As regards community of interest, one of the most fundamental divisions is that between metropolitan and rural areas.").

an especially restrictive requirement, but it does at least prevent districts from joining people with absolutely no geographic connection to one another. It renders unavailable, that is, some of the most heterogeneous possible districts. Likewise, it is certainly possible for compact districts to contain diverse populations—if, for instance, a circular district combines a center city with outlying suburbs.[242] But the compactness criterion at least bars the creation of bizarre-looking districts that are likely to be particularly heterogeneous. As one might expect, there was a modest negative correlation in the 2000 cycle between the compactness and the diversity of American congressional districts. The higher a district's compactness score, in other words, the less diverse it was, and vice versa.[243]

C. Rethinking the American Approach

Choosing between the diversifying criteria favored by the United States and the homogenizing ones used by most foreign jurisdictions may seem impossible. Who is to say whether society's conflicts should be resolved at the district level or at the legislative level? How can any decision be made between diverse districts and a homogeneous legislature, on the one hand, and homogeneous districts and a diverse legislature, on the other? In the words of Professor James Gardner, "there is no clear reason to prefer one mode of democratic organization over another, and therefore none can be ruled out a priori as a legitimate choice."[244]

Professor Gardner may well be right as a matter of formal logic, but, as I discuss in this Section, there are actually several compelling reasons to prefer homogenizing criteria—and the

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[242] See Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistrictring Plans*, 73 Geo Wash L Rev 1131, 1158 (2005) ("One could draw compact districts that group unrelated communities on different sides of a mountain or river.").

[243] This data is on file with the author. I found correlations of around −0.2 using two different measures of district diversity (top-line and spatial) as well as two different measures of compactness (Reock and Polsby-Popper). See Ernest C. Reock Jr, *Measuring Compactness as a Requirement of Legislative Apportionment*, 5 Midwest J of Polit Sci 70–74 (1961); Daniel D. Polsby and Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L & Pol Rev 301, 336 (1991). In all four cases, I could clearly reject the null hypothesis that the correlation between district diversity and compactness was zero. See also Ron Levy, *Drawing Boundaries: Election Law Fairness and Its Democratic Consequences*, in Joo-Cheong Tham, Brian Costar, and Graeme Orr, eds, *Electoral Democracy: Australian Prospects* 57, 61–62 (Melbourne 2011) (noting in Australian context that "rules of contiguity and compactness . . . provide that electorates should not connect distant and dissimilar communities").

[244] Gardner, 11 Election L J at 417 (cited in note 210).

more homogeneous districts they generate—once the level of abstraction is lowered somewhat. As in the Article's previous normative section, these compelling reasons stem from, and are compatible with, a range of theories of representative democracy.[245] The implication is that American states that lack them should adopt (and then enforce) requirements such as respect for political subdivisions, respect for communities of interest, and attention to geographic features, means of communication and travel, and population density. Even better, these criteria should be enacted at the federal level, and the equal population mandate should be relaxed.[246]

1. The benefits of homogenizing criteria.

One important benefit of homogenizing criteria has already been alluded to: they make gerrymanders of both the partisan and bipartisan varieties more difficult to execute.[247] Partisan gerrymandering is limited because the optimal "matching slices" strategy can be carried out only if highly politically heterogeneous districts, combining almost equal numbers of both parties' most fervent supporters, are permitted.[248] Bipartisan gerrymandering is curbed because, somewhat counterintuitively, districts that are congruent with communities of interest (and thus more

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[245] See notes 107–10 and accompanying text.

[246] Another potential implication is that some of the VRA's provisions may need to be rethought. I express my views on minority representation in Part III. I should also note that I assess redistricting criteria using some of the same criteria with which I assessed redistricting institutions in Part I (for example, bias, responsiveness, and competitiveness), but also using certain new criteria (for example, participation, representation, and polarization). These new criteria are closely related to districts' internal composition—the focus of this Part—but have a more attenuated link to the institutional choice between political actors and independent commissions.

[247] See notes 228–32 and accompanying text. This is not to say that homogenizing criteria result in *zero* bias or in *optimal* responsiveness—just that they score better on these metrics than diversifying criteria. The only way to ensure that district plans will be *neutral* in their electoral consequences is to draw district lines with neutrality as the paramount goal, which is an approach that no jurisdiction has attempted.

[248] See Cox and Holden, 78 U Chi L Rev at 567–72 (cited at note 228). In line with Professors Cox and Holden's analysis, several studies have found that partisan fairness increases when districts are required to respect the boundaries of political subdivisions or communities of interest (both classic homogenizing criteria). See Jonathan Winburn, *The Realities of Redistricting* 9, 200–01 (Lexington 2008); Todd Makse, *Defining Communities of Interest in Redistricting through Initiative Voting*, 11 Election L J 503, 508–10 (2012); Stephanopoulos, 160 U Pa L Rev at 1460–62 (cited at note 15) (states that respect communities of interest have lower levels of partisan bias); Stephanopoulos, 125 Harv L Rev at 1964–67 (cited in note 14) (spatial diversity is positively correlated with partisan bias, at least at higher levels of spatial diversity).

demographically and socioeconomically homogeneous) are relatively competitive.[249] It is easier for challengers to craft their messages and to convey their views to the electorate in these districts, making them less hospitable places for incumbents. And both forms of gerrymandering are inhibited by the sheer number of homogenizing criteria that are typically in place in jurisdictions that employ them. It is hard to gerrymander when one must comply with a host of other requirements, some of them quite rigorous.

Another benefit of homogenizing criteria is participatory: people are better informed about candidates,[250] more likely to vote,[251] and more trusting of government,[252] when they live in more demographically and socioeconomically homogeneous districts. To highlight a Canadian study, after Ontario's provincial districts were redrawn in the 1980s, turnout rose in the districts that corresponded best to communities of interest and fell in the districts that corresponded worst.[253] One possible explanation is that, as Professor Robert Putnam has found, levels of social

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[249] See Richard Forgette, Andrew Garner, and John Winkle, *Do Redistricting Principles and Practices Affect U.S. State Legislative Electoral Competition?*, 9 State Polit & Pol Q 151, 162, 164 (2009) (use of homogenizing criteria reduced margin of victory and likelihood of uncontested race in 2000 state legislative elections); Kogan and McGhee, 4 Cal J Polit & Pol at 22–24 (cited in note 122) (new California districts drawn pursuant to community-of-interest requirement are more competitive than their predecessors); Stephanopoulos, 160 U Pa L Rev at 1460–62 (cited at note 15) (states that respect communities of interest have higher levels of electoral responsiveness); Stephanopoulos, 125 Harv L Rev at 1964–67 (cited in note 14) (spatial diversity is correlated negatively with competitiveness and responsiveness).

[250] See Richard G. Niemi, Lynda W. Powell, and Patricia L. Bicknell, *The Effects of Congruity between Community and District on Salience of U.S. House Candidates*, 11 Legis Stud Q 187, 193 (1986) (voters are more likely to recognize and recall candidate names in districts that are congruent with political subdivisions); Jonathan Winburn and Michael W. Wagner, *Carving Voters Out: Redistricting's Influence on Political Information, Turnout, and Voting Behavior*, 63 Polit Rsrch Q 373, 379 (2010) (same).

[251] See David E. Campbell, *Why We Vote: How Schools and Communities Shape Our Civic Life* 23–24 (Princeton 2006) (voter turnout is higher in less demographically, socioeconomically, and ideologically diverse areas); Stephanopoulos, 160 U Pa L Rev at 1464–67 (cited at note 15) (voter turnout is higher in states that respect communities of interest); Stephanopoulos, 125 Harv L Rev at 1941–45 (cited in note 14) (spatial diversity is linked positively to voter roll-off rate).

[252] See Stephanopoulos, 160 U Pa L Rev at 1464–67 (cited in note 15) (trust in government is higher in states that respect communities of interest).

[253] See Courtney, *Commissioned Ridings* at 210–11 (cited in note 66); Stewart, *Community of Interest in Redistricting* at 145–46 (cited in note 199). See also Royal Commission on Electoral Reform and Party Financing, 1 *Reforming Electoral Democracy* at 149 (cited in note 45) (noting in Canadian context that "[w]hen a community of interest is dispersed across two or more constituencies . . . [voters'] incentive to participate is likewise reduced").

capital are higher in areas that are less diverse.[254] That is, people are better connected via social networks and more engaged in civic affairs when they are similar to their neighbors along important dimensions.[255] Another potential cause is that the channels of political communication are clearer when districts coincide with political subdivisions or communities of interest.[256] Candidates are able to communicate more effectively with voters in these districts, resulting in an electorate that is more politically knowledgeable, and, for this reason, more inclined to participate in the political process.

Homogenizing criteria are also linked to better legislative representation (at least if one is receptive to the notion of representatives as delegates).[257] Elected officials from homogeneous districts have voting records that more accurately reflect key constituency characteristics[258] as well as the views of the median voter.[259] In contrast, politicians from heterogeneous districts have voting records that are less tethered to their constituents' attributes and positions.[260] These findings are the result of the more straightforward signals that representatives receive from

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[254] See Robert D. Putnam, E Pluribus Unum*: Diversity and Community in the Twenty-First Century*, 30 Scandinavian Polit Stud 137, 147–51 (2007).

[255] See id. See also Campbell, *Why We Vote* at 48 (cited in note 251); Alberto Alesina and Eliana La Ferrara, *Participation in Heterogeneous Communities*, 115 Q J Econ 847, 848 (2000).

[256] See Niemi, Powell, and Bicknell, 11 Legis Stud Q at 198 (cited in note 250); Winburn and Wagner, 63 Polit Res Q at 375 (cited in note 250).

[257] According to the traditional delegate-trustee dichotomy, representatives who are delegates abide by the expressed preferences of their constituents, while representatives who are trustees make their own autonomous policy decisions. See generally Hanna Fenichel Pitkin, *The Concept of Representation* (California 1967). See also Alan Frizzell, *In the Public Service*, in Small, ed, *Drawing the Map* 251, 258 (cited in note 199) (reporting that plurality of Canadian survey respondents want their representatives to be delegates).

[258] See Michael Bailey and David W. Brady, *Heterogeneity and Representation: The Senate and Free Trade*, 42 Am J Polit Sci 524, 537 (1998) (studying senators' votes on free trade issues and using top-line diversity); Stephanopoulos, 125 Harv L Rev at 1945–47 (cited at note 14) (studying House members' votes on all issues and using spatial diversity).

[259] See Benjamin G. Bishin, Jay K. Dow, and James Adams, *Does Democracy "Suffer" from Diversity? Issue Representation and Diversity in Senate Elections*, 129 Pub Choice 201, 206–10 (2006) (studying Senate candidates' positions and using top-line diversity); Elisabeth R. Gerber and Jeffrey B. Lewis, *Beyond the Median: Voter Preferences, District Heterogeneity, and Political Representation*, 112 J Polit Econ 1364, 1376–78 (2004) (studying legislators' votes in Los Angeles County and using top-line diversity).

[260] See Bailey and Brady, 42 Am J Polit Sci at 537 (cited in note 258); Bishin, Dow, and Adams, 129 Pub Choice at 206–10 (cited in note 259); Gerber and Lewis, 112 J Polit Econ at 1376–78 (cited in note 259); Stephanopoulos, 125 Harv L Rev at 1945–47 (cited in note 14).

residents in homogeneous districts. When the variance of residents' attributes and positions is low, it is relatively easy for elected officials to determine what they are and to vote in a manner consistent with them.[261] But, as Professors Vince Buck and Bruce Cain conclude in a study of British members of Parliament, "Where there are different interests within a constituency, [a member of Parliament] may have to focus his activities on one group or part of the constituency more than another," causing "part of the district [to] feel slighted."[262]

A further advantage of homogenizing criteria—lower legislative polarization—stems from the kind of representation that they foster. Precisely because elected officials from homogeneous districts are more responsive to their constituents' interests, they are less responsive to the views of their political party.[263] Conversely, the voting records of politicians from heterogeneous districts are driven more heavily by partisanship; if one knows these officials' partisan affiliation, one can predict their policy stances with a good deal of certainty.[264] As a consequence, when heterogeneous districts are considered in the aggregate, their representatives' positions are substantially more polarized than those of representatives from homogeneous districts. Over the 2005–10 period, for example, the gap in voting record between the average House Democrat and the average House Republican was about 25 percent larger in the one hundred most heterogeneous districts than in the one hundred most homogeneous.[265]

Beyond their implications for these measures of democratic health, homogenizing criteria appear to be more popular with

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[261] See Thomas L. Brunell, *Redistricting and Representation: Why Competitive Elections are Bad for America* 26–28 (Routledge 2008); Stewart, *Community of Interest in Redistricting* at 121 (cited in note 199).

[262] J. Vincent Buck and Bruce E. Cain, *British MPs in Their Constituencies*, 15 Legis Stud Q 127, 138 (1990). See also Richard F. Fenno Jr, *Home Style: House Members in Their Districts* 2–6 (Little, Brown 1978) (reporting similar findings for US House members); Malcolm E. Jewell, *Representation in State Legislatures* 55–59, 115–17 (Kentucky 1982) (noting similar findings for US state legislators).

[263] See Bailey and Brady, 42 Am J Polit Sci at 525–26 (cited in note 258) (referring to top-line diversity); Gerber and Lewis, 112 J Polit Econ at 1376–78 (cited in note 259) (same); Stephanopoulos, 125 Harv L Rev at 1945–47 (cited in note 14) (referring to spatial diversity).

[264] See Stephanopoulos, 125 Harv L Rev at 1945–47 (cited in note 14).

[265] See id at 1947–49 (cited in note 14) (referring to spatial diversity and measuring voting record using DW-Nominate scores). See also James M. Snyder Jr and David Strömberg, *Press Coverage and Political Accountability*, 118 J Polit Econ 355, 395–99 (2010) (finding that representatives from districts that are more congruent with media markets are less loyal to their parties and hence less polarized).

the public (and with politicians). As mentioned earlier, the vast majority of comments that are submitted to Canadian redistricting commissions argue that districts should be made more congruent with communities of interest and more mindful of historical and geographic considerations.[266] Similarly, about three-quarters of the oral statements made in Ontario hearings in the 1980s called for boundary changes that would have increased interdistrict population deviations, while only about 2 percent explicitly endorsed greater population equality.[267] And 44 percent of British parliamentary members named respect for political subdivisions or respect for local ties as the most important redistricting criterion, compared to 37 percent who favored equal population.[268] Quantitative evidence is unavailable for other jurisdictions, but scholars familiar with their redistricting practices believe that requirements that promote district homogeneity, particularly respect for communities of interest, are highly valued there as well.[269]

The final point in favor of homogenizing criteria is that they are more consistent with territorial districting—the basic premise of all modern electoral systems that use single-member or small multimember districts. The hallmark of homogenizing criteria is that they pay heed to jurisdictions' underlying political geography. They require that political subdivisions and communities of interest be respected, and they mandate that geographic features, means of communication and travel, and population density be taken into account. In contrast, the distinguishing feature of diversifying criteria is that they ignore political geography and could be satisfied more easily if districts were not

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[266] See note 203 and accompanying text. See also *Arizona Minority Coalition for Fair Redistricting v Arizona Independent Redistricting Commission*, 2004 WL 5330049, *8 (Ariz Super Ct) (noting that in comments submitted to Arizona commission "citizens ranked 'communities of interest' as the most important redistricting criteria, and 'city, town, and county boundaries' as the second most important redistricting criteria"); Karin Mac Donald and Bruce E. Cain, *Community of Interest Methodology and Public Testimony* *23 (unpublished manuscript) (on file with author) (finding that 7,138 out of 12,425 comments submitted to California commission explicitly addressed communities of interest).

[267] See Courtney, *Commissioned Ridings* at 214 (cited in note 66); Stewart, *Community of Interest in Redistricting* at 141 (cited in note 199). See also note 203 (describing opposition to "rurban" districts in Alberta).

[268] Rossiter, Johnston, and Pattie, *The Boundary Commissions* at 393–95 (cited in note 46). See also Ron Johnston, David Rossiter, and Charles Pattie, *'Far Too Elaborate about So Little': New Parliamentary Constituencies for England*, 61 Parliamentary Affairs 4, 16 (2007) (noting that comments on proposed English districts "are more concerned with the 'organic' aspects of constituency definition . . . than the purely 'arithmetic'").

[269] See note 204 and accompanying text.

drawn territorially in the first place. Equal population, for instance, would be a trivial requirement if noncontiguous voters could be placed in the same districts. Similarly, it would be much simpler to create majority-minority districts—or to manipulate districts' partisan composition for the sake of political advantage—if the constraints of geography could be set aside entirely. Diversifying criteria are therefore in tension with the American system's foundational assumption of territorial districting, while homogenizing criteria dovetail nicely with it.[270]

In sum, then, the case for homogenizing criteria is that they curb both partisan and bipartisan gerrymandering while generating democratic goods such as higher voter participation, more effective representation, and lower legislative polarization. What is more, the public seems to prefer them, and they are more in harmony with the commitment to territorial districting that underpins the American system. Below I consider several of the claims that are commonly advanced in favor of diversifying requirements (and the more diverse districts they produce).

2. Objections.

The most intuitive argument for diversifying criteria is that they encourage dialogue, debate, and competition within districts. If dissimilar people are placed in the same constituency, they should have more to talk (and argue) about, and more to compete about come election time. As Professor Michael Kang has written, "It is cultural *heterogeneity*, not homogeneity, that provides opportunities for democratic contestation."[271] The trouble with this claim is that, while plausible in theory, it is belied by a large body of empirical evidence. As noted above, districts are more competitive when they are drawn pursuant to homogenizing requirements such as respect for communities of interest.[272] Even focusing on district diversity itself (rather than on redistricting criteria), competitiveness in both general[273] and

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[270] See Stephanopoulos, 160 U Pa L Rev at 1395–97, 1399–1404 (cited in note 15).

[271] Michael S. Kang, *Race and Democratic Contestation*, 117 Yale L J 734, 791–92 (2008).

[272] See note 249 and accompanying text.

[273] See Jonathan S. Krasno, *Challengers, Competition, and Reelection* 62, 69 (1994); Jon R. Bond, *The Influence of Constituency Diversity on Electoral Competition in Voting for Congress, 1974–1978*, 8 Legis Stud Q 201, 206 (1983); William Koetzle, *The Impact of Constituency Diversity upon the Competitiveness of U.S. House Elections, 1962–96*, 23 Legis Stud Q 561, 564 (1998).

primary[274] elections is unrelated to districts' demographic and socioeconomic heterogeneity. Quality challengers also are no more likely to materialize in heterogeneous districts than in homogeneous districts.[275]

Why is politics not more vigorous in heterogeneous districts? Part of the answer is Professor Putnam's finding that "inhabitants of diverse communities tend to withdraw from collective life, to distrust their neighbors . . . [and] to expect the worst from their community and its leaders."[276] The rest of the story is that district heterogeneity usually advantages incumbents, not challengers. When voters differ from one another in fundamental ways, challengers find it difficult to come up with compelling messages and to assemble political coalitions.[277] In contrast, incumbents necessarily have managed to thread the electoral needle at least once before. Even once they have determined their positions, challengers face obstacles conveying their views to the public in heterogeneous districts. These districts are often diverse in the first place because they do not coincide with political subdivisions or communities of interest, meaning that their channels of political communication are less efficient.[278] Challengers bear the brunt of this inefficiency since they are the candidates who have the greater need to reach voters and to persuade them to support someone new.[279]

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[274] See Robert E. Hogan, *Sources of Competition in State Legislative Primary Elections*, 28 Legis Stud Q 103, 115 (2003); Tom W. Rice, *Gubernatorial and Senatorial Primary Elections: Determinants of Competition*, 13 Am Polit Rsrch 427, 438 (1985).

[275] See Paul Gronke, *The Electorate, the Campaign, and the Office: A Unified Approach to Senate and House Elections* 97 (Michigan 2000); Jon R. Bond, Cary Covington, and Richard Fleisher, *Explaining Challenger Quality in Congressional Elections*, 47 J Polit 510, 525 (1985); Michael J. Ensley, Michael W. Tofias, and Scott de Marchi, *District Complexity as an Advantage in Congressional Elections*, 53 Am J Polit Sci 990, 998 (2009).

[276] Putnam, 30 Scan Polit Stud at 150–51 (cited in note 254). This cannot be the whole answer because there is no necessary connection between the diversity of a political subdivision (the unit studied by Professor Putnam and other social scientists) and the diversity of the district(s) in which it is placed. For example, a homogeneous subdivision could be split between two districts, and then each half could be combined with a very different group of people, in which case both districts would be quite diverse.

[277] See Bond, Covington, and Fleisher, 47 J Polit at 527 (cited in note 275); Ensley, Tofias, and de Marchi, 53 Am J Polit Sci at 1000 (cited in note 275).

[278] See Niemi, Powell, and Bicknell, 11 Legis Stud Q at 198 (cited in note 250); Winburn and Wagner, 63 Polit Rsrch Q at 381–83 (cited in note 250).

[279] See Niemi, Powell, and Bicknell, 11 Legis Stud Q at 193 (cited in note 250). See also James E. Campbell, John R. Alford, and Keith Henry, *Television Markets and Congressional Elections*, 9 Legis Stud Q 665, 673–74 (1984) (finding that incumbents perform better in districts that are less congruent with media markets); Dena Levy and

Another important argument for diversifying criteria stems from the Burkean claim that representatives should be trustees, not delegates.[280] If districts are made up of multiple interest groups, none of them numerically dominant, then it should be easier for elected officials to exercise their own independent judgment. They should be more able to resist the tide of public opinion and to "fashion a synthetic position to advance in the legislature . . . . [that may] correspond to a position that is held by very few voters in the district."[281] I take no side here in the longstanding debate between the delegate and trustee models of representation. My objection to this reasoning, rather, is that elected officials from heterogeneous districts actually behave not as trustees but rather as partisan loyalists. As discussed above, these officials' voting records cannot be predicted very well using constituent attributes and positions—but they *can* be forecast accurately using partisan affiliation.[282] In electoral systems that feature strong parties, then, the trustee model is essentially defunct. The choice to be made is not between delegates and trustees, but rather between delegates and disciplined partisan soldiers.

The heavy influence of partisanship on politicians from heterogeneous districts also explains why the (entirely legitimate) preference for a more homogeneous legislature cannot be realized, at least with respect to voting record. With respect to *other* variables, such as race, the relationship between district heterogeneity and legislative homogeneity may well hold. Districts that have racial distributions similar to society as a whole (and that are thus quite diverse) may well elect representatives who are, in the aggregate, very racially homogeneous.[283] But districts that are heterogeneous in terms of politically salient factors simply do *not* elect representatives who are collectively homogeneous in terms of voting record. Rather, depending on which party prevails in each race, some of these districts elect devoted Democrats, while others send reliable Republicans to the legislature.

Peverill Squire, *Television Markets and the Competitiveness of U.S. House Elections*, 25 Legis Stud Q 313, 321 (2000) (same).

[280] See Edmund Burke, *Speech to the Electors of Bristol (Nov 3, 1774)*, in Philip B. Kurland and Ralph Lerner, eds, 1 *The Founders' Constitution* 361 (Chicago 1987).

[281] Gardner, 37 Rutgers L J at 957 (cited in note 39).

[282] See notes 263–64 and accompanying text.

[283] For example, if voting is racially polarized and every district has the same racial composition as America as a whole, then every representative would be white. See Gerken, 118 Harv L Rev at 1125 (cited in note 213).

The predictable outcome is legislative polarization—the exact opposite of legislative homogeneity.[284]

A final argument for diversifying criteria is that they prevent the formation of districts that may seem segregated when examined en masse. The worry that racially homogeneous districts "bear[] an uncomfortable resemblance to political apartheid" prompted the Supreme Court to create a new cause of action for racial gerrymandering in the 1990s.[285] Similar concerns about the "ghettoization" of Aboriginals explain why Canadian provinces only rarely have tried to construct majority-Aboriginal districts.[286] However, the minority-heavy districts that trigger these fears are usually very *heterogeneous* with respect to nonracial factors. For instance, it was only because the challenged majority-black districts in the 1990s combined highly dissimilar African American communities that the Court struck them down.[287] Likewise, the Canadian reluctance to design majority-Aboriginal districts is attributable in part to the enormous diversity of the Aboriginal population, which often overshadows the group's shared interests.[288] When minority members with more in common than their race have been placed in the same districts, the courts universally have upheld them, and the rhetoric of segregation has been nowhere to be found.[289]

Moreover, to the extent that districts appear segregated when they are drawn pursuant to homogenizing criteria—not just racially but also socioeconomically and ideologically—they do so because society itself remains segregated along these axes. As noted earlier, political subdivisions and communities of interest tend to be quite homogeneous,[290] meaning that they, as well as districts that correspond to them, differ considerably

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[284] Ironically, it is actually *homogeneous* districts that result in a more homogeneous legislature with respect to voting record. Representatives from such districts are still quite diverse in the aggregate, but they at least are not divided into two entirely separate camps. See Stephanopoulos, 125 Harv L Rev at 1947–49 (cited in note 14).

[285] *Shaw*, 509 US at 647.

[286] See Royal Commission on Electoral Reform and Party Financing, 1 *Reforming Electoral Democracy* at 11, 184 (cited in note 45).

[287] See Stephanopoulos, 160 U Pa L Rev at 1419–21 (cited in note 15).

[288] See Courtney, *Commissioned Ridings* at 221 (cited in note 66).

[289] See Stephanopoulos, 160 U Pa L Rev at 1419–21 (cited in note 15). See also *Shaw*, 509 US at 646 ("[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district . . . may reflect wholly legitimate purposes.").*!*

[290] See notes 233–38 and accompanying text.

from one another when considered in the aggregate.[291] If subdivisions and communities become more internally diverse, as they have in recent years with respect to race,[292] then so too will districts that coincide with them. Lastly, it is important to remember that districts, unlike other geographic entities, are part of a system of representation that has two levels. Homogeneity at the district level (what some refer to as segregation) therefore is not the end of the story. Instead, it is precisely what makes heterogeneity at the legislative level (what some call integration) possible.

III. MINORITY REPRESENTATION

While all countries with territorial districts must decide which institutions will be involved in redistricting and which criteria will be employed, jurisdictions with substantial minority populations face another difficult question: how to ensure an adequate minority presence in the legislature. As the British political theorist John Stuart Mill once wrote, "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."[293] I begin this Part by summarizing the mechanisms that are used around the world to provide representation to racial, ethnic, and religious minority groups. In America, the Voting Rights Act typically requires majority-minority districts to be drawn wherever there exist large and geographically concentrated minority populations. Abroad, minority representation is achieved through a variety of means, including parallel electoral systems, reserved seats within unitary systems, party slating requirements, and multimember districts using limited, cumulative, or preferential voting rules.

Next, I identify two dimensions along which policies for minority representation can be classified: the geographic concentration of the minority groups that benefit from the policies, and

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[291] See Gerken, 118 Harv L Rev at 1102 (cited in note 213) (noting inverse relationship between first- and second-order diversity).

[292] See Edward Glaeser and Jacob Vigdor, *The End of the Segregated Century: Racial Separation in America's Neighborhoods, 1890–2010* 4 (Manhattan Institute 2012).

[293] John Stuart Mill, *Representative Government*, in Millicent Garret Fawcett, ed, *Three Essays by John Stuart Mill* 143, 252 (Oxford 1960). I focus on descriptive representation in this Part, or the presence of minority members in the legislature, as opposed to substantive representation, or the passage of policies that advance minority interests. While both forms of representation are important, substantive representation is more difficult to measure and harder as well to connect to particular institutional choices.

the explicitness of the processes that allocate legislative seats to the groups. These dimensions both illuminate the many options that are available to policymakers and underscore the distinctiveness of the American approach. Finally, I argue that multimember districts with alternative voting rules are preferable to the VRA's usual model of single-member majority-minority districts created through litigation. The former produce higher levels of minority representation, via more dynamic elections, at a fraction of the social and legal cost.

A. Global Models

1. America.

Under § 2 of the VRA, a minority group (most commonly African American or Hispanic) is entitled to a district in which it can elect the candidate of its choice (most commonly a majority-minority district[294]) if it satisfies a series of criteria. The group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," the group must be politically cohesive, racial polarization in voting must exist, and the totality of the circumstances must support the group's claim.[295] Since most American minority groups vote cohesively and for different candidates than the white majority—and were subjected to pervasive discrimination for many years—the requirement of sufficient size and compactness tends to be dispositive. It usually means that any large and geographically concentrated minority population has the right to its own majority-minority district.[296]

Notably, § 2 does not affirmatively specify any level of minority representation that must be achieved. Rather, the number of majority-minority districts is a function of the lawsuits that are brought by minority groups as well as the choices that line-drawers make in the shadow of potential VRA litigation. Section 2 is complemented, however, by another provision, § 5, that does set a floor for minority representation in certain (mostly

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294 See *Bartlett v Strickland*, 556 US 1, 14–20 (2009).

295 *Thornburg v Gingles*, 478 US 30, 48–51 (1986) (Brennan). See also 42 USC § 1973.

296 See Adam B. Cox and Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U Chi L Rev 1493, 1504 (2008) ("The preconditions suggest that a minority-controlled district may be required wherever a sufficiently large and compact group of minority voters exists.").

southern) jurisdictions.[297] These jurisdictions are barred from reducing minority representation (that is, "retrogressing"),[298] though they may *raise* its level if they wish or alter which particular districts are controlled or influenced by minority groups. Both § 2 and § 5 coexist uneasily with the constitutional ban on racial gerrymandering, which prohibits overly odd-looking or community-disruptive minority-heavy districts from being drawn.[299]

Though the VRA has resulted in dramatic electoral gains for minority groups over the last few decades, African Americans and Hispanics remain underrepresented relative to their population shares. For example, African Americans currently make up 13.2 percent of the population, but only 9.7 percent of congressional districts have black representatives, and only 6.0 percent of districts have black majorities.[300] More starkly, Hispanics make up 15.1 percent of the population, but only 7.0 percent of congressional districts have Hispanic representatives, and only 5.8 percent of districts have Hispanic majorities.[301] The VRA's implementation also necessitates very large volumes of litigation. Between 1982 and 2005, in jurisdictions covered by § 5 alone, there were 653 successful § 2 lawsuits, 626 Department of Justice objections that blocked changes to electoral laws, and 105 successful § 5 enforcement actions.[302]

While the formation of single-member majority-minority districts is the most important way in which minority representation is achieved in America, a growing number of jurisdictions

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297 See 42 USC § 1973c.

298 See, for example, *Georgia v Ashcroft*, 539 US 461, 477 (2003).

299 See 160–61, 224–27 and accompanying text.

300 Data about the racial composition of congressional districts and the country as a whole is from the American Community Survey and is on file with the author. For data on minority members of Congress, see *African, Hispanic (Latino), and Asian American Members of Congress* (Ethnic Majority 2012), online at http://www.ethnicmajority.com/congress.htm (visited May 11, 2013).

301 See id. At the state legislative level, the median gap between a state's proportion of majority-minority districts and its minority population percentage is 10.6 percent. See Stephanopoulos, 160 U Pa L Rev at 1463–64 (cited in note 15). See also David T. Canon, *Electoral Systems and the Representation of Minority Interests in Legislatures*, 24 Legis Stud Q 331, 339 (1999) (noting that 5.5 percent of state house members and 4.1 percent of state senators were black in 1985, while 11.5 percent of population was black).

302 *Shelby County, Alabama v Holder*, 679 F3d 848, 866, 868, 870 (DC Cir 2012), cert granted, 133 S Ct 594 (2012). See also Ellen Katz, et al, *Documenting Discrimination in Voting: Judicial Findings under Section 2 of the Voting Rights Act Since 1982: Final Report of the Voting Rights Initiative*, 39 U Mich J L Ref 643, 654 (2006) (describing study that identified 331 § 2 lawsuits since 1982 that resulted in published opinions).

use (or have used) alternative approaches.[303] Limited voting, a system in which districts have multiple representatives and voters cast fewer ballots than there are seats to be filled, is employed by dozens of towns and counties in Alabama, Connecticut, North Carolina, and Pennsylvania.[304] Cumulative voting, which also features multimember districts but which allows voters to distribute their ballots as they see fit (including casting multiple votes for individual candidates), was used for the Illinois state house for more than a century, and is now the regime of choice for many jurisdictions in Alabama, Illinois, New Mexico, New York, South Dakota, Texas, and West Virginia.[305] And preferential voting, which again relies on multimember districts but which permits voters to rank candidates in order of preference, was formerly used by major cities such as Cincinnati and New York, and is now employed by a handful of jurisdictions in Massachusetts and Minnesota.[306]

A key rationale for all of these approaches is that they enable minority groups (both racial and political) to win representation without having to muster a plurality of the district-wide vote. In the parlance of political scientists, they lower the threshold of exclusion, especially as the number of members per district increases.[307] As predicted, minority groups indeed have been able to secure a legislative presence in jurisdictions that have adopted limited, cumulative, or preferential voting. For instance, in the scores of jurisdictions that instituted one of these systems in the 1980s and 1990s due to settlements of VRA

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[303] For a clear summary of these approaches, see Richard L. Engstrom, *Modified Multi-seat Election Systems as Remedies for Minority Vote Dilution*, 21 Stetson L Rev 743, 749–51, 757–58, 762–68 (1992).

[304] See Grofman, 33 UCLA L Rev at 163–64 (cited in note 44); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv CR–CL L Rev 173, 223–31 (1989); *Communities in America Currently Using Proportional Voting* (Fair Vote), online at http://archive.fairvote.org/index.php?page=2101 (visited May 11, 2013).

[305] See Grofman, 33 UCLA L Rev at 164 (cited in note 44); Karlan, 24 Harv CR–CL L Rev at 233–36 (cited in note 304); *Communities in America Currently Using Proportional Voting* (cited in note 304).

[306] See Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 Houston L Rev 1119, 1160 (1998); *Communities in America Currently Using Proportional Voting* (cited in note 304).

[307] See Kenneth Benoit and Kenneth A. Shepsle, *Electoral Systems and Minority Representation*, in Paul E. Peterson, ed, *Classifying by Race* 50, 62–63 (Princeton 1995) (explaining how threshold of exclusion is calculated for limited and cumulative voting rules).

lawsuits, African American or Hispanic candidates won seats (usually for the first time) in almost every case.[308]

2. Abroad.

While foreign countries have converged on similar policies with respect to redistricting institutions and criteria,[309] their approaches to minority representation are highly varied—and usually quite different from the American model. To begin with, several nations take no steps whatsoever to guarantee a legislative presence for minority groups. In Australia, Britain, and France, for example, single-member districts are drawn pursuant to criteria that do not include minority representation.[310] Minority groups may form communities of interest that redistricting commissions may choose to respect, but the groups are not otherwise entitled to any special consideration. Not surprisingly, levels of minority representation are very low in all of these countries. In Australia, only one Aboriginal has ever been elected to the House of Representatives;[311] while in Britain and France, minority groups comprise 9.5 percent and 12.6 percent of the population, respectively, but only 2.3 percent and 0.4 percent of parliamentary members.[312]

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[308] See Shaun Bowler, Todd Donovan, and David Brockington, *Electoral Reform and Minority Representation: Local Experiments with Alternative Elections* 96 (Ohio State 2003); Engstrom, 21 Stetson L Rev at 752–62 (cited in note 303); Steven J. Mulroy, *The Way out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 Harv CR–CL L Rev 333, 349 (1998).

[309] See Parts I.A.2 and II.A.2.

[310] See Commonwealth Electoral Act 1918 § 66 (Australia); Parliamentary Voting System and Constituencies Act, 2011, part 2, § 11 (UK); Conseil Constitutionnel, Décision No 2008-573, §§ 22–25 (Jan 8, 2009) (France). However, there have been several proposals in Australia (none yet successful) to adopt policies that would increase levels of Aboriginal representation. See, for example, Parliament of New South Wales, *Enhancing Aboriginal Political Representation: Inquiry into Dedicated Seats in the New South Wales Parliament* (1998) (Australia).

[311] See *First Australian Aboriginal in House of Representatives*, BBC News Asia-Pacific (BBC Aug 29, 2010), online at http://www.bbc.co.uk/news/world-asia-pacific-11125497 (visited May 11, 2013). See also Gianni Zappalà, *The Political Representation of Ethnic Minorities: Moving beyond the Mirror*, in Sawar and Zappalà, eds, *Speaking for the People* 134, 144 (cited in note 191) (noting under-representation of ethnic minority groups in Australia).

[312] See *Must the Rainbow Turn Monochrome in Parliament?*, Economist 54 (Oct 27, 2007). See also Karen Bird, *The Political Representation of Women and Ethnic Minorities in Established Democracies: A Framework for Comparative Research* *25 (Academy of Migration Studies in Denmark Working Paper, 2003), online at http://www.outcome-eng.com/wp-content/uploads/2011/12/Karen-Bird-amidpaper.pdf (visited May 11, 2013) (reporting similar figures).

Next, a few jurisdictions—including Panama, the Ukraine, and about half of Canada's provinces—follow something like the American model, deliberately drawing minority-heavy, single-member districts in areas where minority populations are concentrated. Panama requires "concentrations of indigenous populations" to be taken into account,[313] Ukrainian law refers to the "density of national minority populations,"[314] and commissions in Alberta, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, and Saskatchewan intentionally create districts in which Aboriginals, Acadians, or African Canadians constitute majorities (or large minorities).[315] Nova Scotia's efforts are the most prominent in this vein, as four of its provincial districts are "protected constituencies" designed to be won by Acadians or African Canadians.[316] Also of note, New Brunswick's breakup of an Acadian-majority district prompted the only foreign decision analogous to America's § 2 case law, in which the Federal Court held that the district should not have been split for the sake of greater population equality.[317] Nevertheless, as in America, Canadian minorities of all stripes remain substantially underrepresented.[318]

At the other end of the policy spectrum, many countries provide for minority representation through more explicit mechanisms, such as reserved seats for particular groups. These

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313 See *Communities of Interest: Delimiting Boundaries* (ACE Electoral Knowledge Network), online at http://aceproject.org/ace-en/topics/bd/bdb/bdb05/bdb05c (visited May 11, 2013).

314 See id.

315 See Courtney, *Commissioned Ridings* at 103, 175–77, 182–83, 190–91, 225–32 (cited in note 66). See also *1991 Saskatchewan Reference Case*, 2 SCR 158, ¶ 31 (S Ct 1991) (Canada) (referring to "minority representation" as factor that can justify deviations from perfect population equality).

316 See Courtney, *Commissioned Ridings* at 103, 225–26 (cited in note 66); Nova Scotia Select Committee on Establishing an Electoral Boundaries Commission, *Report* 8, 12 (Nova Scotia House of Assembly 2011).

317 See *Raiche v Attorney General of Canada*, 2004 FC 679, ¶ 82 (Fed Ct 2005) (Canada). See also *Charlottetown (City) v Prince Edward Island*, 142 DLR 4th 343, ¶ 39 (PEI S Ct 1996) (Canada) (upholding under-populated district because of its Acadian-majority status)

318 See Trevor Knight, *Electoral Justice for Aboriginal People in Canada*, 46 McGill L J 1063, 1065–67 (2001) (noting that in 2000 there were only five Aboriginal members in Canadian House of Commons); *Must the Rainbow*, Economist at 54 (cited in note 312) (showing that ethnic minorities make up 15.9 percent of Canadian population but only 7.8 percent of parliamentary members). See also Royal Commission on Electoral Reform and Party Financing, 1 *Reforming Electoral Democracy* at 169–93 (cited in note 45) (recommending that dedicated Aboriginal districts be created along lines of New Zealand model).

reserved seats often are separate from the rest of the electoral system, as in New Zealand, Fiji, and Pakistan. In New Zealand, there is one nationwide district map for the sixty-three regular constituencies, and another map for the seven Māori constituencies, in which only voters who have registered for the Māori roll may cast ballots.[319] Not unexpectedly, the Māori make up about the same proportion (15 percent) of both the general population and the membership of the legislature.[320] In Fiji, likewise, there are *five* nationwide maps, four for ethnic groups such as ethnic Fijians and Fijian Indians, and one for all voters of all ethnicities.[321] Each voter belongs to, and casts ballots in, both a reserved and an open district.[322] And in Pakistan, there are 272 conventional single-member districts as well as 10 seats reserved for non-Muslims and elected via proportional representation—a number that slightly *overrepresents* this group.[323]

Reserved seats can also be part of a unitary electoral system, as in India, Jordan, and the Palestinian Territories. In India, both scheduled castes and scheduled tribes are allocated particular single-member districts in each state, in shares equal to the groups' proportions of the state's population. Only candidates from the specified caste or tribe may compete in these constituencies, which are assigned by ordering each state's districts by their minority population and then reserving the requisite number that are most minority-heavy.[324] Similarly, in Jordan

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[319] See *Report of the Representation Commission 2007* 7–13 (Representation Commission 2007), online at http://www.elections.org.nz/sites/default/files/2007%20Representation%20Commission%20Report.pdf (visited May 11, 2013).

[320] See Catherine J. Iorns Magallanes, *Dedicated Parliamentary Seats for Indigenous Peoples: Political Representation as an Element of Indigenous Self-Determination*, 10 Murdoch U Electronic J L ¶ 31 (Dec 2003), online at http://www3.austlii.edu.au/au/journals/MurUEJL/2003/39.html (visited May 11, 2013); Michael A. Murphy, *Representing Indigenous Self-Determination*, 58 U Toronto L J 185, 193 (2008). Interestingly, more Māori are elected to parliament through the general roll than through the reserved districts.

[321] See Jon Fraenkel, *The Design of Ethnically Mixed Constituencies in Fiji, 1970–2006*, in Handley and Grofman, eds, *Redistricting* 123, 124–28 (cited in note 10).

[322] See id at 125.

[323] See Pakistan Const Art 51. See also Andrew Reynolds, *Reserved Seats in National Legislatures: A Research Note*, 30 Legis Stud Q 301, 304 (2005) (listing nations with reserved seats, in both parallel systems and unitary systems); *Special Provisions for Minority Groups When Delimiting Electoral Districts* (ACE Electoral Knowledge Network), online at http://aceproject.org/ace-en/topics/bd/bdb/bdb05/bdb05d (visited May 11, 2013).

[324] See India Const Art 330; Delimitation Commission of India, *Changing Face of Electoral India* at 5–6, 33 (cited in note 69); Wendy Singer, *A Seat at the Table: Reservations and Representation in India's Electoral System*, 11 Election L J 202, 206–09 (2012).

and the Palestinian Territories, specific seats in specific multimember districts are reserved for Christian and Circassian candidates (in Jordan) and for Christian and Samaritan candidates (in the Palestinian Territories).[325] All of these groups receive proportional representation (or better) as a result.[326]

Yet another device that is sometimes used to ensure minority representation is the party-slating requirement—that is, a mandate that each party nominate a certain number of minority candidates, either in each district or in the country as a whole. In Singapore, parties are only permitted to contest multimember constituencies if their candidate slates for the districts include at least one minority member.[327] In Lebanon, likewise, parties must put forward candidate slates whose sectarian composition has been specified in advance (and varies markedly from one constituency to another).[328] And in Britain and Canada, major parties have voluntarily decided to adopt internal procedures that encourage the nomination of minority candidates, such as the British Labour Party's policy of including at least one minority candidate in its shortlist for each district.[329]

There is somewhat more leeway in the assignment of scheduled caste constituencies, which the commission tries to avoid placing adjacent to one another. See id.

[325] See International Institute for Democracy and Electoral Assistance (IDEA), *Building Democracy in Jordan: Women's Political Participation, Political Party Life and Democratic Elections* 135 appendix 3.1 (2005); *Special Provisions for Minority Groups* (cited in note 323).

[326] In India, for example, scheduled castes and scheduled tribes comprised 16.4 and 7.9 percent of the population, respectively, and occupy on average 14.4 and 7.3 percent of government positions. See Rohini Pande, *Can Mandated Political Representation Increase Policy Influence for Disadvantaged Minorities? Theory and Evidence from India*, 93 Am Econ Rev 1132, 1138, 1140 (2003). Similarly, Christians make up about 6 percent of Jordan's population and receive about 8 percent of the seats in the legislature. See IDEA, *Building Democracy in Jordan* at 135 appendix 3.1 (cited in note 325) (providing table with figures of minority representation in Jordan); *The World Factbook: Middle East; Jordan* (CIA 2012), online at https://www.cia.gov/library/publications/the-world-factbook/geos/jo.html (visited May 11, 2013).

[327] See Yash Ghai, *Public Participation and Minorities* 15 (Minority Rights Group International 2003); Singapore Const Art 39A(2)(a)(ii); N. Ganesan, *Entrenching a City-State's Dominant Party System*, 1998 SE Asian Affairs 229, 230.

[328] See Bassel F. Salloukh, *The Limits of Electoral Engineering in Divided Societies: Elections in Postwar Lebanon*, 39 Can J Polit Sci 635, 639, 643 (2006).

[329] See Royal Commission on Electoral Reform and Party Financing, 1 *Reforming Electoral Democracy* at 102, 112, 171 (cited in note 45); Judith Squires, *Gender and Minority Representation in Parliament*, 1 Polit Insight 82, 84 (Dec 2010). Similar approaches (in both voluntary and mandatory forms) are used in many more countries to promote the representation of women in the legislature. See Mala Htun, *Is Gender Like Ethnicity? The Political Representation of Identity Groups*, 2 Persp on Polit 439, 452 (2004).

Finally, several jurisdictions employ small multimember districts in combination with limited, cumulative, or preferential voting rules. (Many more rely on large multimember districts with party-list proportional representation, but, as noted at the outset, such regimes are beyond this Article's scope.)[330] Limited voting is used in Afghanistan, Indonesia (for the upper house), Jordan, Kuwait, and Spain (for the Senate), and was formerly used in Britain (in the 1800s), Japan, South Korea, and Taiwan.[331] Cumulative voting was used in Britain and South Africa for certain elections in the 1800s.[332] And preferential voting is used in Australia (for the Senate and in certain states), Ireland, Malta, New Zealand (for local elections), Northern Ireland (for local and European Union elections), and Scotland (for local elections).[333] Not all of these jurisdictions have significant minority populations, but their voting rules facilitate the representation of *all* groups that cannot muster a plurality of the district-wide vote—be they racial or political. For example, Aboriginal candidates have won more seats in the Australian Senate than in the House,[334] and smaller parties also perform better in Senate than in House elections.[335]

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[330] See note 18 and accompanying text.

[331] See Benoit and Shepsle, *Electoral Systems and Minority Representation* at 73 (cited in note 307); Arend Lijphart, Raphael Lopez Pintor, and Yasunori Sone, *The Limited Vote and the Single Nontransferable Vote: Lessons from the Japanese and Spanish Examples*, in Grofman and Lijphart, eds, *Electoral Laws and Their Political Consequences* 154, 155 (cited in note 11); Steven R. Reed and Michael F. Thies, *The Consequences of Electoral Reform in Japan*, in Shugart and Wattenberg, eds, *Mixed-Member Electoral Systems* 380, 381 (cited in note 11); John M. Carey, *Legislative Voting and Accountability* 11 (Cambridge 2009); Andrew Ellis, *One Year after the Elections: Is Democracy in Indonesia on Course?* *4 (Institute for Democracy and Electoral Assistance Sept 20, 2005).

[332] See Bowler, Donovan, and Brockington, *Electoral Reform and Minority Representation* at 19 (cited in note 308); George S. Blair, *Cumulative Voting: An Effective Electoral Device for Fair and Minority Representation*, 219 Annals NY Acad Sci 20, 20 (2006); Shaun Bowler, Todd Donovan, and David M. Farrell, *Party Strategy and Voter Organization under Cumulative Voting in Victorian England*, 47 Polit Stud 906, 906–07 (1999).

[333] See McKaskle, 35 Houston L Rev at 1160 (cited in note 306); Mulroy, 33 Harv CR–CL L Rev at 341 (cited in note 308); *Single Transferable Vote* (Electoral Reform Society 2012), online at http://www.electoral-reform.org.uk/single-transferable-vote (visited May 11, 2013).

[334] See Keith Archer, *Representing Aboriginal Interests: Experiences of New Zealand and Australia* (Electoral Insight Nov 2003), online at http://www.elections.ca/res/eim/article_search/article.asp?id=%2027&lang=e&frmPageSize=%5B (visited May 11, 2013); Murphy, 58 U Toronto L J at 188–89 (cited in note 320).

[335] See Campbell Sharman, *The Representation of Small Parties and Independents, Papers on Parliament No. 34—Representation and Institutional Change: Fifty Years of Proportional Representation in the Senate* (Parliament of Australia Dec 1990), online at

B. Geographic Concentration and Power Allocation

1. Beneficiaries and techniques.

The American election law literature has barely noticed the many policies enacted by foreign countries to promote the legislative representation of minority groups.[336] Even when scholars have engaged with foreign approaches, they have tended merely to describe them[337]—not to think deeply about the value choices they reflect or the ways in which they resemble or differ from one another. In this Section, I therefore introduce a conceptual framework that can be used to classify models of minority representation. The first key dimension is the geographic concentration of the minority groups that benefit, and the second is the explicitness of the processes that allocate legislative seats to them.

The identities of the minority groups that are assisted in gaining representation vary, of course, from country to country. Some nations focus their efforts on indigenous populations (e.g., Canada, New Zealand),[338] others emphasize historically disadvantaged minorities (e.g., India, the United States),[339] and still others are most concerned about ethnic or sectarian cleavages (e.g., Fiji, Lebanon).[340] A crucial question that all of these jurisdictions must answer, however, is whether only *concentrated* minority groups should be represented or also *diffuse* groups. Concentrated groups, such as America's blacks and India's scheduled tribes, are heavily clustered—that is, segregated—in particular areas.[341] As a consequence, they are often capable of

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http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/pops/pop34/c13 (visited May 11, 2013).

[336] See Richard H. Pildes and Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U Chi Legal F 241, 258 (noting that literature "has only recently begun to explore the different voting practices democracies might choose").

[337] See, for example, Benoit and Shepsle, *Electoral Systems and Minority Representation* at 51 (cited in note 307); Arend Lijphart, *Proportionality by Non-PR Methods: Ethnic Representation in Belgium, Cyprus, Lebanon, New Zealand, West Germany, and Zimbabwe*, in Grofman and Lijphart, eds, *Electoral Laws and Their Political Consequences* 113 (cited in note 11); Reynolds, 30 Legis Stud Q at 301 (cited at note 323). See also Bird, *The Political Representation of Women and Ethnic Minorities* at *7 (cited in note 312) ("Comparative studies that do exist are largely descriptive and theoretically underdeveloped.").

[338] See notes 313, 315–16 and accompanying text.

[339] See notes 318 and 350, and accompanying text.

[340] See notes 321 and 328, and accompanying text.

[341] See Ghai, *Public Participation and Minorities* at 16 (cited in note 327) (discussing India's scheduled tribes); *The Black Population: 2010* *8 (US Census Bureau Sept

winning representation in districts (even single-member ones) that are drawn geographically. In contrast, diffuse groups, such as Canada's Aboriginals and New Zealand's Māori, are dispersed more evenly throughout the country.[342] They are invariably underrepresented by single-member districts and require other mechanisms to achieve anything close to proportional representation.[343]

In addition to choosing what kinds of minority populations should be represented, nations need to decide how to allocate legislative seats to them. In particular, they need to decide whether to allocate seats *explicitly* or *implicitly*. Explicit methods of allocation, such as reserved seats and party slating requirements (and, arguably, § 5 of the VRA), are marked by their efficacy. There is no doubt in which districts and in what numbers minority candidates will win election. However, such techniques are often controversial because they openly take race into account and deviate from the ideal of the color-blind state.[344] Implicit methods of allocation, such as redistricting rules that pay heed to minorities' geographic distributions and multimember districts with low thresholds of exclusion, are notable for their subtlety. They do not racialize the electoral system (at least not to the same extent) while still making possible substantial levels of minority representation. But they are usually more complicated than explicit mechanisms, and thus less certain to produce a proportional minority presence in the legislature.[345]

2011), online at http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf (visited May 11, 2013).

342 See Royal Commission on Electoral Reform and Party Financing, 1 *Reforming Electoral Democracy* at 10, 170 (cited in note 45) (discussing Canada's Aboriginals); Andrew Geddis, *A Dual Track Democracy? The Symbolic Role of the Māori Seats in New Zealand's Electoral System*, 5 Election L J 347, 347 (2006) (discussing New Zealand's Māori).

343 See Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 Colum L Rev 418, 430 (1995) ("Districting will be effective only in areas where minority voters are residentially concentrated in homogeneous territories."); Kent Roach, *Chartering the Electoral Map into the Future*, in John C. Courtney, Peter MacKinnon, and David E. Smith, eds, *Drawing Boundaries: Legislatures, Courts, and Electoral Values* 200, 213 (Fifth House 1992) (noting in Canadian context that "[a]ffirmative districting will not benefit more diffuse disadvantaged groups").

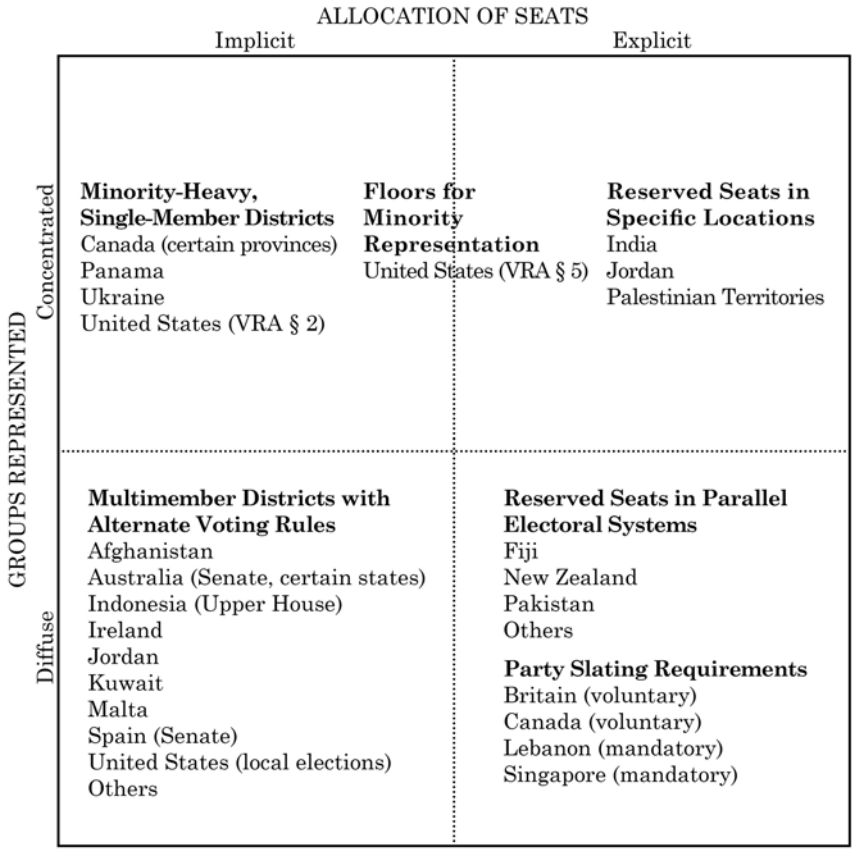
344 See, for example, Ghai, *Public Participation and Minorities* at 16–17 (cited in note 327) (noting that reserved seats remain controversial in India); Alistair McMillan, *Delimitation in India*, in Handley and Grofman, eds, *Redistricting* 75, 76 (cited in note 10) (same); Geddis, 5 Election L J at 360–66 (cited in note 342) (same in New Zealand).

345 See Bowler, Donovan, and Brockington, *Electoral Reform and Minority Representation* at 32–50 (cited in note 308) (discussing voter and party coordination required by systems of limited and cumulative voting).

2. Processing the policies.

While interesting individually, the dimensions of minority group concentration and allocative explicitness are more analytically useful when considered in tandem. Figure 4 below, then, is a matrix in which the vertical axis indicates whether only concentrated minority groups are represented or also diffuse groups, and the horizontal axis denotes whether legislative seats are allocated explicitly or implicitly. Only the policies currently in place in different jurisdictions are displayed; unlike earlier in the Article,[346] I do not present a second figure showing policy changes over time because approaches to minority representation have not exhibited much temporal variation.

FIGURE 4. MODELS OF MINORITY REPRESENTATION



346 See Part I.B.2.

To begin with, the deliberate creation of minority-heavy, single-member districts (as often required in America by § 2 of the VRA) occupies the concentrated-implicit quadrant of the matrix. These sorts of districts can benefit only minority groups that are large and geographically dense enough to comprise the majority, or at least a substantial minority, in specific constituencies. Indeed, the Supreme Court has made sufficient size and geographic compactness a prerequisite for the grant of relief in § 2 litigation.[347] These districts are also relatively circumspect in their allocation of legislative influence. True, their construction requires line-drawers to take into account the spatial distribution of minority populations; but they then function in precisely the same fashion, under precisely the same electoral rules, as all other districts. They are not formally designated as "minority constituencies," and they may be (and sometimes are) won by candidates of any race.

Section 5 of the VRA, in contrast, straddles the line between the concentrated-implicit and concentrated-explicit quadrants. Like § 2, it usually applies to minority-heavy, single-member districts,[348] which are beneficial only to geographically concentrated minority groups. But unlike § 2, it sets a floor for minority representation below which covered jurisdictions may not fall. Section 5 is thus notably more overt in its allocation of seats—not as blatant as policies that specify *levels* of minority representation, but also not as discreet as approaches that merely require that minority-heavy districts be drawn in certain circumstances. As Justice Anthony Kennedy has observed, "considerations of race that would doom a redistricting plan under . . . § 2 seem to be what save it under § 5."[349]

The first of the policies that do specify levels of minority representation, occupying the concentrated-explicit quadrant, is the reservation of particular districts in particular locations. These constituencies are typically situated in areas where the relevant minority groups are concentrated. In India, for example, the districts reserved for scheduled tribes are by law the districts in each state in which the tribes make up the largest shares of the population.[350] However, these constituencies are

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[347] See *Gingles*, 478 US at 50 (Brennan).

[348] See notes 295–96 and accompanying text.

[349] *Georgia*, 539 US at 491 (Kennedy concurring).

[350] See India Const Art 330; Delimitation Commission of India, *Changing Face of Electoral India* at 5–6, 33 (cited in note 69).

also capable of representing more diffuse minority groups. Because only candidates of the designated race, ethnicity, or religion are permitted to run for office, minority groups are guaranteed victory even if they make up less than 50 percent of the district population (as is often the case, for instance, with India's scheduled castes).[351] It is this feature that accounts for this model's lower position on the concentration-diffusion axis (relative to the VRA)—as well as its position further to the right on the implicit-explicit axis.

The other two policies that explicitly set levels of minority representation are reserved seats in parallel electoral systems and party slating requirements. Like reserved seats in unitary systems, these approaches determine in advance how much legislative influence minority groups should have, and then use overt mechanisms to provide it to them. As Professor Andrew Geddis has remarked about New Zealand, "The Māori seats provide a guaranteed presence in Parliament for MPs directly elected by those Māori who wish to enroll and vote as Māori."[352] Unlike reserved seats in unitary systems, however, reserved seats in parallel systems and party slating requirements are not linked at all to minority groups' geographic distributions. No matter how dispersed New Zealand's Māori or Pakistan's non-Muslims are, they still receive exactly the same representation through their separate electoral structures. Similarly, Singapore's ethnic minorities and Lebanon's religious sects are assured the same legislative presences, regardless of their spatial patterns, since their positions in party slates are protected by law.[353]

Finally, multimember districts with alternative voting rules occupy the diffuse-implicit quadrant of the matrix. Relative to single-member districts, they enable smaller and more scattered

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[351] See, for example, Ghai, *Public Participation and Minorities* at 16 (cited in note 327) (noting that scheduled castes in India usually make up less than 30 percent of population in districts reserved for them).

[352] Geddis, 5 Election L J at 357 (cited in note 342).

[353] Singapore's system, which requires every party slate for every multimember district to include at least one minority candidate, is entirely unmoored from minority groups' geographic distributions. See note 327 and accompanying text. However, Lebanon's system, in which the required sectarian composition of party slates varies from district to district, does partly take into account the areas in which different religious groups are concentrated. See Salloukh, 39 Can J Polit Sci at 639–40 (cited in note 328). It is thus closer on the concentration-diffusion axis to the Indian, Jordanian, and Palestinian approaches of reserved seats in specific locations. See notes 324–25 and accompanying text.

minority groups to gain representation, especially as the number of members per district rises and the threshold of exclusion falls. However, since some minority groups cannot meet even a relatively low threshold, these constituencies do still require a greater degree of geographic concentration than do reserved seats in parallel systems or party slating requirements. Multimember districts with alternative voting rules are also the least allocatively explicit of all the models of minority representation. They are obviously far less blatant than policies that set outright the numbers of seats for different minority groups, but they are also substantially subtler than § 2 of the VRA. Every element of the § 2 inquiry involves racial considerations,[354] while limited, cumulative, and preferential voting all operate without race ever entering into the equation. Indeed, perhaps the most notable feature of these systems is that they promote the representation of *all* minority groups, not just racial ones.[355]

C. Rethinking the American Approach

Unlike with redistricting institutions and criteria, there are many global models of minority representation to choose from, not just two. However, all of the foreign approaches that allocate seats explicitly—reserved districts in unitary systems, reserved districts in parallel systems, and party slating requirements—can essentially be rejected out of hand as options for the United States. If § 5 of the VRA is on constitutional thin ice,[356] and if minority-heavy, single-member districts violate the Equal Protection Clause when they disrupt communities or are shaped too oddly,[357] then there is no question that policies that overtly set levels of representation for minority groups would be unconstitutional. (Party slating requirements would also likely run afoul of the First Amendment associational freedoms that American parties enjoy.)[358]

The only plausible models of minority representation for the United States are therefore the status quo, characterized by the

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354 See *Gingles*, 478 US at 48–51 (Brennan).

355 See Karlan, 24 Harv CR–CL L Rev at 236 (cited in note 304); Pildes and Donoghue, 1995 U Chi Legal F at 255 (cited in note 336).

356 See *Shelby County*, 679 F3d at 873; *Northwest Austin Municipal Utility District Number One v Holder*, 557 US 193, 203–05 (2009).

357 See 160–61, 224–27 and accompanying text.

358 See, for example, *California Democratic Party v Jones*, 530 US 567, 585–86 (2000) (invalidating California law that required parties to participate in "blanket" primary).

creation of minority-heavy, single-member districts in areas where there exist large and geographically concentrated minority groups, and the use of multimember districts with alternative voting rules.[359] In this section, I first make the case for the latter approach and then consider a number of potential objections. Because I am not the first to argue for systems of limited, cumulative, or preferential voting,[360] I emphasize the lessons that can be gleaned from comparative and empirical analysis—modes of inquiry that have not yet been brought to bear on these issues.[361] Once again, the arguments that I present are consistent with a range of democratic theories.[362]

1. Better representation via better means.

Two of the benefits of multimember districts with alternative voting rules stem directly from their positions on the taxonomic axes that I introduced above. First, their ability to provide representation to more diffuse minority groups is not a neutral attribute but rather one that is quite normatively attractive. The underlying rationale for trying to secure a legislative presence for American minorities is that they are socioeconomically disadvantaged and have been subjected to pervasive discrimination for many years.[363] Crucially, this justification in no way rests on the groups' geographic concentration. Spatially dispersed groups are just as deserving of representation—and can earn it via limited, cumulative, or preferential voting in many areas where they would be denied it by single-member districts. I noted earlier that Australia's widely scattered Aboriginals have won more seats in the Senate, which is elected from

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[359] Scrapping the VRA altogether is also an option, but such a step would signify the *absence* of any actual model of minority representation. Consider *Bush v Vera*, 517 US 952, 1072 (1996) (Souter dissenting) (noting that if VRA were eliminated "the result . . . would almost inevitably be a so-called 'representative' Congress with something like 17 black members").

[360] Other scholars who have made similar arguments include Professors Richard Briffault, Lani Guinier, and Pamela Karlan. See generally Briffault, 95 Colum L Rev 418 (cited in note 343); Guinier, 71 Tex L Rev 1589 (cited in note 18); Karlan, 24 Harv CR–CL L Rev 173 (cited in note 304).

[361] See Bird, *The Political Representation of Women* at *7 (cited in note 312) (noting "underdevelopment of comparative research on ethnic minority representation").

[362] See text accompanying notes 107–10.

[363] See *Gingles*, 478 US at 36–37 (listing factors that govern totality-of-circumstances inquiry under § 2 of VRA, which include "any history of official discrimination in the state" and "the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health").

six-member districts using preferential voting, than in the House.[364] America's diffuse Hispanic population has also experienced greater electoral success in jurisdictions that employ limited or cumulative voting.[365]

Second, it is normatively appealing as well that multimember districts with alternative voting rules allocate seats implicitly to minority groups. Explicit methods of allocation are troublesome because they raise the salience of racial identity and conflict with the principle that governments should treat all of their citizens equally. Concerns of this sort are precisely why India and New Zealand's reserved-seat systems remain controversial generations after they were adopted,[366] and why Australia and Canada have decided not to form dedicated Aboriginal districts analogous to New Zealand's.[367] Of course, the construction of minority-heavy, single-member districts is not as brazen as these mechanisms, but it does still require race to be taken into account when districts are drawn. As Justice Clarence Thomas has written (somewhat hyperbolically), § 2 of the VRA can be seen as an "enterprise of systematically dividing the country into electoral districts along racial lines [and] segregating the races into political homelands."[368] In contrast, multimember districts with alternative voting rules do not compel

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[364] See note 334 and accompanying text. Each district (or each Australian state) actually elects twelve senators, but their terms are staggered so that only six positions are filled in each election. *Parliament of Australia, about the Senate* (Australia 2012), online at http://www.aph.gov.au/About_Parliament/Senate/About_the_Senate (visited May 11, 2013).

[365] See Bowler, Donovan, and Brockington, *Electoral Reform and Minority Representation* at 95–96 (cited in note 308); Richard L. Engstrom, Delbert A. Taebel, and Richard L. Cole, *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico*, 5 J L & Polit 469, 482 (1989) (noting success of Hispanics in Alamogordo, despite their "relative dispersion . . . across the city," under cumulative voting). Consider Robert G. Moser, *Electoral Systems and the Representation of Ethnic Minorities: Evidence from Russia*, 40 Comp Polit 273, 289 (2008) (finding that minority groups in Russia perform well under single-member districts only if they are geographically concentrated); Jessica Trounstine and Melody E. Valdini, *The Context Matters: The Effects of Single-Member versus At-Large Districts on City Council Diversity*, 52 Am J Polit Sci 554, 563 (2008) (same for minority groups in American municipal elections).

[366] See note 344.

[367] See Parliament of New South Wales, *Enhancing Aboriginal Political Representation* at 53 (cited in note 310) (describing view that "dedicated seats would be perceived as 'special treatment' for Aboriginal people"); Melissa S. Williams, *Sharing the River: Aboriginal Representation in Canadian Political Institutions*, in David Laycock, ed, *Representation and Democratic Theory* 93, 96–98 (British Columbia 2004).

[368] *Holder v Hall*, 512 US 874, 905 (1994) (Thomas concurring in the judgment). See also id at 906 (arguing that § 2 is "indistinguishable in principle" from foreign reserved-seat systems).

any consideration of race in their design or operation. They promise levels of minority representation comparable to those produced by § 2, but without any of the "dividing" and "segregating" that are sometimes linked to the provision.[369]

But do limited, cumulative, and preferential voting rules actually deliver on this promise? In fact, they perform even better in terms of minority representation than do single-member districts. In a recent study, Professor Shaun Bowler and others compared African American vote and seat shares in US jurisdictions that use limited or cumulative voting to the equivalent proportions in jurisdictions employing single-member districts or at-large elections.[370] Limited and cumulative voting resulted in higher African American seat shares for all potential vote shares. An African American group that won 40 percent of a jurisdiction's vote, for example, could expect to win 10 percent of its seats in an at-large election, 30 percent with single-member districts, and almost 40 percent under limited or cumulative voting.[371]

Similarly, African Americans, Hispanics, and Asian Americans made up 37 percent to 46 percent of New York City's population during the three decades in which it used preferential voting for its school board elections.[372] 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.[373] In the Spanish Senate as well,

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[369] See Briffault, 95 Colum L Rev at 434 (cited in note 343); Karlan, 24 Harv CR–CL L Rev at 236 (cited in note 304) (noting that these approaches avoid "permanently embedding racial polarization in the political landscape by drawing district lines in an expressly race-conscious manner"); Pildes and Donoghue, 1995 U Chi Legal F at 255 (cited in note 336).

[370] See Bowler, Donovan, and Brockington, *Electoral Reform and Minority Representation* at 98–103 (cited in note 308).

[371] See id at 101. See also id at 98 (finding seat-vote slope of 0.95 for these jurisdictions, where 1.0 indicates perfect proportionality); Edward Still, *Cumulative Voting and Limited Voting in Alabama*, in Rule and Zimmerman, eds, *United States Electoral Systems* 183, 184 (cited in note 220) ("Empirical studies of existing LV and CV systems show they usually result in the election of racial minorities at a level close to the minority percentage in the population.").

[372] See Robert Richie, *Improving New York City's Community School Board Elections: Testimony to the Citywide Community School Board Elections Committee* (Center for Voting and Democracy Dec 2, 1997), online at http://archive.fairvote.org/library/geog/cities/ny_school_board.htm (visited May 11, 2013).

[373] See id. See also Douglas J. Amy, *Real Choices/New Voices: The Case for Proportional Representation in the United States* 138 (Columbia 1993); Benoit and Shepsle, *Electoral Systems and Minority Representation* at 73 (cited in note 307); Leon Weaver and Judith Baum, *Proportional Representation on New York City Community School*

controlling for malapportionment, the two main ethnic parties in the 1980s both received slightly *higher* seat shares than vote shares in a system of four-member districts with limited voting.[374] And in Ireland, the Protestant minority has secured approximately proportional representation for decades in a regime of three- to five-member districts with preferential voting.[375] In contrast, racial, ethnic, and religious minorities are dramatically under-represented in all countries that employ single-member districts.[376]

A further advantage of multimember districts with alternative voting rules is that they ensure minority representation without giving rise to extensive litigation. As mentioned above, there have been hundreds of VRA lawsuits since the statute was amended in 1982, many requiring the plaintiffs to prove contestable elements such as racial polarization and subjection to discrimination.[377] Voting rights suits are actually among the most time- and labor-intensive of all actions brought before the federal courts.[378] Abroad as well, the most prominent court dispute over minority representation involved the dissolution of a single-member Acadian-majority district in New Brunswick.[379]

But very little of this legal activity is necessary with limited, cumulative, or preferential voting. With respect to local jurisdictions that employ one of these schemes, their compliance with the VRA is almost assured (thanks to their high resultant levels of minority representation), and they typically no longer even need to draw district lines.[380] Counties and states must still

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Boards, in Rule and Zimmerman, eds, *United States Electoral Systems* 197, 202–03 (cited in note 220).

374 See Lijphart, Pintor, and Sone, *The Limited Vote* at 167 (cited in note 331) (showing that Catalan party won 4.9 percent of seats with 4.2 percent of votes and Basque party won 4.1 percent of seats with 2.0 percent of votes).

375 See Enid Lakeman, *Comparing Political Opportunities in Great Britain and Ireland*, in Wilma Rule and Joseph F. Zimmerman, eds, *Electoral Systems in Comparative Perspective: Their Impact on Women and Minorities* 45, 52–53 (Greenwood 1994); Rein Taagepera, *Beating the Law of Minority Attrition*, in Rule and Zimmerman, eds, *Electoral Systems in Comparative Perspective* 235, 240 (cited in note 375). See also Blair, 219 Annals NY Acad Sci at 23 (cited in note 332) (stating that African Americans were better represented under cumulative voting in Illinois than in most other states).

376 See notes 311–12, 318 and accompanying text.

377 See note 302 and accompanying text.

378 See *Shelby County*, 679 F3d at 872 (discussing study finding that voting rights suits are fifth most work-intensive out of sixty-three categories).

379 See note 317 and accompanying text.

380 See Bowler, Donovan, and Brockington, *Electoral Reform and Minority Representation* at 22 (cited in note 308) (observing that jurisdictions often adopt limited or cumulative voting "to save the time and cost of drawing districts"); Steven Mulroy, *Alternative,*

design districts even if they assign them multiple members—but in smaller numbers and for lower stakes. Since minority groups are able to win seats over wider vote share ranges, the precise locations of district boundaries become less important. Not surprisingly, there has not been *any* successful VRA litigation against jurisdictions that have embraced one of the alternatives to the usual American model.[381] Nor have any foreign countries that employ these approaches ever been sued over their use (successfully or otherwise) on the ground of inadequate minority representation.

Finally, there is reason to think that multimember districts with alternative voting rules foster more vigorous elections than the status quo. The Bowler study of all US jurisdictions using limited or 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.[382] Similarly, Professors David Farrell and Ian McAllister determined that voters worldwide in preferential voting systems exhibit greater satisfaction with democracy and are more likely to believe that elections are conducted fairly.[383] The likely explanation is that voters are more inclined to participate, and candidates to compete, when elections are decided by rules other than winner-take-all. Under the usual electoral arrangements, many districts have lopsided racial and partisan compositions, many races are uncompetitive, and many voters and candidates do not engage as energetically as possible in the political process.[384] But under limited, cumulative, or preferential voting, groups that do not

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Nondistrict Vote Dilution Remedies under the Voting Rights Act *15 (University of Memphis School of Law Research Paper No 111, Sept 2011), online at http://ssrn.com/abstract=1923777 (visited May 11, 2013).

[381] To the contrary, these alternatives have most commonly been adopted in the first place as *remedies* in VRA litigation. See, for example, Karlan, *Maps and Misreadings* at 227, 234 (cited in note 304) (discussing Alabama litigation that resulted in dozens of municipalities instituting either limited or cumulative voting).

[382] See Bowler, Donovan, and Brockington, *Electoral Reform and Minority Representation* at 51–64, 75–91 (cited in note 308). See also Shaun Bowler, David Brockington, and Todd Donovan, *Election Systems and Voter Turnout: Experiments in the United States*, 63 J Polit 902, 912–13 (2001).

[383] See David M. Farrell and Ian McAllister, *Voter Satisfaction and Electoral Systems: Does Preferential Voting in Candidate-Centered Systems Make a Difference?*, 45 Eur J Polit Rsrch 723, 732, 739 (2006).

[384] See Amy, *Real Choices/New Voices* at 146–47 (cited in note 373).

command plurality support can still win seats—and thus have a greater incentive to leap wholeheartedly into the fray.

In sum, then, the case for multimember districts with alternative voting rules is that they result in higher levels of minority representation, through more dynamic elections, for both diffuse and concentrated groups. They do so, moreover, without recognizing race explicitly or triggering endless rounds of acrimonious litigation. Below I consider several of the objections that scholars and judges have posed to these approaches.

2. Objections.

One relatively crude argument against multimember districts with alternative voting rules is that they are too unfamiliar or exotic for American jurisdictions. Justice Thomas, for example, has referred to them as "bizarre concoctions of Voting Rights Act plaintiffs" and "radical departures from the electoral systems with which we are most familiar."[385] But, as noted earlier, dozens of American towns and counties in at least twelve different states currently use limited, cumulative, or preferential voting.[386] A sovereign state, Illinois, also employed cumulative voting for more than a century for its state house races.[387] Party-list proportional representation, having never been adopted by any American jurisdiction, may indeed be an alien system, but the same simply cannot be said for the approaches under examination here.

A more sophisticated version of the unfamiliarity argument is that voters will be confused (and their voting intentions confounded) by rules that require them to rank candidates or to cast more or fewer ballots than they are accustomed to.[388] Limited, cumulative, and preferential voting *are* somewhat more complicated than plurality voting in single-member districts,[389] but there is abundant evidence that voters can manage this additional complexity. In a survey in Alamogordo, New Mexico, which uses cumulative voting for its city council elections,

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[385] *Hall*, 512 US at 910 & n 17 (Thomas concurring in the judgment).

[386] See notes 304–06 and accompanying text.

[387] See Blair, 219 Annals NY Acad Sci at 21–26 (cited in note 332).

[388] See, for example, Douglas W. Rae, *The Political Consequences of Electoral Laws* 128 (Yale 1971) (arguing that voters lack "rather complex cognitive arrangements" necessary for preferential voting).

[389] Though they are only slightly more complicated than voting in at-large elections, which also requires voters to cast ballots for multiple candidates.

Professor Richard Cole and others found that 95 percent of voters understood the procedure and 87 percent deemed it no more difficult to comprehend than the regime it replaced.[390] Exit polls in fifteen Texas jurisdictions using cumulative voting revealed similar levels of understanding,[391] as did a survey in a South Dakota school district.[392] And it is clear from actual election results, both in America and abroad, that minority voters not only understand these systems but also deploy them effectively to elect the candidates of their choice.[393]

Another related worry is that voters and candidates in multimember districts with alternative voting rules will have difficulty coordinating their electoral strategies.[394] For instance, multiple minority candidates might run in a district whose minority population is only slightly above the threshold of exclusion; and then minority voters might split their ballots among these candidates with the result than none of them wins a seat. This fear of nonoptimal behavior also is belied by the favorable election results in jurisdictions that use these approaches.[395] Moreover, the fear is relevant in the first place only to limited or cumulative voting, since the systematic reallocation of votes under preferential voting largely allays any concerns about coordination.[396] And even under limited or cumulative voting, it is actually *larger* political groups, not minorities, that face the greatest strategic challenges. The optimal tactic is often obvious for minorities—nominate one candidate and then cast all ballots for her—

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[390] See Richard L. Cole, Delbert A. Taebel, and Richard L. Engstrom, *Cumulative Voting in a Municipal Election: A Note on Voter Reactions and Electoral Consequences*, 43 W Polit Q 191, 194 (1990).

[391] See Robert R. Brischetto and Richard L. Engstrom, *Cumulative Voting and Latino Representation: Exit Surveys in Fifteen Texas Communities*, 78 Soc Sci Q 973, 978–79 (1997).

[392] See Richard L. Engstrom and Charles J. Barrilleaux, *Native Americans and Cumulative Voting: The Sisseton-Wahpeton Sioux*, 72 Soc Sci Q 388, 391 (1991).

[393] See notes 370–74 and accompanying text. See also Brischetto and Engstrom, 78 Soc Sci Q at 980 (cited in note 391) (finding that Hispanics in Texas jurisdictions successfully "plumped" votes for their preferred candidates); Engstrom and Barrilleaux, 72 Soc Sci Q at 391 (cited in note 392) (same for Native Americans in South Dakota school district); Pildes and Donoghue, 1995 U Chi Legal F at 273–74 (cited in note 336) (same for African Americans in Alabama county).

[394] See David Brockington, et al, *Minority Representation under Cumulative and Limited Voting*, 60 J Polit 1108, 1112 (1998); Karlan, 24 Harv CR–CL L Rev at 230 (cited in note 304).

[395] See notes 370–74 and accompanying text. See also Brischetto and Engstrom, 78 Soc Sci Q at 984 (cited in note 391) (finding that Hispanic candidates' defeats under cumulative voting were not attributable to strategic errors).

[396] See Engstrom, 21 Stetson L Rev at 767 (cited in note 303); Pildes and Donoghue, 1995 U Chi Legal F at 299 (cited in note 336).

but much less clear for larger groups that need to decide how many candidates to run and how to distribute votes among them. For precisely this reason, it is majority parties in Britain, Japan, and Spain that typically have lost the most winnable seats under limited or cumulative voting.[397]

The final common argument against multimember districts with alternative voting rules is that they encourage legislative fragmentation. Because they lower the threshold of exclusion, they allow groups that cannot win district-wide pluralities into the legislature, thus threatening the two-party system that many Americans hold dear.[398] It is certainly true that *large* multimember districts (say with ten or more members) would enable additional parties to gain a legislative foothold—but these are not the kinds of districts that have generally been used in, or proposed for, the United States. To the contrary, most American jurisdictions that employ limited, cumulative, or preferential voting elect between three and five members in this fashion.[399] Illinois, notably, relied on three-member districts during its century-long experience with cumulative voting.[400] At these magnitudes, there is no evidence that multimember districts foster the development of third parties. None emerged in Illinois,[401] none routinely wins seats in the US jurisdictions that now use these approaches,[402] and even foreign non-ethnic third parties tend to

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397 See Bowler, Donovan, and Farrell, 47 Polit Stud at 911–12 (cited in note 332) (discussing losses of "locally-dominant" Liberal Party in Birmingham election under cumulative voting after it nominated too many candidates); Lijphart, Pintor, and Sone, *The Limited Vote* at 159–63 (cited in note 331) (same for Liberal Democratic Party in Japan and Socialist Party in Spain under limited voting).

398 See Karlan, 24 Harv CR–CL L Rev at 230 (cited in note 304); Pildes and Donoghue, 1995 U Chi Legal F at 256–57 (cited in note 336). See also *Davis v Bandemer*, 478 US 109, 144–45 (1986) (O'Connor concurring in the judgment) (praising American two-party system and worrying that it would be undermined by use of proportional representation to curb partisan gerrymandering).

399 See Brockington, et al, 60 J Polit at 1111 (cited in note 394) (showing that US cumulative voting jurisdictions average 3.22 seats per election and US limited voting jurisdictions average 4.00 seats per election); Engstrom, 21 Stetson L Rev at 752–62 (cited in note 303).

400 See Blair, 219 Annals NY Acad Sci at 21–26 (cited in note 332).

401 See id at 21.

402 See Pildes and Donoghue, 1995 U Chi Legal F at 291–94 (cited in note 336). See also Lani Guinier, *The Representation of Minority Interests*, in Peterson, ed, *Classifying by Race* 21, 21 (cited in note 307) (noting that jurisdictions can "juggl[e] the number of legislative positions within each multimember district" so as to "set a community-specific threshold of exclusion"); Bowler, Donovan, and Brockington, *Electoral Reform* at 41 (cited in note 308).

have seat shares that are substantially lower than their vote shares.[403]

Indeed, multimember districts with alternative voting rules might actually *improve* the functionality of the American two-party system. According to a study by Professor Greg Adams, one of the main effects of Illinois's cumulative voting regime was to increase the variance of the policy views held by both Democratic and Republican members of the state house.[404] Freed from the need to win over the median voter in single-member districts, politicians from both parties were able to adopt wider ranges of policy positions. These wider ranges unsurprisingly overlapped to a substantial degree, leading to a lower level of legislative polarization. Since high and rising polarization is one of the most worrisome features of the current American political scene,[405] the appeal of limited, cumulative, and preferential voting is particularly pronounced at present. As Professor Adams writes, "If 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."[406]

CONCLUSION

This Article began with a description of Texas's most recent redistricting experience—an experience that exemplifies each aspect of the exceptional (and exceptionally flawed) American model of district design. Can this model actually be reformed? Is there any hope that independent commissions might soon take the place of political actors, that homogenizing criteria might supplant diversifying requirements, or that alternative voting systems might displace plurality-rule elections? In fact, there is reason for optimism on all three fronts.

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403 See Lijphart, Pintor, and Sone, *The Limited Vote* at 164, 167 (cited in note 331) (presenting results under limited voting for Japan and Spain).

404 Greg D. Adams, *Legislative Effects of Single-Member vs. Multi-member Districts*, 40 Am J Polit Sci 129, 140 (1996). See also Gary W. Cox, *Centripetal and Centrifugal Incentives in Electoral Systems*, 34 Am J Polit Sci 903, 927 (1990) ("In multimember districts, cumulation promotes a dispersion of competitors across the ideological spectrum.").

405 For an excellent recent discussion of polarization and its consequences, see Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 Calif L Rev 273, 276–81 (2011).

406 Adams, 40 Am J Polit Sci at 141–42 (cited in note 404).

Start with redistricting institutions. After several decades in which popular initiatives to establish commissions almost always failed,[407] such measures have recently succeeded in Arizona and (twice) in California. Reformers have developed several tactics that seem to resonate with voters, for instance, recruiting bipartisan support for initiatives and proposing to staff commissions with citizens rather than former judges.[408] Of course, direct democracy is unavailable in many states, but even in these jurisdictions, the political process may be growing more amenable to institutional change. At the urging of the state's reformist governor, the New York legislature recently embraced a commission for the next redistricting cycle,[409] as did the Texas State Senate after becoming frustrated by endless rounds of litigation.[410]

The courts can also prod the elected branches into relinquishing their line-drawing authority by subjecting their district plans to heightened scrutiny. Indeed, some scholars believe this is already the courts' implicit practice, especially in racial gerrymandering cases.[411] Lastly, at least in theory, Congress could exercise its Elections Clause power and compel states to craft congressional districts using commissions.[412] Federal law already requires congressional districts to have a single member[413] and used to require contiguity and compactness;[414] there is no reason why it could not be extended to issues of institutional design as well.

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[407] See generally Stephanopoulos, 23 J L & Polit 331 (cited in note 29) (discussing redistricting initiatives and reasons for their success or failure).

[408] See id at 381–85. See also Vladimir Kogan and Thad Kousser, *Great Expectations and the California Citizens Redistricting Commission*, in Moncrief, ed, *Reapportionment and Redistricting* 219, 227 (cited in note 44); Nicholas O. Stephanopoulos, *A Fighting Chance for Redistricting*, LA Times A21 (Sept 27, 2008).

[409] See note 22.

[410] See note 24. In addition, almost every foreign jurisdiction that has adopted a redistricting commission has done so through ordinary legislation. Political actors plainly are not *incapable* of enacting policies that result in a reduction of their own power. See, for example, Courtney, *Commissioned Ridings* at 36–56 (cited in note 66) (discussing history of Canadian provinces' adoption of redistricting commissions).

[411] See Issacharoff, 116 Harv L Rev at 646–47 (cited in note 12); Issacharoff, 71 Tex L Rev at 1690 (cited in note 44). See also *1994 Alberta Reference Case*, 119 DLR 4th 1, 19 (Alberta App 1993) (Canada) (noting that lower "level of deference is appropriate when the author of the boundary is some [entity] . . . who is not insulated from partisan influence").

[412] See US Const Art I, § 4, cl 1. See also *Vieth v Jubelirer*, 541 US 267, 275 (2004) (describing Elections Clause as including "power to check partisan manipulation of the election process").

[413] See 2 USC § 2c.

[414] See *Vieth*, 541 US at 276.

Next consider redistricting criteria. All of the initiatives that created commissions put into place homogenizing requirements such as compactness, respect for political subdivisions, and respect for communities of interest.[415] One recent Florida measure actually aimed to curb gerrymandering *solely* by imposing rules that tend to make districts more homogeneous.[416] Homogenizing criteria also are much more realistic products of the political process than are independent commissions. Dozens of states already employ such criteria, particularly at the state legislative level,[417] and they easily could be adopted by more states or applied to congressional districts as well. Furthermore, as I have argued elsewhere, the Supreme Court has evinced a preference for districts that are congruent with geographic communities in several lines of its redistricting case law.[418] Judicial doctrine thus already exerts a homogenizing influence on district composition. And again, as it has in the past, Congress could once more enact homogenizing requirements for the design of all congressional districts.

Finally, with respect to minority representation, the VRA has been the vehicle through which most jurisdictions have implemented alternative voting systems. While VRA litigation usually has resulted in the formation of single-member–majority-minority districts, plaintiffs increasingly have sought—and defendants and courts increasingly have agreed to—multimember districts with limited or cumulative voting rules.[419] This is a very promising development that should be emphatically encouraged, not only at the municipal level but also for statewide elections. Even without the spur of potential VRA liability, the dozen or so states that currently use multimember districts with plurality voting rules could switch to alternative schemes almost effortlessly.[420] All they would have to do is change the type of ballot that each voter within a multimember district is entitled to cast. And yet again, Congress could improve matters for the whole country by either mandating

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415 See Stephanopoulos, 23 J L & Polit at 345–77 (cited in note 29).

416 See note 25.

417 See notes 166–67.

418 See Stephanopoulos, 160 U Pa L Rev at 1413–24 (cited at note 15).

419 See note 308 and accompanying text. See also *United States v Village of Port Chester*, 704 F Supp 2d 411, 448–49 (SDNY 2010) (summarizing favorable VRA case law on alternative voting systems).

420 See NCSL, *Redistricting* at 160 (cited in note 4) (listing states using multimember districts for their state legislatures).

multimember congressional districts with alternative voting rules (an unlikely prospect) or at least granting states the discretion to adopt them if they so desire. Precisely because of these approaches' advantages, House members have repeatedly introduced bills that would eliminate the single-member requirement, though so far to no avail.[421]

Several mechanisms thus exist for making the American model of redistricting less unique—and better. Popular initiatives, state legislation, judicial intervention, and congressional action have all made valuable contributions in the past and can all be expected to bear further fruit in the future. Accordingly, reformers need not despair when they contemplate the many jurisdictions in which political actors still draw heterogeneous single-member districts that underrepresent minorities. The status quo in these places is indeed lamentable, but the situation was worse not long ago, and most recent policy shifts have been in a favorable direction. If these trends continue, the days of American electoral exceptionalism may well be numbered.

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[421] See Voter Choice Act of 2005, HR 2690, 109th Cong, 1st Sess, in 151 Cong Rec 11463 (May 26, 2005); Voters' Choice Act, HR 1189, 107th Cong, 1st Sess, in 147 Cong Rec 4299 (Mar 22, 2001); States' Choice of Voting Systems Act, HR 1173, 106th Cong, 1st Sess, in 145 Cong Rec 4727 (Mar 17, 1999); Voters' Choice Act, HR 2545, 104th Cong, 1st Sess, in 141 Cong Rec 30009 (Oct 26, 1995).

DOCUMENTING DISCRIMINATION IN VOTING: JUDICIAL FINDINGS UNDER SECTION 2 OF THE VOTING RIGHTS ACT SINCE 1982

FINAL REPORT OF THE VOTING RIGHTS INITIATIVE, UNIVERSITY OF MICHIGAN LAW SCHOOL

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INTRODUCTION†

The Voting Rights Act of 1965 ("the VRA") is one of the most remarkable and consequential pieces of congressional legislation ever enacted. It targeted the massive disfranchisement of African-American citizens in numerous Southern states. It imposed measures drastic in scope and extraordinary in effect. The VRA eliminated the use of literacy tests and other "devices" that Southern jurisdictions had long employed to prevent black residents from registering and voting.[1] The VRA imposed on these "covered" jurisdictions onerous obligations to prove to federal officials that proposed changes to their electoral system would not discriminate against minority voters.[2]

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† Case citations within this Article have been adapted to better serve the purposes of the piece and to conserve space. Litigation titles correspond with the Voting Rights Initiative Master List of cases, *infra* Appendix, *available at* http://www.votingreport.org, and have been abbreviated in accordance with *The Bluebook*. Litigation titles do not reflect the traditional party versus party designation and often encompass several cases in a particular litigation "string."

The adapted citation format identifies the state from which the litigation arose in cases where the traditional citation format does not indicate the state. The relevant state is indicated by its postal service abbreviation, in parenthesis, after the litigation title. Some cases of particular import do not identify the state in this manner. In order to allow for immediate identification of the relevant state, short forms are seldom used for case citations.

1. As originally enacted, the VRA banned the use of any "test or device," such as a literacy test, for five years in areas of the country where a significant portion of the voting age population either was not registered to vote or failed to vote in the 1964 presidential election. *See* 42 U.S.C. § 1973b (2000) (as amended by Pub. L. No. 94-73, tit. I, § 101, tit. II, §§ 201–03, 206, 89 Stat. 400–02 (1975)) (making ban permanent and nationwide).

2. Section 5 of the VRA required that these so-called "covered" jurisdictions obtain federal "preclearance" before they changed any aspect of their electoral rules. 42 U.S.C. § 1973c (2000). Covered jurisdictions may obtain a declaratory judgment to this effect from the United States District Court for the District of Columbia, or, alternatively, submit a preclearance request to the United States Department of Justice. *Id.* §§ 1973b, 1973c. The VRA required that these jurisdictions demonstrate that the new practice did "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race . . . ." *Id.* § 1973c.

Resistance was immediate, but the VRA withstood the challenge.[3] The result was staggering. The VRA ended the long-entrenched and virtually total exclusion of African Americans from political participation in the South. Black voter registration rose and black participation followed such that, by the early 1970s, courts routinely observed that black voters throughout the South were registering and voting without interference. Similar benefits accrued to non-English speaking voters, particularly to Latino voters in the Southwest, after Congress amended the VRA to protect specified language minorities in 1975. This increased participation exposed less blatant inequalities and problems—complex issues such as racial vote dilution, the contours of which courts are still tackling today.

These persistent problems have led Congress to extend and expand the VRA each time its non-permanent provisions were due to expire. The ban on literacy tests and the "preclearance" provisions contained in Section 5 initially were enacted to last for five years. Congress extended these provisions in 1970, again in 1975, and for twenty-five more years in 1982, at which time Congress also expanded the terms of the core permanent provision of the Voting Rights Act—Section 2. This summer, Congress renewed and reauthorized the non-permanent provisions of the VRA, which were set to expire in 2007.[4]

The Voting Rights Initiative ("VRI") at the University of Michigan Law School was created during the winter of 2005 to help inform both the debates that led to this latest congressional reauthorization and the legal challenge to it that is certain to follow. A cooperative research venture involving 100 students working under faculty direction set out to produce a detailed portrait of litigation brought since 1982 under Section 2. This Report evaluates the results of that survey. The comprehensive data set may be found in a searchable form at http://www.votingreport.org or http://www.sitemaker.umich.edu/votingrights. The aim of this report and the accompanying website is to contribute to a critical understanding of current opportunities for effective political participation on the part of those minorities the Voting Rights Act seeks to protect.

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3. *See* South Carolina v. Katzenbach, 383 U.S. 301, 327 (1966) (upholding constitutionality of major portions of the VRA).

4. These provisions are the preclearance requirements of Section 5, the federal election monitoring and observer provisions set forth in Sections 6, 7, 8 and 9, and the language minority ballot coverage provisions of Sections 203 and 4(f). *See* 42 U.S.C. § 1973b(a)(8) (2000) (setting 2007 as the next required reauthorization date).

I. The Project: Background, Goals, and Methods

A. Statutory Background

The Voting Rights Act of 1965 was enacted in response to the continued, massive, and unconstitutional exclusion of African Americans from the franchise. Despite the ratification in 1870 of the Fifteenth Amendment, which prohibits denying or abridging the right to vote on the basis of "race, color, or previous condition of servitude," state voting officials continued to devise mechanisms to exclude African Americans from the franchise.[5] Judicial invalidation of one such practice often prompted the creation of another to achieve the same result. Using tactics ranging from outright violence to explicit race-based exclusions to "grandfather clauses," literacy tests, and redistricting practices, many former Confederate states (and several others) successfully prevented African Americans from participating in elections for nearly a century.[6]

Prompted by several notorious attacks on civil rights activists and recognition of the scope of African-American disfranchisement, Congress and the President acted to remedy the ineffectiveness of existing anti-discrimination provisions in 1965. The statute they created both reaffirmed the basic constitutional prohibition against race-based exclusions from the franchise and made those constitutional prohibitions effective. Section 2 of the Voting Rights Act, as originally enacted, closely tracked the wording of the Fifteenth Amendment.[7] To this Congress added Section 4, which suspended the use of particular exclusionary practices such as literacy tests, and Section 5, which demanded that jurisdictions with extremely low levels of voter registration and turnout seek "preclearance" from federal officials before implementing any changes to their voting laws and procedures.[8] Congress extended the nonpermanent provisions of the Voting Rights Act, including Section 5, in 1970, 1975, and 1982, and again this summer in The Fannie

5. U.S. Const. amend. XV.

6. *See generally* Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990, at 3 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter Quiet Revolution].

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

8. 42 U.S.C. § 1973c (2000).

Lou Hamer, Rosa Parks, And Coretta Scott King Voting Rights Act Reauthorization And Amendments Act of 2006.[9]

Congress enacted the current version of Section 2 when it amended the statute in the course of reauthorizing the nonpermanent provisions in 1982. The amendment was a response to the Supreme Court's interpretation of the VRA in a case brought by African-American residents in Mobile, Alabama. By the summer of 1975, black citizens in Mobile were registering and voting without hindrance, a feat that would have seemed impossible a decade earlier. And yet, ten years after passage of the Voting Rights Act, black residents in Mobile noticed that their participation seemed to be making little difference to the substance and structure of local governance. At the time, African Americans comprised approximately one third of the city's population, white and black voters consistently supported different candidates, and no African-American candidate had ever won a seat on the three-person city commission. Housing remained segregated, black city employees were concentrated in the lowest city salary classification, and "a significant difference and sluggishness" characterized the City's provision of city services to black residents when compared to that provided to whites.[10] Since 1911, Mobile had chosen its commissioners through city-wide at-large elections.[11]

In June of 1975, African-American residents in Mobile filed a class action lawsuit challenging the city's at-large electoral system. Two lower federal courts held that this system unconstitutionally diluted black voting strength.[12] In 1980, the Supreme Court reversed. In *City of Mobile v. Bolden*,[13] the Court held that neither the Constitution nor Section 2 of the Voting Rights Act prohibited electoral practices simply because they produced racially discriminatory results. The Court determined that these provisions proscribed only those rules or practices enacted with racially invidious intent. Mobile's at-large system remained permissible

9. Pub. L. No. 109-246, 120 Stat. 577 (2006); Pub. L. No. 97-205, 96 Stat. 131 (1982); Pub. L. No. 94-73, tit. I, § 101 & tit. II, §§ 201–03, 206, 89 Stat. 400–402 (1975); Pub. L. No. 91-285, §§ 2–4, 84 Stat. 314, 315 (1970).

10. Bolden v. City of Mobile, 423 F. Supp. 384, 391 (S.D. Ala. 1976).

11. *Id.*

12. *Id.*, *aff'd*, 571 F.2d 238 (5th Cir. 1978), *rev'd*, 446 U.S. 55 (1980).

13. City of Mobile v. Bolden, 446 U.S. 55, 60–61 (1980) ("[I]t is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, . . . [and] that it was intended to have an effect no different from that of the Fifteenth Amendment itself.").

unless the plaintiffs could demonstrate that the city adopted the at-large system for the purpose of diluting black voting strength.[14]

In 1982, Congress responded to *Mobile* by amending Section 2 to create an explicit "results"-based test for discrimination in voting. As a consequence, Section 2 provides today:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [on account of statutorily designated language minority status].[15]

Determining whether a particular electoral rule results in a denial or abridgement of the right to vote is a complex inquiry. The statute indicates that to prevail under Section 2, plaintiffs must demonstrate that, "based on the totality of circumstances . . . the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial or language minority]." Plaintiffs must show that members of these protected classes "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Relevant to the inquiry is "the extent to which members of a protected class have been elected to office in the State or political subdivision," although the statute is explicit in that it creates no right to proportional representation.[16]

The Senate Judiciary Committee issued a report to accompany the 1982 amendment to Section 2, now known as the "Senate Report."[17] The Supreme Court has since described this report as "the authoritative source" on the meaning of the amended statute.[18] The Senate Report identified several factors, now known as "the Senate Factors," for courts to use when assessing whether a particular practice or procedure results in prohibited discrimination in

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14. *Id.* On remand, the district court struck down the at-large system based on evidence of such intent. Bolden v. Mobile, 542 F. Supp. 1050 (S.D. Ala. 1982). *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, LAW OF DEMOCRACY 711 (rev. 2d ed. 2002) [hereinafter ISSACHAROFF, KARLAN & PILDES]; Peyton McCrary, *The Significance of* Bolden v. The City of Mobile, *in* MINORITY VOTE DILUTION 47, 48–49 (Chandler Davidson ed., 1984).

15. 42 U.S.C. § 1973(a) (2000).

16. *Id.* § 1973(b).

17. S. REP. NO. 97–417 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177 [hereinafter SENATE REPORT].

18. Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986).

violation of Section 2. Derived from the Supreme Court's analysis in *White v. Regester*,[19] and the Fifth Circuit's subsequent decision in *Zimmer v. McKeithen*,[20] these "typical" factors are:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. If there is a candidate slating process, whether members of the minority group have been denied access to that process;
5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. Whether political campaigns have been characterized by overt or subtle racial appeals;
7. The extent to which members of the minority group have been elected to public office in the jurisdiction.[21]

The Senate Report also identified two additional factors that have "probative value" in establishing a plaintiff's claim under the amended statute, referred to as Senate Factors 8 and 9. These query whether "there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group," and whether the justification for the policy behind the practice or procedure is "tenuous."[22] The 1982 amendment to Section 2 dramatically altered voting rights

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

20. Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam).

21. SENATE REPORT, *supra* note 17, at 28–29.

22. *Id.* at 29.

litigation nationwide. While prior to 1982 plaintiffs had rarely invoked Section 2 in its original form, most plaintiffs alleging racial vote dilution since 1982 have consistently brought their claims under Section 2.[23]

B. Research Objectives

A detailed understanding of Section 2 litigation informs several issues related to the reauthorization of the expiring provisions of the Voting Rights Act. First, the record of judicial implementation of Section 2 informs the question whether the auxiliary provisions, such as Section 5, are still helpful today. To be sure, Section 5 is distinct from Section 2 in that, for covered jurisdictions, compliance with Section 2 is neither necessary nor sufficient to obtain preclearance from the federal government. Nonetheless, analyzing the judicial record of Section 2 decisions—including the structured nature of the judicial inquiry under the Senate Factors—helps illuminate the extent to which meaningful minority participation in elections has been a reality in recent times.

Section 2 decisions tell a powerful story about the health of minority political participation throughout the United States since 1982. And they do so in Congress's own terms—in the way Congress asked courts to assess political equality and to determine whether to issue a remedy. An examination of these decisions also illustrates how both claims and remedies have changed over the years. Enacted by Congress in 1965 to address the specific problem of black disfranchisement in the South, the Voting Rights Act has been amended to protect language minorities and today is invoked by several different minority groups to challenge a host of electoral practices throughout the country. The findings in these cases offer a lens, provided by Congress itself, through which variations in political participation over time and region may be viewed and evaluated.[24]

Recent Supreme Court decisions have demanded increased scrutiny of the connection between the perception of a constitutional evil and the remedy enacted under Congress's power to enforce the Civil War amendments. In *City of Boerne v. Flores*, the Supreme Court announced that Congress could only invoke its legislative powers under Section 5 of the Fourteenth Amendment

23. ISSACHAROFF, KARLAN & PILDES, *supra* note 14, at 747.
24. *See infra* Parts II.B, II.C.

where the Congressional legislation was "congruent and proportional" to "remedy or prevent" an underlying constitutional violation.[25] The same is true for the power to enforce the Fifteenth Amendment pursuant to Section 2 of that amendment.[26]

Many people read *City of Boerne* and its progeny to signal that the reauthorization of Section 5 will survive constitutional scrutiny only if Congress has adequately documented pervasive unconstitutional conduct in covered jurisdictions.[27] To the extent the Supreme Court will require such a record,[28] the Section 2 decisions offer one source for identifying recent instances of unconstitutional conduct related to voting. To be sure, Section 2's "results"-based test goes beyond what the Fifteenth Amendment alone commands. And yet, some Section 2 violations are constitutional violations.[29] Moreover, courts assessing the Senate Factors in the course of adjudicating Section 2 cases have documented evidence that reveals a range of unconstitutional conduct by state and local officials in specific regions across the Nation.[30] While these judicial findings are not

25. City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997).

26. *Id.* at 518 (discussing "Congress' parallel power to enforce the provisions of the Fifteenth Amendment" as co-extensive with Section 2 of the Fourteenth Amendment).

27. Ellen D. Katz, *Not Like the South?: Regional Variation and Political Participation Through the Lens of Section 2*, *in* DEMOCRACY, PARTICIPATION AND POWER: PERSPECTIVES ON REAUTHORIZATION OF THE VOTING RIGHTS ACT (forthcoming 2006) (manuscript at nn.4–6, on file with authors) (discussing this argument).

28. For the argument that it should not require such a record, see *id.* *See also An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 15 (2006) (statement of Pamela S. Karlan, Professor of Public Interest Law, Stanford University School of Law); Pamela S. Karlan, *Congressional Power to Extend Preclearance Under the Voting Rights Act*, AMERICAN CONSTITUTION SOCIETY LAW FOR LAW AND POLICY, at 14, 19, June 14, 2006, http://www.acslaw.org/node/2964.

29. Some lawsuits found both constitutional and Section 2 violations. *See* Arakaki Litig., 314 F.3d 1091 (9th Cir. 2002); Garza v. L.A. Litig., 918 F.2d 763 (9th Cir. 1990); Mobile Sch. Bd. Litig., 706 F.2d 1103 (11th Cir. 1983); Gadsden County Litig., 691 F.2d 978 (11th Cir. 1982); City of New Rochelle Litig., 308 F. Supp. 2d 152, 158 (S.D.N.Y. 2003); Marks-Phila. Litig., No. CIV. A. 93-6157, 1994 WL 146113 (E.D. Pa. Apr. 26, 1994); Jeffers Litig., 740 F. Supp. 585 (E.D. Ark. 1990); Armour Litig., 775 F. Supp. 1044 (N.D. Ohio 1991); LULAC v. Midland Litig., 648 F. Supp. 596 (W.D. Tex. 1986); Terrell Litig., 565 F. Supp. 338 (N.D. Tex. 1983); *see also* Dean Litig., 555 F. Supp. 502 (D.R.I. 1982) (declaratory and injunctive relief based on "constitutional error" and implied Section 2 violation); Haywood County Litig., 544 F. Supp. 1122 (W.D. Tenn. 1982) (preliminary injunction based on proven Section 2 violation and likely success on constitutional claim). Some lawsuits found discriminatory intent and effect under Section 2. *See* Town of N. Johns Litig., 717 F. Supp. 1471, 1476 (M.D. Ala. 1989); Baldwin Bd. of Educ. Litig., 686 F. Supp. 1459, 1467 (M.D. Ala. 1988); Harris Litig., 695 F. Supp. 517, 521 (M.D. Ala. 1988); Buskey v. Oliver Litig., 565 F. Supp. 1473, 1485 (M.D. Ala. 1983); *see also* Town of Cicero Litig., No. Civ.A. 00C 1530, 2000 WL 34342276, at *1 (N.D. Ill. Mar. 15, 2000) (preliminary injunction based on likely success of showing purposeful discrimination under Section 2); Dillard v. Crenshaw Litig., 640 F. Supp. 1347, 1361 (M.D. Ala. 1986) (same).

30. *See infra* Part II.C.1.

formal adjudications of unconstitutional conduct, they represent the considered judgments of federal judges nationwide that the evidence they reviewed reveals conduct that runs afoul of the Constitution.

C. Research Project and Design

The Voting Rights Initiative is a faculty-student research collaborative established in January 2005 at the University of Michigan Law School. Working under the direction of Professor Ellen Katz, a group of more than 100 Michigan Law students set out to document the nature and scope of litigation brought, since 1982, under Section 2 of the Voting Rights Act.

Researchers began by searching the federal court databases on Westlaw and LexisNexis to identify electronically published decisions addressing a Section 2 claim. To develop the master list, researchers searched these databases for every federal court decision that cited 42 U.S.C. § 1973 between June 29, 1982, when Section 2 was amended, and December 31, 2005. The resulting list was then narrowed by identifying cases in which plaintiffs had filed an actual claim under Section 2, and removing all decisions that merely reference Section 2 without involving a claim brought under that provision.[31]

Researchers then located all related decisions and organized them by lawsuit with a single litigation title. Within each lawsuit, researchers determined which opinion provided the final word for the purposes of this project, since many lawsuits included multiple appeals and remands.[32] The final word case in each lawsuit is usu-

31. The resulting list includes decisions published in the federal reporters, as well as some only published on electronic databases. The list includes some lawsuits that have not yet resulted in a final unappealable decision, but for which at least one opinion was published within the specified time period. The study does not include lawsuits that did not produce a published opinion before 2006. *See, e.g.*, Cottier v. City of Martin, 445 F.3d 1113 (8th Cir. 2006); Quinn v. Pauley, No. 04 C 6581, 2006 WL 752965 (N.D. Ill. Mar. 21 2006); Gonzalez v. City of Aurora, No. 02 C 8346, 2006 WL 681048 (N.D. Ill. Mar. 13 2006). The list does include a few lawsuits decided after the 1982 amendment to Section 2 which did not apply the new results test. *See, e.g.*, Cross Litig. (GA), 704 F.2d 143, 144 (5th Cir. 1983); Mobile Sch. Bd. Litig. (AL), 706 F.2d 1103, 1106 (11th Cir. 1983).

32. The final word citation, along with the litigation title, is used as a shorthand reference to an entire lawsuit (which may have multiple opinions addressing various issues). While the report frequently cites to the final word opinion to refer to the litigation as a whole, sometimes a particular judicial opinion within a litigation string is cited in order to pinpoint a specific finding or issue for discussion. Most lawsuits have only one final word citation. In the rare situations in which merits issues were severed (e.g. by minority group or by practice challenged) and addressed in separate proceedings, a lawsuit may have more

ally the last case in the lawsuit that assessed liability on the merits and determined whether Section 2 was violated. If there was no such case to analyze, researchers coded as the final word the last published case in the lawsuit making some other determination for or against the plaintiff, including whether to issue a preliminary injunction, whether to approve a settlement, what remedy to order, and whether to grant fees. In these latter cases, the contours of the underlying Section 2 claim and the court's analysis of it were often difficult to discern as the reported decision was addressing a distinct question. Still, these cases, especially preliminary injunction cases, sometimes included reference to some Senate Factors or other substantive Section 2 criteria. Even where nothing more than the fact of decision could be discerned from these opinions, researchers included the lawsuit in the overall list of lawsuits to attempt to give as broad a picture as possible of Section 2 litigation.

Researchers reviewed each case within a litigation string and followed a standard checklist[33] to catalogue the information discussed and the outcome reached on the Section 2 claim. Researchers recorded which of the nine Senate Factors, if any, the reviewing court found to exist, and whether the court ultimately found a violation of Section 2. Researchers also tracked how courts have treated the so-called "*Gingles*" threshold test,[34] the law or practice challenged in each lawsuit, the implicated governing body, the minority groups bringing the claim, the involvement of expert witnesses, and other basic case data such as the judges and lawyers involved with the case.

Each case was read and catalogued by multiple researchers working independently, then by research directors, and then checked for consistency by editors. Since the completion of the case reports, searches have been designed using the database to document and analyze particular findings in this report.

All of the case reports and searches to access this data are available at www.votingreport.org. This website includes lists of cases, organized by lawsuit and by state, in both Section 5-covered and non-covered jurisdictions that: resulted in a successful outcome for the plaintiffs;[35] found any of the Senate Factors; challenged specific

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than one "final word" case, each corresponding to the final decision on an issue. Many lawsuits may also contain decisions subsequent to the final word opinion that addressed other matters, such as fees, remedies or other related claims.

33. *See* The Voting Rights Initiative, Data Key, http://www.votingreport.org, also located at http://www.sitemaker.umich.edu/votingrights.

34. Thornburg v. Gingles, 478 U.S. 30 (1986).

35. Suits coded as a successful plaintiff outcome include both those lawsuits where a court determined, or the parties stipulated, that Section 2 was violated, and a category of lawsuits where the only published opinion indirectly documented plaintiff success. In this

types of electoral practices; challenged certain governing bodies; and involved particular minority groups. The site also provides a timeline of racial appeals in campaigns.[36] An abridged version of the master list and the Section 2 lawsuits analyzed in this study appears in an appendix to this report.[37]

VRI issued a report evaluating its findings in November 2005, as congressional hearings considering the merits of reauthorization were proceeding.[38] With the legislative component of reauthorization now complete, this volume of *The University of Michigan Journal of Law Reform* provides a revised and updated version of the original VRI report.

II. The Findings: Documenting Discrimination

A. Overall Results

1. The Numbers—This study identified 331 lawsuits, encompassing 763 decisions, addressing Section 2 claims since 1982.[39] These lawsuits, of course, represent only a portion of the Section 2 claims filed or decided since 1982. Of the total number of cases filed, some plaintiffs failed to pursue their claims, some obtained relief through settlement, and others saw their cases go to judgment, but the courts involved did not issue any published opinion or ancillary ruling published on the electronic databases surveyed. The total number of claims filed under Section 2 since the 1982 amendment is, accordingly, not known.

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second category of plaintiff success are suits where the only—or most recently—published case granted a preliminary injunction, considered a remedy or settlement, or decided whether to grant attorneys' fees after a prior unpublished determination of a Section 2 violation.

36. For additional analysis and comparisons of the following in covered and non-covered jurisdictions: rates of success in local and statewide lawsuits, rates of success for different electoral practices challenged, differing levels of white bloc voting in covered and non-covered jurisdictions, differing historic rates of minority candidate success, and rates of success when challenging new, as opposed to longstanding, electoral practices, see Katz, *supra* note 27, at app.

37. *Infra* Appendix.

38. Dave Gershman, *Study: Discrimination in Voting Still a Problem: U-M Students Suggest Congress Take Action*, Ann Arbor News, Nov. 11, 2005; *see also* VRI website, http://www.votingreport.org.

39. *See* VRI Database Master List of the Voting Rights Initiative Database (2006), http://www.votingreport.org (highlight "Final Report" on the top menu) (on file with the University of Michigan Journal of Law Reform) [hereinafter VRI Database Master List] (including instructions on how to sort data to find lists of lawsuits for each citation in this report).

The ACLU reports that approximately one out of five of their plaintiffs' Section 2 cases filed in Georgia and in South Carolina ended with a published decision.[40] Insofar as this ratio of filings is at all representative, this study's compilation of 331 lawsuits conservatively suggests that there have been more than 1,600 Section 2 filings nationwide, with filings in covered jurisdictions possibly exceeding 800.[41]

Of the identified lawsuits, 211 produced at least one published merits decision on the question of whether Section 2 was violated. The remaining 120 include lawsuits in which the only published decisions addressed preliminary matters (78 decisions) or fees, remedy, or settlement issues (42 decisions). Of the 211 lawsuits that ended with a determination on the merits, 98 (46.4%) originated in jurisdictions covered by Section 5 of the Voting Rights Act, and 113 (53.5%) were filed in non-covered jurisdictions.[42]

Plaintiffs succeeded in 123 (37.2%) of the lawsuits identified in this study. Of these suits, 92 documented a violation of Section 2—either on the merits or in the course of another favorable determination for the plaintiff. Another 31 lawsuits made a favorable determination for the plaintiff (such as issuing a preliminary injunction, granting a settlement, awarding fees, or crafting a remedy) without stating whether Section 2 was actually violated.[43]

Plaintiffs won more Section 2 lawsuits in covered jurisdictions than they did in non-covered jurisdictions even though less than one-quarter of the U.S. population resides in a jurisdiction covered by Section 5, and preclearance blocks some portion of discriminatory electoral changes that might otherwise be challenged under Section 2.[44] Of the 123 successful plaintiff outcomes documented,

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40. *See* LAUGHLIN MCDONALD & DANIEL LEVITAS, ACLU, THE CASE FOR AMENDING AND EXTENDING THE VOTING RIGHTS ACT, VOTING RIGHTS LITIGATION, 1982–2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION (2006) (on file with the University of Michigan Journal of Law Reform), *available at* http://www.aclu.org/votingrights/2005_report.pdf .

41. In Texas, the Section 2 litigation record of attorney Rolando Rios suggests an even higher number, in that 8 of 211 or 3.8% of his law firm's filed Section 2 lawsuits ended with a reported decision. *See* List of Cases Litigated by Rolando L. Rios, Law Office, sometimes in cooperation with the Mexican American Legal Defense and Educational Fund or with Texas Rural Legal Aid (on file with the Voting Rights Initiative).

42. *See* VRI Database Master List, *supra* note 39.

43. *Id.*; *see also supra* note 35.

44. The number of people living in Section 5 jurisdictions is 67,767,900 out of 281,421,906. U.S. Census Bureau, United States Census 2000, Demographic Profiles: 100-percent and Sample Data: Demographic Profile Data Search, http://censtats.census.gov/pub/Profiles.shtml (select the appropriate state and county to view and sum county-level population and demographic data for covered and non-covered jurisdictions) (last visited June 22, 2006). In addition, census data shows that 39.3% of African Americans in the

68 originated in covered jurisdictions, and 55 elsewhere. Plaintiffs in covered jurisdictions also won a higher percentage of the cases decided than did those in non-covered areas. Of the 171 lawsuits published involving non-covered jurisdictions, 32.2% ended favorably for plaintiffs, while 42.5% of the 160 lawsuits from covered jurisdictions produced a result favorable to the plaintiffs.[45]

Courts identified violations of Section 2 more frequently between 1982 and 1992 than in the years since. Of the 92 total violations identified, courts found 46.7% of them during the 1980s, 38% during the 1990s, and 15.2% since then.[46]

The nature of Section 2 litigation has changed in recent years. Of the 100 lawsuits in the 1980s, most involved challenges to at-large elections (60 or 60%). Since 1990, 231 lawsuits have produced published opinions. Of these, 86 (37.2%) challenged at-large elections, and 89 (38.5%) challenged reapportionment or redistricting plans.[47]

African-American plaintiffs have brought the vast number of published claims (272 or 82.2%) under Section 2 since 1982, with an increasing number of cases involving Latino (97), Native American (12), and Asian American (7) plaintiffs. African Americans were the sole plaintiffs in 93 (75.6%) of the successful decisions for plaintiffs. Of all lawsuits where any plaintiff achieved success, 16 involved multiple minority group plaintiffs.[48] In addition, Latino plaintiffs won 7 lawsuits independently, and Native American plaintiffs won 5 published lawsuits.[49]

In several lawsuits, courts addressed the constitutionality of Section 2 and all upheld the statute.[50] Judicial findings on the Senate

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United States live in Section 5-covered areas, 31.8% of Hispanics or Latinos live in covered jurisdictions, and 25% of Native Americans live in covered jurisdictions. *Id.*

45. *See* VRI Database Master List, *supra* note 39.

46. *Id.* Of these 92 lawsuits, 43 found violations during the 1980s, between 1982 and 1992, 35 during the 1990s, and 14 from 2000–2006.

47. *Id.* For an analysis of the types of electoral practices plaintiffs have challenged under Section 2 and comparative success rates in covered and non-covered jurisdictions, *see* Katz, supra *note* 27, at app., fig. 4.

48. *See, e.g.*, Perry Litig. (TX), 126 S. Ct. 2594 (2006); City of Chi.-Bonilla Litig., 141 F.3d 699 (7th Cir. 1998); City of Chi.-Barnett Litig., 17 F. Supp. 2d 753 (N.D. Ill. 1998).

49. *See* VRI Database Master List, *supra* note 39. Two other lawsuits brought by plaintiffs of unknown race reached success. Arakaki Litig., 314 F.3d 1091 (9th Cir. 2002) (overturning the race-specific candidacy requirement to run for trustee of the Office of Hawaiian Affairs); Jefferson County Litig., 798 F.2d 134 (5th Cir. 1986) (litigating the amount of appropriate attorneys' fees after approval of a non-published settlement agreement).

50. Blaine County Litig. (MT), 363 F.3d 897, 904 (9th Cir. 2004); Sanchez-Colo. Litig. (CO), 97 F.3d 1303, 1314 (10th Cir. 1996); Lubbock Litig. (TX), 727 F.2d 364, 375 (5th Cir. 1984); Marengo County Litig. (AL), 731 F.2d 1546, 1558 (11th Cir. 1984); Alamosa County Litig., 306 F. Supp. 2d 1016, 1026, 1040 (D. Colo. 2004); Elections Bd. Litig., 793 F. Supp. 859, 868–69 (W.D. Wis. 1992); Wesley Litig., 605 F. Supp. 802, 808 (M.D. Tenn. 1985); Jordan Litig., 604 F. Supp. 807, 811 (N.D. Miss. 1984); El Paso Indep. Sch. Dist. Litig., 591

Factors are discussed in more detail below. Briefly stated, however, courts found Senate Factor 1—a history of official discrimination touching the right to vote—in 111 lawsuits. Thirty-three lawsuits identified evidence of explicit official discrimination against a racial or language minority group since 1982, of which 12 originated in covered jurisdictions.[51]

Since 1982, 105 lawsuits found racially polarized voting or racial bloc voting, generally analyzing the question under either Senate Factor 2 or the second and third *Gingles* preconditions. Where courts found racial bloc voting, plaintiffs prevailed 73.3% of the time, or in 77 lawsuits overall. Courts found racially polarized voting in 52 lawsuits in covered jurisdictions.[52]

Ninety lawsuits found that minority candidates had difficulty getting elected under Senate Factor 7. In 88 lawsuits, courts found that Senate Factor 5—past socioeconomic discrimination—hindered effective political participation. Courts documented, under Factor 3, the presence of enhancing practices, such as at-large elections or majority vote requirements, in 52 lawsuits, of which the vast majority did not involve a direct challenge to the practice identified under Factor 3. Courts identified Factor 6—overt or subtle racial appeals—to be met in 47 campaigns held between 1982 and 2002. Ten lawsuits expressly found that minorities were denied access to a candidate slating process (Factor 4); 20 lawsuits documented a significant lack of responsiveness by current officials to the needs of the minority community (Factor 8); and 23 found that only a tenuous policy existed for the challenged practice (Factor 9). Factors 4, 8 and 9 featured less prominently in analyzed lawsuits, but when these factors were present, courts typically found a statutory violation as well.[53]

2. The Trends

a. The Persistence of Discrimination—Four decades after the enactment of the Voting Rights Act, racial discrimination in voting is far from over. Federal judges adjudicating Section 2 cases over the last twenty-three years have documented a range of conduct by state and local officials that they have deemed racially discriminatory—and intentionally so. Examples abound.[54] The *Bone Shirt*

F. Supp. 802, 805–06 (W.D. Tex. 1984); City of Greenwood Litig., 599 F. Supp. 397, 399 (N.D. Miss. 1984); Major Litig., 574 F. Supp. 325, 345 (E.D. La. 1983)).

51. *See infra* Part II.C.1; *see also* VRI Database Master List, *supra* note 39. *See also* Ketchum Litig. (IL), 740 F.2d 1398, 1408 (7th Cir. 1984) (drawing close analogy to intentional discrimination found in Rybicki Litig., 574 F.Supp. 1147, 1151 (N.D. Ill. 1983)).

52. VRI Database Master List, *supra* note 39.

53. *Id.*

54. *See infra* Part II.C.1.

litigation documents how county officials in South Dakota purposely blocked Native Americans from registering to vote and from casting ballots.[55] The *Charleston County* litigation (South Carolina) reveals deliberate and systematic efforts by county officials to harass and intimidate African-American residents seeking to vote.[56] The *North Johns* litigation in Alabama describes the town mayor's refusal to provide African-American candidates registration forms required by state law.[57] The *Harris* litigation in Alabama tells of Jefferson County's refusal to hire black poll workers for white precincts—and the blind eye state government turned to the voting discrimination perpetuated at local polls.[58] A Philadelphia lawsuit describes a deliberate and collusive effort by party officials and city election commissioners to trick Latino voters into casting illegitimate absentee ballots that would never be counted.[59] The *Town of Cicero* litigation (Illinois) categorizes an 18-month residency requirement as deliberately designed to stymie Latino candidacies.[60] Many more cases tell of state and local authorities drawing district lines for the express purpose of diminishing the influence of minority voters, or to protect partisan interests, knowing that doing so will hinder minority voting strength.[61]

Judicial findings under the various factors set forth in the Senate Report also reveal the persistence of private (typically nonactionable) discrimination and vestiges of past official discrimination that continue to hinder meaningful political participation by various minority groups. Section 2 lawsuits catalogue formal and informal slating procedures implemented by party officials and private associations that function to deny minority candidates meaningful access to the ballot.[62] Federal judges have identified a host of campaign tactics nationwide designed to appeal to base racial prejudice, including manipulating photographs to darken the skin of opposing candidates, allusions or threats of minority group "take over"[63] or imminent racial strife, and cynical attempts to increase turnout among perceived "anti-black"[64] voters.[65]

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55. Bone Shirt Litig., 336 F. Supp. 2d 976 (D.S.D. 2004).
56. Charleston County Litig. (SC), 365 F.3d 341 (4th Cir. 2004).
57. Town of N. Johns Litig., 717 F. Supp. 1471 (M.D. Ala. 1989).
58. Harris Litig., 695 F. Supp. 517 (M.D. Ala. 1988).
59. Marks-Phila. Litig., No. CIV. A. 93-6157, 1994 WL 146113 (E.D. Pa. Apr. 26, 1994).
60. Town of Cicero Litig., No. Civ.A. 00C 1530, 2000 WL 34342276, at *1 (N.D. Ill. Mar. 15, 2000).
61. *See infra* notes 247–256 and accompanying text.
62. *See infra* Part II.C.4.
63. Bone Shirt Litig., 336 F. Supp. 2d 976, 1041 (D.S.D. 2004).
64. Charleston County Litig., 316 F. Supp. 2d 268, 296 (D.S.C. 2003).
65. *See infra* Part II.C.6.

b. The Power of Partisanship—Courts adjudicating Section 2 claims must confront the significance of the tight linkage between race and party in many parts of this country. This issue has taken on greater importance with the emergence of the Republican Party as a vibrant and influential force in the Southern United States, a development that complicates claims of racial vote dilution, as traditionally alleged. Courts must now assess how partisan affiliation affects minority electoral success and the legal significance to accord to that relationship.

Courts adjudicating Section 2 lawsuits confront this issue at numerous junctures, but do so most prominently when assessing racial bloc voting. The *LULAC v. Clements* litigation famously declared that Section 2 is "implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats."[66] The majority of courts today will examine the claim that party, rather than race, causes minority electoral defeats. Some Section 2 plaintiffs falter on this requirement, particularly as numerous Section 2 lawsuits document the increasing willingness of white Democrats to support minority-preferred candidates in the general election. Concerned that party affiliation masks instances of racial discrimination among voters, some courts are looking more frequently to the primary elections as a gauge of minority political opportunity.[67] A host of recent Section 2 lawsuits document that significant racial polarization in voting remains prevalent at this juncture of the electoral process, notwithstanding the willingness of voters, minority and non-minority alike, to support the party nominee in the general election. With the proliferation of noncompetitive districts in the United States, the primary now forms the critical locus for political participation today such that the racial composition of the primary electorate is often more critical to minority electoral opportunity than is the composition of the district as a whole.[68]

Emphasis on the centrality of party as an organizing principle in American politics may also obscure the ways in which partisan conduct itself may diminish opportunities for minority political participation. State-mandated white primaries are long gone, but party officials, acting formally or ad hoc, continue to implement slating procedures that stymie minority candidacies. Some lawsuits

66. LULAC v. Clements Litig. (TX), 999 F.2d 831, 854 (5th Cir. 1993).

67. *See infra* notes 127–133 and accompanying text.

68. *See* Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383 (2001); Ellen D. Katz, *Resurrecting the White Primary*, 153 U. PA. L. REV. 325 (2004); *see also infra* note 128.

document what might aptly be labeled backstabbing by party officials who omit minority candidates from party campaign literature or otherwise fail to support their party's minority candidates.[69] Numerous courts now classify the knowing sacrifice of minority interests to the quest for partisan gain a form of intentional race discrimination.[70]

B. The Gingles *Threshold*

The Supreme Court's 1986 decision *Thornburg v. Gingles* distilled three "preconditions" from the totality of the circumstances test that Section 2 requires. Satisfaction of these conditions does not establish a Section 2 violation, but failure to meet them almost always brings a plaintiff's case to an end.

Since the Court decided *Gingles*, 169 lawsuits have addressed its preconditions, and 68 lawsuits found them to be satisfied. Of these, most (57) proceeded to a favorable outcome for the plaintiff.[71] In many of these cases, courts engaged in only a perfunctory review of the Senate Factors. Moreover, since *Johnson v. De Grandy*,[72] a number have restricted their post-*Gingles* inquiries to assessing whether the challenged practice achieved "proportionality," and finding a Section 2 violation only if it did not.[73]

In 101 lawsuits considering the *Gingles* Factors, courts held that plaintiffs failed to establish one or more of the preconditions.[74] A few of these courts nevertheless proceeded to evaluate plaintiffs' claims under the totality of the circumstances, typically finding that plaintiffs lose under this test as well.[75] In a few cases, courts have analyzed claims under the totality of circumstances without engaging in review under *Gingles* at all. Since *Gingles*, only 14 cases have identified a violation of Section 2 without addressing the *Gingles* factors.[76]

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69. *See infra* notes 314–320 and accompanying text.

70. *See, e.g.*, Garza v. L.A. Litig. (CA), 918 F.2d 763, 771 (9th Cir. 1990); Ketchum Litig. (IL), 740 F.2d 1398, 1408 (7th Cir. 1984); City of New Rochelle Litig., 308 F. Supp. 2d 152, 158 (S.D.N.Y. 2003).

71. *See* VRI Database Master List, *supra* note 39.

72. Johnson v. De Grandy, 512 U.S. 997 (1994).

73. *See, e.g.*, Little Rock Litig. (AR), 56 F.3d 904, 910 (8th Cir. 1995); Austin Litig., 857 F. Supp. 560, 569–70 (E.D. Mich. 1994); *infra* Part II.C.10.

74. *See* VRI Database Master List, *supra* note 39.

75. *See, e.g.*, Meza Litig., 322 F. Supp. 2d 52, 69 (D. Mass. 2004); Town of Babylon Litig., 914 F. Supp. 843, 884–91 (E.D.N.Y. 1996).

76. *See* VRI Database Master List, *supra* note 39.

Plaintiffs crossing the *Gingles* threshold are more likely to prevail in covered jurisdictions than in non-covered areas. Thirty lawsuits originating in covered jurisdictions found the *Gingles* factors, and of these, 28 (93.3%) also ended favorably for the plaintiffs. In non-covered jurisdictions, 38 lawsuits found all three *Gingles* factors, of which 29 (76.3%) ended with plaintiff success.[77]

1. Gingles *I: Sufficiently Large and Geographically Compact*

a. Sufficiently Large—The first component of the *Gingles* test requires a minority group to demonstrate that it is "sufficiently large and geographically compact to constitute a majority in a single-member district."[78] Courts addressing *Gingles* I have generally engaged in two inquiries: (1) assessing when the minority population is "sufficiently large," and (2) determining whether a proposed district encompassing that population is "geographically compact."[79]

Discussion of the "sufficiently large" prong has focused primarily on the size of the population needed to establish a majority in a single-member district. Most courts define the relevant majority to be the voting age population, reasoning that absent a majority among voters, the minority group will not be an effective majority.[80] Where, however, the minority group contains a large proportion of non-citizens, some courts have required that plaintiffs demonstrate the feasibility of creating a district in which the group constitutes a majority of the citizen voting age population.[81] Finally, a few courts rely on the overall minority population when assessing *Gingles* I.[82]

Several lawsuits involved claims brought by more than one minority group. These plaintiffs argued that, if members of the two

77. *Id.*

78. Thornburg v. Gingles, 478 U.S. 30, 50 (1986).

79. Other courts have simply asserted in conclusory terms that *Gingles* I is, or is not, satisfied, or have noted that the parties stipulated to its existence. *See, e.g.*, Rural West II Litig. (TN), 209 F.3d 835, 839 (6th Cir. 2000); City of LaGrange Litig., 969 F. Supp. 749, 774 (N.D. Ga. 1997); Blytheville Sch. Dist. Litig., 759 F. Supp. 525, 526 (E.D. Ark. 1991); Chattanooga Litig., 722 F. Supp. 380, 390 (E.D. Tenn. 1989).

80. *See, e.g.*, Hamrick Litig. (GA), 296 F.3d 1065, 1067 (11th Cir. 2002); Old Person Litig. (MT), 230 F.3d 1113, 1121 (9th Cir. 2000); Brewer Litig. (TX), 876 F.2d 448, 452 (5th Cir. 1989); Springfield Park Dist. Litig. (IL), 851 F.2d 937, 945 (7th Cir. 1988); Black Political Task Force Litig., 300 F. Supp. 2d 291, 300 (D. Mass. 2004); Marylanders Litig., 849 F. Supp. 1022, 1051 (D. Md. 1994).

81. *See, e.g.*, Pasadena Indep. Sch. Dist. Litig. (TX), 165 F.3d 368 (5th Cir. 1999); City of Chi.-Bonilla Litig. (IL), 141 F.3d 699, 705 (7th Cir. 1998); City of Miami Beach Litig. (FL), 113 F.3d 1563, 1569 (11th Cir. 1997); Pomona Litig. (CA), 883 F.2d 1418, 1426 (9th Cir. 1988); Meza Litig., 322 F. Supp. 2d 52, 59 (D. Mass. 2004); *see also* Perry Litig. (TX), 126 S. Ct. 2594, 2623 (2006).

82. *See, e.g.*, County of Thurston Litig. (NE), 129 F.3d 1015, 1025 (8th Cir. 1997); Dickinson Litig. (IN), 933 F.2d 497, 503 (7th Cir. 1991); City of New Rochelle Litig., 308 F. Supp. 2d 152, 159 (S.D.N.Y. 2003); Albany County Litig., No. 03-CV-502, 2003 WL 21524820, at *5 (N.D.N.Y. Jul. 7, 2003); Aldasoro v. Kennerson Litig., 922 F. Supp. 339, 372 (S.D. Cal. 1995).

(or more) groups were placed together in a single district, they would constitute an effective majority within the meaning of *Gingles* I. Most courts view this type of claim as cognizable under the statute, so long as the groups can demonstrate political cohesiveness under the second *Gingles* factor,[83] a requirement on which many aggregation claims falter.[84]

Plaintiffs have raised Section 2 claims on behalf of minority groups too small in number to constitute a majority in a single-member district. Typically, these plaintiffs take issue with district lines that divide the minority group members among several districts, and argue that the challenged districting plans hinder their ability either (1) to elect representatives of choice by forming coalitions with other voters ("coalition districts" or "ability to elect districts"), or (2) more amorphously, to influence elections ("influence districts").[85] This past June in the *Perry* litigation, the Supreme Court held that influence alone is not sufficient to establish a Section 2 claim.[86] *Perry* nevertheless expressly left open the possibility that Section 2 might protect coalition districts, a question that has divided lower courts.[87]

b. Geographically Compact—Under *Gingles* I, courts have examined the proposed district's shape,[88] the extent to which it comports with the jurisdiction's traditional districting principles,[89]

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83. *See, e.g.*, Hardee County Litig. (FL), 906 F.2d 524, 526 (11th Cir. 1990); Baytown Litig. (TX), 840 F.2d 1240, 1244 (5th Cir. 1988); Albany County Litig., No. 03-CV-502, 2003 WL 21524820, at *11 (N.D.N.Y. July 7, 2003); France Litig., 71 F. Supp. 2d 317, 327 (S.D.N.Y. 1999); LULAC—N.E. Indep. Sch. Dist., 903 F. Supp. 1071, 1092 (W.D. Tex. 1995).

84. *See, e.g.*, Forest County Litig. (WI), 336 F.3d 570, 575–76 (7th Cir. 2003); Kent County Litig. (MI), 76 F.3d 1381, 1396 (6th Cir. 1996) (en banc); Stockton Litig. (CA), 956 F.2d 884, 886 (9th Cir. 1992); Pomona Litig. (CA), 883 F.2d 1418 (9th Cir. 1989); Perry Litig., 298 F. Supp. 2d 451, 509 (E.D. Tex. 2004); Rodriguez Litig., 308 F. Supp. 2d 346, 409 (S.D.N.Y. 2004); San Diego County Litig., 794 F. Supp. 990, 998 (S.D. Cal. 1992).

85. *Gingles* itself expressly left open this question. *See* Gingles Litig., 478 U.S. 30, 46 n.12 (1986) (reserving the question of "whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections"). The Supreme Court again reserved the question in the *Quilter* litigation. Quilter Litig. (OH), 507 U.S. 146, 154 (1993).

86. Perry Litig. (TX), 126 S. Ct. 2594, 2625–26 (2006).

87. *Compare* Metts Litig. (RI), 363 F.3d 8, 11 (1st Cir. 2004); Rodriguez Litig., 308 F. Supp. 2d 346, 443 (S.D.N.Y. 2004); Page Litig., 144 F. Supp. 2d 346, 362 (D.N.J. 2001); Armour Litig., 775 F. Supp. 1044, 1059–60 (N.D. Ohio 1991), *with* Hall v. Virginia Litig., 385 F.3d 421, 430 (4th Cir. 2004); Kent County Litig. (MI), 76 F.3d 1381, 1386 (6th Cir. 1996) (en banc).

88. *See, e.g.*, Sensley Litig. (LA), 385 F.3d 591, 596 (5th Cir. 2004); Mallory-Ohio Litig. (OH), 173 F.3d 377, 382–83 (6th Cir. 2000).

89. *See, e.g.*, Bone Shirt Litig., 336 F. Supp. 2d 976, 989, 992 (D.S.D. 2004); Montezuma-Cortez Sch. Dist. Litig., 7 F. Supp. 2d 1152, 1167 (D. Colo. 1998).

and how it compares to other proposed or existing districts.[90] Some courts view compactness as a "practical or functional" concept to be assessed in terms of whether the district captures a community.[91]

Since 1994, courts have invoked *Shaw v. Reno*[92] and its progeny[93] when discussing compactness under *Gingles* I.[94] The *Shaw* cases require close scrutiny of districting plans in which racial considerations predominate over traditional districting principles in the drawing of district lines. An oddly shaped district is not a prerequisite to a *Shaw* claim, but courts often look to shape to assess whether race was the primary consideration when the district was drawn. Since *Shaw*, some courts have invoked bizarre shape to measure compactness under *Gingles* I,[95] and generally consider districts compact when they appear more compact than those struck down in the *Shaw* cases.[96]

The Supreme Court's decision this past June in the *Perry* litigation holds that compactness under *Shaw* is not sufficient to establish compactness under *Gingles* I. *Perry* finds that an exceptionally large district that combines minority populations with "disparate needs and interests" fails to satisfy the first *Gingles* factor.[97]

2. Gingles *II and III: Racial Bloc Voting*—Racial polarization in voting, also known as racial bloc voting, constitutes a critical component of a Section 2 claim.[98] The majority of successful Section 2

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90. *See, e.g.*, Bone Shirt Litig., 336 F. Supp. 2d 976, 989, 992 (D.S.D. 2004); City of Columbia Litig., 850 F. Supp. 404, 413 (D.S.C. 1993).

91. *See, e.g.*, Sensley Litig. (LA), 385 F.3d 591, 597–98 (5th Cir. 2004); City of Chi.-Barnett Litig., 17 F. Supp. 2d 753, 758 (N.D. Ill. 1998); Columbus County Litig., 782 F. Supp. 1097, 1105 (E.D.N.C. 1991); Baldwin Bd. of Educ. Litig., 686 F. Supp. 1459, 1466 (M.D. Ala. 1988); Jefferson Parish I Litig., 691 F. Supp. 991, 1007 (E.D. La. 1988).

92. Shaw v. Reno, 509 U.S. 630 (1993).

93. Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995).

94. Sensley Litig. (LA), 385 F.3d 591, 596–98 (5th Cir. 2004); Hamrick Litig. (GA), 296 F.3d 1065, 1071 (11th Cir. 2002); Town of Hempstead Litig. (NY), 180 F.3d 476, 492 (2d Cir. 1999); Davis v. Chiles Litig. (FL), 139 F.3d 1414, 1424 (11th Cir. 1998); City of Rome Litig. (GA), 127 F.3d 1355, 1376 (11th Cir. 1997); City of New Rochelle Litig., 308 F. Supp. 2d 152, 159 (S.D.N.Y. 2003); France Litig., 71 F. Supp. 2d 317, 325–26 (S.D.N.Y. 1999); Lafayette County Litig., 20 F. Supp. 2d 996, 999–1000 (N.D. Miss. 1998); Chickasaw County II Litig., No. CIV.A. 1:92CV142-JAD, 1997 WL 33426761, at *1 (N.D. Miss. Oct. 28, 1997); Town of Babylon Litig., 914 F. Supp. 843, 873 (E.D.N.Y. 1996); Calhoun County Litig., 881 F. Supp. 252, 253–54 (N.D. Miss. 1995); Marylanders Litig., 849 F. Supp. 1022, 1056 (D. Md. 1994).

95. *See, e.g.*, County of Thurston Litig. (NE), 129 F.3d 1015, 1025 (8th Cir. 1997); City of Minneapolis Litig., No. 02-1139 (JRT/FLN), 2004 U.S. Dist. LEXIS 19708, at *49–50 (D. Minn. Sept. 30, 2004).

96. *See, e.g.*, Sanchez-Colo. Litig. (CO), 97 F.3d 1303, 1315 (10th Cir. 1996); Town of Babylon Litig., 914 F. Supp. 843, 873 (E.D.N.Y. 1996).

97. Perry Litig. (TX), 126 S. Ct. 2594, 2619 (2006).

98. SENATE REPORT, *supra* note 17, at 27–30. Unlike the other Senate Factors, which were largely derived from judicial decisions predating the 1982 amendments, racial bloc

suits (77 of 123, or 62.6%) identified in this study found legally significant racial bloc voting.[99] Racial bloc voting factors into the evaluation of Section 2 claims at two junctures. The second and third of the *Gingles* "preconditions" to a Section 2 claim call for an inquiry into racial polarization in voting. They require courts to determine whether minority voters are politically cohesive, and whether whites vote sufficiently as a bloc to defeat the minority-preferred candidate.[100] Courts who so find (and also find the first *Gingles* factor[101]) must then evaluate whether the plaintiffs can sustain their claim under "the totality of circumstances."[102] This inquiry includes analysis of the Senate Factors, one of which is the extent of racially polarized voting.[103]

In practice, however, courts that consider racial bloc voting generally engage in one inquiry, typically under the *Gingles* factors.[104] Of those that deem *Gingles* satisfied and proceed to the totality of circumstances review, some simply refer back to their previous analysis of racial bloc voting under *Gingles*. Other courts engage in additional analysis, typically examining within the totality of circumstances the question whether race is the cause of the polarized

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voting emerged as a formal element of the Section 2 inquiry for the first time in 1982. *See, e.g.*, Lubbock Litig. (TX), 727 F.2d 364, 384 (5th Cir. 1984). Supporters of the 1982 amendments to Section 2 invoked racial bloc voting as the critical restraint that would keep the amended statute from devolving into a mandate for proportional representation. *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 14, at 741.

99. *See* VRI Database Master List, *supra* note 39. The exceptions are: (1) cases involving challenges to specific voting procedures that identified Section 2 violations without considering racially polarized voting, *see* Operation Push Litig. (MS), 932 F.2d 400, 401 (5th Cir. 1991) (voter registration system); Berks County Litig., 277 F. Supp. 2d 570, 573–75 (E.D. Pa. 2003) (poll official conduct); Marks-Phila. Litig., No. CIV. A. 93-6157, 1994 WL 146113, at *3 (E.D. Pa. Apr. 26, 1994) (absentee ballots); Town of N. Johns Litig., 717 F. Supp. 1471, 1471 (M.D. Ala. 1989) (withholding of candidacy filing forms); Harris Litig., 695 F. Supp. 517, 517 (M.D. Ala. 1988) (policy of appointing only white poll officials); Madison County Litig., 610 F. Supp. 240, 243 (S.D. Miss. 1985) (invalidation of absentee ballots), and (2) cases that found a violation of Section 2 based on invidious intent without considering racially polarized voting, *see* Arakaki Litig. (HI), 314 F.3d 1091, 1097 (9th Cir. 2002); Rybicki Litig., 574 F. Supp. 1147, 1149 (N.D. Ill. 1983).

100. *See* Gingles Litig. (NC), 478 U.S. 30, 50–51 (1986).

101. *See id.* at 32; *see also supra* Part II.B.

102. *See, e.g.*, De Grandy Litig. (FL), 512 U.S. 997, 1011–12 (1994); City of Holyoke Litig. (MA), 72 F.3d 973, 983 (1st Cir. 1995); LULAC v. Clements Litig. (TX), 999 F.2d 831, 849–50 (5th Cir. 1993).

103. *See* SENATE REPORT, *supra* note 17, at 27–30.

104. Decisions between the 1982 amendments and the Court's decision in *Gingles* obviously did not employ the *Gingles* test. Instead, these courts applied varied standards to evaluate racial bloc voting under Senate Factor 2. *See, e.g.*, Terrell Litig., 565 F. Supp. 338, 348–49 (N.D. Tex. 1983).

voting patterns identified under *Gingles*.[105] This Report discusses racial bloc voting solely within this Section.

Of the lawsuits analyzed, 155 considered the extent of racially polarized voting, 105 found the factor to exist. In covered jurisdictions, 52 lawsuits found racial bloc voting; 53 in non-covered.[106] Of suits finding this factor, 77 (73.3%) also resulted in a favorable outcome for the plaintiff.[107]

The discussion that follows describes several recurring issues that pervade judicial analyses of racial bloc voting.

a. Identifying the Minority-Preferred Candidate—Courts assessing racial bloc voting must identify the minority-preferred candidate in order to determine "whether whites vote sufficiently as a bloc usually to defeat"[108] this candidate. In making this determination, courts overwhelmingly agree that the race of the candidates must inform the analysis at least to some degree. Courts have thus not followed Justice Brennan's position in *Thornburg v. Gingles* that a candidate's race should be irrelevant when assessing racial bloc voting.[109]

Most courts, for example, more easily identify a minority candidate as minority-preferred than they do a non-minority candidate. Some implicitly or explicitly assume the minority candidate is

105. *See, e.g.*, Westwego Litig. (LA), 946 F.2d 1109, 1116 (5th Cir. 1991); Charleston County Litig., 316 F. Supp. 2d 268, 277–78 (D.S.C. 2003). Many courts also have held that causation should be considered in the totality of the circumstances assessment. *See infra* Part II.B.2. Some courts then import the causation question into a consideration of Factor 2. *See, e.g.*, Alamosa County Litig., 306 F. Supp. 2d 1016, 1029–33 (D. Colo. 2004) (finding *Gingles* met, but no racially polarized voting due to causation). Others simply consider causation as a different part of the totality of the circumstances. *See, e.g.*, Alamance County Litig. (NC), 99 F.3d 600, 616 n.12 (4th Cir. 1996) ("[T]he best reading of [*Gingles*] . . . is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions but relevant in the totality of circumstances inquiry." (internal citation omitted)); *see also infra* notes 131–168.

106. *See* VRI Database Master List, *supra* note 39.

107. *Id.* Twenty-eight lawsuits found racially polarized voting but ultimately did not end in a favorable outcome for the plaintiffs. *Id.* Sixty percent of these were in non-covered jurisdictions. Seven deemed *Gingles* I or II unsatisfied, *id.*, eight identified "rough proportionality" as defined in *Johnson v. De Grandy*, *see infra* Part II.B (discussing cases that found *Gingles* but no violation due to proportionality), two remanded the case for further review, *see* City of Chi.-Bonilla Litig. (IL), 141 F.3d 699, 706 (7th Cir. 1998); Carrollton NAACP Litig. (GA), 829 F.2d 1547, 1563 (11th Cir. 1987), and six declined to find a violation under a more general totality of the circumstances review, *see* Old Person Litig. (MT), 312 F.3d 1036, 1050 (9th Cir. 2002); NAACP v. Fordice Litig. (MS), 252 F.3d 361, 374 (5th Cir. 2001); Liberty County Comm'rs Litig. (FL), 221 F.3d 1218, 1235 (11th Cir. 2000); Niagara Falls Litig. (NY), 65 F.3d 1002, 1019–24 (2d Cir. 1995); Democratic Party of Arkansas Litig. (AR), 902 F.2d 15, 15 (8th Cir. 1990); City of Boston Litig. (MA), 784 F.2d 409, 414 (1st Cir. 1986).

108. Gingles Litig. (NC), 478 U.S. 30, 56 (1986).

109. *Id.* at 68.

the minority-preferred candidate,[110] and some demand evidence on point, although typically less than what they require to demonstrate a white candidate is minority-preferred.[111] No court has held that white candidates cannot be minority-preferred.[112]

Decisions in several circuits, however, have held that courts should engage in a searching inquiry before identifying a white candidate as minority-preferred. This approach, typically associated with the *Jenkins v. Red Clay School District* litigation that articulated it, deems election results only a preliminary component of the inquiry.[113] Courts must determine not only who gets minority votes, but also the depth and vigor of minority support for that candidate, the scope of that candidate's interest in the minority community, whether and why a viable minority candidate did not run, and whether minority candidates had run previously.[114] Because this approach looks at factors such as candidate slating, it implicitly imports into the racial bloc voting inquiry some of the

110. *See, e.g.*, Brooks Litig. (GA), 158 F.3d 1230, 1235, 1240 (11th Cir. 1998); City of Chi.-Barnett Litig. (IL), 141 F.3d 699, 703 (7th Cir. 1998); Blytheville Sch. Dist. Litig. (AR), 71 F.3d 1382, 1387–88 (8th Cir. 1995); Jenkins v. Red Clay Sch. Dist. Litig. (DE), 4 F.3d 1103, 1126 (3d Cir. 1993); Gretna Litig. (LA), 834 F.2d 496, 503 (5th Cir. 1987); City of Boston Litig. (MA), 784 F.2d 409, 413 (1st Cir. 1986); Alamosa County Litig., 306 F. Supp. 2d 1016, 1029–33 (D. Colo. 2004); Campuzano Litig., 200 F. Supp. 2d 905, 914 (N.D. Ill. 2002); St. Bernard Parish Sch. Bd. Litig., No. CIV.A. 02-2209, 2002 WL 2022589, at *6 (E.D. La. Aug. 26, 2002); Rural West I Litig., 877 F. Supp. 1096, 1108 (W.D. Tenn. 1995).

111. Some courts allow for a lesser burden to establish that a minority candidate is minority-preferred. *See, e.g.*, Sanchez-Colo. Litig. (CO), 97 F.3d 1303, 1320–21 (10th Cir. 1996); Jenkins v. Red Clay Sch. Dist. Litig. (DE), 4 F.3d 1103, 1129 (3d Cir. 1993); De Grandy Litig., 815 F. Supp. 1550, 1572–73 (N.D. Fla. 1992); Rockford Bd. of Educ. Litig., No. 89 C 20168, 1991 WL 299104, at *4 (N.D. Ill. Sept. 12, 1991); Gretna Litig., 636 F. Supp. 1113, 1133 (E.D. La. 1986).

Others require the same evidence regardless of the candidate's race. *See, e.g.*, City of Santa Maria Litig. (CA), 160 F.3d 543, 549–50 (9th Cir. 1998); Alamance County Litig. (NC), 99 F.3d 600, 615 (4th Cir. 1996); Watsonville Litig. (CA), 863 F.2d 1407, 1416 (9th Cir. 1988); Black Political Task Force Litig., 300 F. Supp. 2d 291, 303 (D. Mass. 2004); Rodriguez Litig., 308 F. Supp. 2d 346, 388, 389 (S.D.N.Y. 2004); Armour Litig., 775 F. Supp. 1044, 1057 (N.D. Ohio 1991).

112. *See generally* City of Santa Maria Litig. (CA), 160 F.3d 543, 549–50 (9th Cir. 1998); City of Rome Litig. (GA), 127 F.3d 1355, 1379 n.9 (11th Cir. 1997); Alamance County Litig. (NC), 99 F.3d 600, 608 (4th Cir. 1996); Blytheville Sch. Dist. Litig. (AR), 71 F.3d 1382, 1387–88 (8th Cir. 1995); Niagara Falls Litig. (NY), 65 F.3d 1002, 1016 (2d Cir. 1995); Cincinnati Litig. (OH), 40 F.3d 807, 813 (6th Cir. 1994); Jenkins v. Red Clay Sch. Dist. Litig. (DE), 4 F.3d 1103, 1126 (3d Cir. 1993); LULAC v. Clements Litig. (TX), 999 F.2d 831, 882–83 (5th Cir. 1993); Bond Litig. (CO), 875 F.2d 1488, 1495 (10th Cir. 1989); Black Political Task Force Litig., 300 F. Supp. 2d 291, 304 (D. Mass. 2004); Williams v. State Bd. of Elections Litig., 718 F. Supp. 1324, 1325–26 (N.D. Ill. 1989).

113. Jenkins v. Red Clay Sch. Dist. Litig. (DE), 4 F.3d 1103, 1129 (3d Cir. 1993).

114. *See, e.g., id.*; Sanchez-Colo. Litig. (CO), 97 F.3d 1303, 1321 (10th Cir. 1996); Blytheville Sch. Dist. Litig. (AR), 71 F.3d 1382, 1386 (8th Cir. 1995); Nipper Litig. (FL), 39 F.3d 1494, 1540 (11th Cir. 1994); Bone Shirt Litig., 336 F. Supp. 2d 976, 997–1017 (D.S.D. 2004).

Senate Factors typically reviewed only after the *Gingles* threshold is crossed.

Courts in the Second, Sixth, and Ninth Circuits expressly reject this approach, maintaining that this "subjective" inquiry into minority preferences is inappropriate and impractical. These courts posit that the inquiry should be limited almost exclusively to election results to identify the minority-preferred candidate. With a few caveats, these courts define the preferred candidate as the one who receives the most votes from minority voters.[115] The Fourth Circuit appears to follow a similar approach, albeit not explicitly,[116] while the Seventh Circuit seems to assume that a minority candidate is the minority-preferred candidate.[117]

In practice, however, many courts do not strictly adhere to one or the other of these tests.[118] For instance, after adopting the *Jenkins v. Red Clay School District* approach,[119] the Eighth Circuit, in the *St. Louis Board of Education* litigation, noted "it is a near tautological principle that the minority preferred candidate 'should generally be one able to receive [minority] votes.' "[120] Likewise, the Eleventh Circuit relies on the totality of the circumstances to demonstrate that a white candidate is minority-preferred, but its most recent decisions treat the candidate who receives the majority of the minority vote as minority-preferred.[121] In the context of multi-seat elections, moreover, where voters are permitted to cast as many votes as there are seats, both the Fourth and Eleventh Circuits have combined the quantitative and subjective approaches to assess the

115. *See, e.g.*, City of Santa Maria Litig. (CA), 160 F.3d 543, 552 (9th Cir. 1998); Niagara Falls Litig. (NY), 65 F.3d 1002, 1018–19 (2d Cir. 1995); Cincinnati Litig. (OH), 40 F.3d 807, 810 n.1 (6th Cir. 1994); Watsonville Litig. (CA), 863 F.2d 1407, 1416 (9th Cir. 1988).

116. Older cases in the Fourth Circuit allowed room for subjective inquiries. *See, e.g.*, City of Norfolk Litig. (VA), 816 F.2d 932, 937 (4th Cir. 1987). More recently, however, the Fourth Circuit has moved closer to the Second Circuit's approach. *See* Alamance County Litig. (NC), 99 F.3d 600, 614 (4th Cir. 1996).

117. *See, e.g.*, City of Chi.-Bonilla Litig. (IL), 141 F.3d 699, 703 (7th Cir. 1998).

118. Courts in the Fifth and First Circuits do consider voting patterns, testimony from the community, and evidence of active minority support for a particular candidate. *See* LULAC v. Roscoe Indep. Sch. Dist. Litig. (TX), 123 F.3d 843, 848 (5th Cir. 1997); Black Political Task Force Litig., 300 F. Supp. 2d 291, 307–08 (D. Mass. 2004); LULAC v. Roscoe Indep. Sch. Dist. Litig., No. 1:94-CV-104-C, 1996 WL 453584, at *2 (N.D. Tex. May 14, 1996); City of Dallas Litig., 734 F. Supp. 1317, 1393, 1395 (N.D. Tex. 1990).

119. Blytheville Sch. Dist. Litig. (AR), 71 F.3d 1382 (8th Cir. 1995).

120. St. Louis Bd. of Educ. Litig. (MO), 90 F.3d 1357, 1362 (8th Cir. 1996).

121. Hamrick Litig. (GA), 296 F.3d 1065, 1072–73 (11th Cir. 2002); Davis v. Chiles Litig. (FL), 139 F.3d 1414, 1417–18 (11th Cir. 1998); City of Rome Litig. (GA), 127 F.3d 1355, 1377, 1379 n.9 (11th Cir. 1997).

status of candidates that do not place first among black voters, but do receive a substantial percentage of the black vote.[122]

b. Probative Elections—Courts in most circuits generally place more weight on elections involving a minority candidate than on those involving only white candidates.[123] Some courts discount white-on-white elections based on concern that the candidate receiving minority votes is not truly minority-preferred.[124] Others do so because of concern that these elections mask polarized voting patterns that should be deemed legally significant.[125] Not infrequently, candidates preferred by minority voters in elections between white candidates prevail. These victories suggest that white voters are not voting sufficiently as a bloc to defeat minority-preferred candidates. And yet, minority candidates in the same jurisdictions are often defeated even though they receive overwhelming support from minority voters, suggesting white voters are voting as a bloc within the meaning of the third *Gingles* factor.[126] Discounting elections between white candidates consequently helps courts discern polarization of a sort that might otherwise be obscured.

For similar reasons, courts have increasingly looked to primary elections to determine which candidate is minority-preferred. Because primary elections remove party as a causal explanation for voting patterns, some courts view these elections as allowing better

122. *See, e.g.*, City of Rome Litig. (GA), 127 F.3d 1355, 1379 n.9 (11th Cir. 1997); Alamance County Litig. (NC), 99 F.3d 600, 614 (4th Cir. 1996).

123. *See* Old Person Litig. (MT), 230 F.3d 1113, 1127 (9th Cir. 2000); Sanchez-Colo. Litig. (CO), 97 F.3d 1303, 1307–08 (10th Cir. 1996); City of Holyoke Litig. (MA), 72 F.3d 973, 988 n.8 (1st Cir. 1995); S. Christian Leadership Litig. (AL), 56 F.3d 1281, 1293 (11th Cir. 1995); Jenkins v. Red Clay Sch. Dist. Litig. (DE), 4 F.3d 1103, 1128 (3d Cir. 1993); Magnolia Bar Ass'n Litig. (MS), 994 F.2d 1143, 1149 (5th Cir. 1993); City of Indianapolis Litig. (IN), 976 F.2d 357, 361 (7th Cir. 1992); Gretna Litig. (LA), 834 F.2d 496, 503–04 (5th Cir. 1987); Jeffers Litig., 730 F. Supp. 196, 209 (E.D. Ark. 1989); City of Jackson, TN Litig., 683 F. Supp. 1515, 1531 (W.D. Tenn. 1988). *But see* Alamance County Litig. (NC), 99 F.3d 600, 608, 610 n.8 (4th Cir. 1996); Niagara Falls Litig. (NY), 65 F.3d 1002, 1018–19 (2d Cir. 1995).

124. *See, e.g.*, Black Political Task Force Litig., 300 F. Supp. 2d 291, 304 (D. Mass. 2004); Metro Dade County Litig., 805 F. Supp. 967, 984–85 (S.D. Fla. 1992); City of Dallas Litig., 734 F. Supp. 1317, 1388 (N.D. Tex. 1990).

125. *See* LULAC-N.E. Indep. Sch. Dist. Litig., 903 F. Supp. 1071, 1092–93 (W.D. Tex. 1995); City of Columbia Litig., 850 F. Supp. 404, 416 (D.S.C. 1993); Jeffers Litig., 730 F. Supp. 196, 209 (E.D. Ark. 1989); Smith-Crittenden County Litig., 687 F. Supp. 1310, 1317 (E.D. Ark. 1988).

126. *See* S. Christian Leadership Litig. (AL), 56 F.3d 1281, 1287, 1291 (11th Cir. 1995); City of LaGrange Litig., 969 F. Supp. 749, 775 (N.D. Ga. 1997); City of Columbia Litig., 850 F. Supp. 404, 416 (D.S.C. 1993); Nipper Litig., 795 F. Supp. 1525, 1534, 1548 (M.D. Fla. 1992); City of Starke Litig., 712 F. Supp. 1523, 1530 (M.D. Fla. 1989); Jeffers Litig., 730 F. Supp. 196, 209 (E.D. Ark. 1989); Smith-Crittenden County Litig., 687 F. Supp. 1310, 1316, 1317 (E.D. Ark. 1988).

focus on the role of race in voter decisionmaking.[127] Primaries, moreover, are increasingly the only election of consequence as noncompetitive districts have proliferated nationwide.[128]

Many courts, consequently, discount minority support for a particular candidate in the general election where minority voters supported another candidate in the primary.[129] A few courts have also held that white support for a minority-preferred candidate in the general election does not bar finding the third *Gingles* factor, so long as white voters supported a different candidate in the Democratic primary.[130] Highlighting this point, the district court in the *Black Political Task Force* litigation observed that "black and white voters in Boston preferred the [black] Democratic candidate at a general election is hardly news. . . . [It] says less about race than about partisan politics."[131]

Courts have also relied on primary election results to examine whether two minority groups seeking to aggregate their voting strength in a Section 2 claim prefer the same candidate. While most courts have held that multi-minority coalition claims are cognizable under Section 2, several decisions find that party affiliation masks a lack of cohesiveness between, for example, black and Latino voters.[132] In this context, evidence that members of the minority groups supported different candidates in the primary weighs against finding political cohesion, even if voters from both groups supported the same candidate in the general election. As such, voting patterns in primary elections are probative on the

127. *See, e.g.*, Black Political Task Force Litig., 300 F. Supp. 2d 291, 305–06 (D. Mass. 2004); Perry Litig., 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004); Anthony Litig., 35 F. Supp. 2d 989, tbl. iv (E.D. Mich. 1999); Cousin Litig. (TN), 145 F.3d 818, 825 (6th Cir. 1998); Sanchez-Colo. Litig. (CO), 97 F.3d 1303, 1317 n.25 (10th Cir. 1996); LULAC v. Clements Litig. (TX), 999 F.2d 831, 884 (5th Cir. 1993); Chattanooga Litig., 722 F. Supp. 380, 392 (E.D. Tenn. 1989); City of Starke Litig., 712 F. Supp. 1523, 1534 (M.D. Fla. 1989); County of Big Horn (Windy Boy) Litig., 647 F. Supp. 1002, 1009–10 (D. Mont. 1986).

128. *See* Black Political Task Force Litig., 300 F. Supp. 2d 291, 305–06 (D. Mass. 2004); City of Starke Litig., 712 F. Supp. 1523, 1534, 1537 (M.D. Fla. 1989); *see generally* MORRIS FIORINA, DIVIDED GOVERNMENT (2d ed. 1996); Katz, *supra* note 68; Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179 (2003).

129. *See* Niagara Falls Litig. (NY), 65 F.3d 1002, 1019 (2d Cir. 1995); Nash Litig., 797 F. Supp. 1488, 1500 (W.D. Mo. 1992).

130. *See, e.g.*, Black Political Task Force Litig., 300 F. Supp. 2d 291, 305–06 (D. Mass. 2004); Garza v. L.A. Litig., 756 F. Supp. 1298, 1335 n.7 (C.D. Cal. 1990).

131. Black Political Task Force Litig., 300 F. Supp. 2d 291, 306 (D. Mass. 2004).

132. *See* Pomona Litig. (CA), 883 F.2d 1418, 1426 (9th Cir. 1989); Perry Litig., 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004). *Cf.* France Litig., 71 F. Supp. 2d 317, 327 (S.D.N.Y. 1999).

issue of cohesion because such elections remove partisanship as an explanation for voting behavior.[133]

Although no court has expressly rejected consideration of primary elections, some courts have identified reasons that suggest caution before weighing primary elections too heavily. To the extent that primary voters are fewer in number and more extreme in political persuasion than those participating in the general election, the candidate who garners minority group support in the primary may not be the preferred candidate of most minority voters. Some courts, therefore, have expressed concern that the preferences of politically active members of the minority community should not define the candidate preferred by the minority community as a whole.[134] Some courts have also questioned whether general election results should be discounted simply because minority voters supported a different candidate in the primary. These courts suggest that doing so privileges minority voters to an improper extent, effectively relieving them of the obligation to "pull, haul, and trade" that all voters confront.[135]

c. Causation—The Justices in *Thornburg v. Gingles* disagreed about the role causation should play in the racial bloc voting inquiry. Justice Brennan rejected causation in his plurality opinion, arguing that "it is the *difference* between the choices made by blacks and whites—not the reasons for that difference" that is important.[136] Justice O'Connor, however, thought the inquiry should address "evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters."[137] Justice White was the critical fifth vote on the issue and his separate opinion did not definitively resolve the question. Lower courts ever since have disputed the role causation should play in the racial bloc voting analysis. When courts consider causation, they all ask the same underlying question: namely, whether race, as opposed to partisanship or some other factor, best explains why white voters

133. *See* Perry Litig., 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004); Rodriguez Litig., 308 F. Supp. 2d 346, 389, 421 (S.D.N.Y. 2004); Page Litig., 144 F. Supp. 2d 346 (D.N.J. 2001); County of Big Horn (Windy Boy) Litig., 647 F. Supp. 1002 (D. Mont. 1986).

134. *See, e.g.*, City of Santa Maria Litig. (CA), 160 F.3d 543, 552 (9th Cir. 1998).

135. City of Rome Litig. (GA), 127 F.3d 1355, 1378–79 (11th Cir. 1997); Alamance County Litig. (NC), 99 F.3d 600, 615 (4th Cir. 1996).

136. Gingles Litig. (NC), 478 U.S. 30, 63 (1986).

137. *Id.* at 100 (O'Connor, J., concurring) ("Evidence that a candidate preferred by the minority group . . . was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates.").

failed to support the minority-preferred candidate. Courts in nine judicial circuits now expressly or implicitly incorporate causation when they assess racial bloc voting, either under the second and third *Gingles* factors or as part of the totality of circumstances test.[138]

And yet, courts suggest that the juncture at which they ask this question matters. A finding that political party best explains divergent voting patterns under *Gingles* means that the court will not find legally significant racial bloc voting and that a plaintiff's results-based voting discrimination claim likely fails.[139] Instead, consideration of causation within the totality of the circumstances review means that the plaintiffs have already satisfied the *Gingles* preconditions and, as a result, an inference may come into play that "racial bias is at work."[140] In the *Mount Holyoke* litigation, the appellate court posited that "cases will be rare in which plaintiffs establish the *Gingles* preconditions yet fail on a Section 2 claim because other facts undermine the original inference."[141]

In practice, however, the juncture at which courts consider causation may matter less than these courts suggest. Regardless of where they consider causation, courts do not typically require that plaintiffs disprove that factors other than race caused divergent voting patterns,[142] but most require that plaintiffs demonstrate that race is the causal linkage when defendants proffer evidence supporting an alternative explanation.[143] Proving the linkage is difficult

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138. *See, e.g.*, Charleston County Litig. (SC), 365 F.3d 341, 348–49 (4th Cir. 2004); Town of Hempstead Litig. (NY), 180 F.3d 476, 493 (2d Cir. 1999); Mallory-Ohio County Litig., 38 F. Supp. 2d 525, 575–76 (S.D. Ohio 1997), *aff'd*, 173 F.3d 377 (6th Cir. 1999); Milwaukee NAACP Litig. (WI), 116 F.3d 1194, 1199 (7th Cir. 1997); Attala County Litig. (MS), 92 F.3d 283, 290 (5th Cir. 1996); Sanchez-Colo. Litig. (CO), 97 F.3d 1303, 1307–08, 1313 (10th Cir. 1996); City of Holyoke Litig. (MA), 72 F.3d 973, 983 (1st Cir. 1995); S. Christian Leadership Litig. (AL), 56 F.3d 1281, 1293–94 (11th Cir. 1995); LULAC v. Clements Litig. (TX), 999 F.2d 831 (5th Cir. 1993); *see also* Bone Shirt Litig., 336 F. Supp. 2d 976, 1008 (D.S.D. 2004); Perry Litig., 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004); Rodriguez Litig., 308 F. Supp. 2d 346, 393 (S.D.N.Y. 2004).

139. *See* LULAC v. Clements Litig. (TX), 999 F.2d 831, 850 (5th Cir. 1993) ("Unless the tendency among minorities and whites to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race . . . plaintiffs' attempt to establish legally significant white bloc voting, and thus their vote dilution claim under § 2, must fail.").

140. Nipper Litig. (FL), 39 F.3d 1494, 1525 (11th Cir. 1994); *see also* City of Holyoke Litig. (MA), 72 F.3d 973, 983 (1st Cir. 1995) (noting that *Gingles* preconditions "rise to an inference that racial bias is operating through the medium of the targeted electoral structure to impair minority political opportunities").

141. City of Holyoke Litig. (MA), 72 F.3d 973, 983 (1st Cir. 1995).

142. *See, e.g.*, *id.* (examining causation and stating that plaintiffs need not "affirmatively . . . disprove every other possible explanation for racially polarized voting."); Attala County Litig. (MS), 92 F.3d 283, 290 (5th Cir. 1996).

143. *See, e.g.*, City of Holyoke Litig. (MA), 72 F.3d 973, 983 (1st Cir. 1995) ("[O]nce the defendant proffers enough evidence to raise a legitimate question in regard to whether

regardless of the juncture,[144] and numerous lawsuits have held that plaintiffs failed to meet their burden to successfully rebut defendants' evidence on this point.[145]

d. Special Circumstances—Courts have identified a variety of "special circumstances" that influence the racial bloc voting inquiry and have excluded or discounted elections involving such special circumstances as distinct from the "usual predictability" of voting patterns.[146] Some circuits have identified numerous special circumstances, others few or none. Typically, the recognition of special circumstances makes an ultimate finding of racial bloc voting more likely. A few cases, however, have discounted elections where the minority-preferred candidate was defeated due to special circumstances, thus having the opposite effect.[147] Some recent decisions voice resistance to discounting elections because of special circum-

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nonracial factors adequately explain racial voting patterns, the ultimate burden of persuading the factfinder that the voting patterns were engendered by race rests with the plaintiffs."); Mallory-Ohio Litig., 38 F. Supp. 2d 525, 539, 575–76 (S.D. Ohio 1997) ("In this case, numerous factors, other than race, explain losses at the polls by particular minority candidates .... Two factors in particular, 'partisanship' and 'incumbency,' accurately explain electoral outcomes in numerous judicial elections involving African-American candidates.").

144. *But see* Charleston County Litig. (SC), 365 F.3d 341, 353 (4th Cir. 2004) (holding that it was not clearly erroneous for the district court to conclude that "even controlling for partisanship in Council elections, race still appears to play a role in the voting patterns of white and minority voters in Charleston County"); Town of Hempstead Litig. (NY), 180 F.3d 476, 495–96 (2d Cir. 1999) (rejecting defendants' argument that minority-preferred candidates were defeated because of party not race, due to the town Republican Party's slating process which effectively excluded minorities).

145. *See, e.g.*, Bexar County Litig. (TX), 385 F.3d 853, 867 (5th Cir. 2004); Hamrick Litig. (GA), 296 F.3d 1065, 1078 (11th Cir. 2002); City of Rome Litig. (GA), 127 F.3d 1355, 1383 (11th Cir. 1997); S. Christian Leadership Litig. (AL), 56 F.3d 1281, 1293–94 (11th Cir. 1995); Nipper Litig. (FL), 39 F.3d 1494, 1547 (11th Cir. 1994); Liberty County Comm'rs Litig. (FL), 899 F.2d 1012, 1021 (11th Cir. 1990); Alamosa County Litig., 306 F. Supp. 2d 1016, 1039–40 (D. Colo. 2004); Perry Litig., 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004) (concluding that minority groups are not politically cohesive because they "do not vote cohesively in primary elections, where their allegiance is free of party affiliation"); City of Holyoke Litig., 960 F. Supp. 515 (D. Mass. 1997); Mallory-Ohio Litig., 38 F. Supp. 2d 525, 539 (S.D. Ohio 1997) ("The 'clear partisan patterns' reflected in Dr. King's Report suggest that party affiliation is a, if not the, predominant factor in Ohio judicial elections."); Town of Babylon Litig., 914 F. Supp. 843, 881–84 (E.D.N.Y. 1996); City of Columbia Litig., 850 F. Supp. 404, 418, 420 (D.S.C. 1993) (concluding that plaintiffs' evidence was "simply not sufficient to overcome the evidence that the blacks who lost owe their losses as much to blacks' failure to vote more cohesively or to turn out at all as to failure to achieve white support"); Bandemer Litig., 603 F. Supp. 1479, 1489–90 (S.D. Ind. 1984) (finding that minorities in Indiana vote as a bloc for the Democratic candidate and that therefore "the voting efficacy of [minorities] was impinged upon because of their politics and not because of their race").

146. Cano Litig., 211 F. Supp. 2d 1208, 1235–42 (C.D. Cal. 2002).

147. *See, e.g.*, Hamrick Litig. (GA), 296 F.3d 1065, 1978 (11th Cir. 2002) (using incumbency to dismiss the loss of the minority-preferred candidate); Fort Bend Indep. Sch. Dist. (TX), 89 F.3d 1205, 1217 (5th Cir. 1996) (discounting a minority loss because the candidate lost to an incumbent).

stances, preferring instead to consider all the evidence presented.[148]

Incumbency: Numerous courts have held that legally significant white bloc voting may exist, notwithstanding white support for a black candidate, if the black candidate is an incumbent.[149] Others disagree, finding that "incumbency plays a significant role in the vast majority of American elections," such that its use as a special circumstance "would confuse the ordinary with the special."[150]

Majority-Minority Districts: Some courts have identified the majority-minority district as a "special circumstance" that alters the conventional racial bloc inquiry.[151] In such districts, white voters are by definition a minority of the population, and thus, courts have reasoned that the inability of white voters to defeat the minority-preferred candidate is less probative evidence of a decline in racial bloc voting than it would be elsewhere. The Ninth Circuit said that "[t]o do otherwise would permit white bloc voting in a majority-white district to be washed clean by electoral success in neighboring majority-Indian districts."[152]

Post-Lawsuit Elections: Some courts have discounted the results of elections occurring after a lawsuit was filed. This approach is premised on the view that the very filing of a Section 2 lawsuit makes white voters more likely to support the minority-preferred candidate and that this support is somehow not genuine. The concern is that post-lawsuit elections might "work[] a one-time advantage for [minority] candidates in the form of unusual organized political support by white leaders concerned to forestall single-member

148. *See, e.g.*, Rodriguez Litig., 308 F. Supp. 2d 346, 422 (S.D.N.Y. 2004) (noting that it would be possible to find anomalies in most elections and refusing to discount 3 elections because of low turnout, a little known candidate, and controversy).

149. *See, e.g.*, Gingles Litig. (NC), 478 U.S. 30, 76 (1996); Fort Bend Indep. Sch. Dist. Litig. (TX), 89 F.3d 1205, 1217 (5th Cir. 1996); Little Rock Litig. (AR), 56 F.3d 904, 911 (8th Cir. 1995); Metro Dade County Litig. (FL), 985 F.2d 1471, 1483–84 (11th Cir. 1993); City of Norfolk Litig. (VA), 883 F.2d 1232, 1342 (4th Cir. 1989); Black Political Task Force Litig., 300 F. Supp. 2d 291, 306 (D. Mass. 2004); Rodriguez Litig., 308 F. Supp. 2d 346, 403 (S.D.N.Y. 2004); City of LaGrange Litig., 969 F. Supp. 749, 775–76 (N.D. Ga. 1997); Town of Babylon Litig., 914 F. Supp. 843, 879, 881 (E.D.N.Y. 1996); Texarkana Litig., 861 F. Supp. 756 (W.D. Ark. 1992); Chattanooga Litig., 722 F. Supp. 380, 394 n.200 (E.D. Tenn. 1989); Jeffers Litig., 730 F. Supp. 196 (E.D. Ark. 1989).

150. Cincinnati Litig. (OH), 40 F.3d 807, 813, 814 n.3 (6th Cir. 1994); *see also* Milwaukee NAACP Litig. (WI), 116 F.3d 1194, 1198–99 (7th Cir. 1997) (rejecting incumbency as a special circumstance when minority judges ran unopposed); Alamance County Litig. (NC), 99 F.3d 600, 617 (4th Cir. 1996).

151. Old Person Litig. (MT), 230 F.3d 1113, 1122 (9th Cir. 2000); Black Political Task Force Litig., 300 F. Supp. 2d 291, 305 (D. Mass. 2004); Bone Shirt Litig., 336 F. Supp. 2d 976, 1011 (D.S.D. 2004).

152. Old Person Litig. (MT), 230 F.3d 1113, 1122 (9th Cir. 2000).

districting."[153] Other courts will consider such elections, either outright,[154] or with the caveat that plaintiffs are unable to show unusual white support for the minority-preferred candidate.[155]

Unusual Elections: Courts have held that the success of minority-preferred candidates may be discounted when reason exists to view voting behavior as unusual. Courts have excluded elections based on a plurality victory,[156] an atypical primary,[157] an unopposed candidacy,[158] and a candidacy against only a third-party candidate.[159] Courts have also excluded elections where a minority candidate was seen as "anti-busing" at a time when a local school desegregation lawsuit was pending,[160] a candidate was under federal indictment at the time of the election,[161] and a winning black candidate had been a professional athlete.[162] Further, courts discount elections not involving serious or well-known candidates,[163] and some have approved discounting minority success when the race of the candidate was not widely known.[164] Courts are often skeptical,

153. Gingles Litig. (NC), 478 U.S. 30, 76 (1986). *See, e.g.*, City of Santa Maria (CA), 160 F.3d 543, 548–50 (9th Cir. 1998) (discounting the election because days before the election, the candidate told a local newspaper that his victory would prove "that the city of Santa Maria is not racist"); City of Norfolk Litig. (VA), 816 F.2d 932, 938 (4th Cir. 1987) (discounting an election where the mayor made a public statement suggesting the election of two black candidates could moot the pending litigation).

154. *See, e.g.*, Alamosa County Litig., 306 F. Supp. 2d 1016, 1033 (D. Colo. 2004); NAACP v. Fordice Litig. (MS), 252 F.3d 361, 370 (5th Cir. 2001).

155. *See, e.g.*, Nat'l City Litig. (CA), 976 F.2d 1293, 1297–98 (9th Cir. 1992); City of Norfolk Litig. (VA), 816 F.2d 932, 938 (4th Cir. 1987); Aldasoro v. Kennerson Litig., 922 F. Supp. 339, 376 (S.D. Cal. 1995).

156. *See, e.g.*, Blytheville Sch. Dist. Litig. (AR), 71 F.3d 1382, 1387–88 (8th Cir. 1995).

157. Jordan Litig., 604 F. Supp. 807, 812 (N.D. Miss. 1984) (concluding that the primary was "atypical" because of "a variety of factors, including uncertainty about election dates, the recent realignment of the district . . . the lack of an incumbent" and "a court order allowing Republican voters to participate in the democratic primary").

158. *See, e.g.*, Blytheville Sch. Dist. Litig. (AR), 71 F.3d 1382, 1387–88 (8th Cir. 1995). Some other courts do, however, consider these elections on the grounds that the candidate would not be unopposed if not supported by the white voters. *See, e.g.*, Milwaukee NAACP Litig. (WI), 116 F.3d 1194, 1199 (7th Cir. 1997) ("One good measure of white voters' willingness to support black candidates is the failure of white candidates to present themselves for election even when a majority of the electorate is white. Potential opponents concede the election only when they face certain defeat. That 6 black candidates ran without opposition therefore is highly informative.").

159. Old Person Litig. (MT), 312 F.3d 1036, 1048 n.13 (9th Cir. 2002).

160. Chattanooga Litig., 722 F. Supp. 380 (E.D. Tenn. 1989).

161. Kirksey v. Allain Litig., 658 F. Supp. 1183, 1193 (S.D. Miss. 1987).

162. Chickasaw County II Litig., No. CIV.A. 1:92CV142-JAD, 1997 WL 33426761, at *4 (N.D. Miss. Oct. 28, 1997).

163. Columbus County Litig., 782 F. Supp. 1097, 1101 (E.D.N.C. 1991).

164. Carrollton NAACP Litig. (GA), 829 F.2d 1547, 1559 (11th Cir. 1987). *But see* Alamosa County Litig., 306 F. Supp. 2d 1016, 1032 (D. Colo. 2004).

however, of "special circumstances" that simply illustrate good campaigning on the part of the minority candidate.[165]

Low Turnout: Some courts have been unwilling to find white bloc voting where minority voters did not turn out to vote in substantial numbers.[166] Some courts phrase this issue as one of causation: namely, those plaintiffs must establish that white bloc voting caused the minority defeat, as opposed to a seemingly independent cause such as low turnout. The premise is that if there had been higher minority turnout, the minority-preferred candidate might have been elected.[167] Other courts warn that indicators of vote dilution, such as official discrimination, may contribute to low turnout.[168]

C. The Senate Factors

1. History of Official Discrimination in Voting—The first factor listed in the Senate Report asks courts to assess "the extent of any history of official discrimination" in the jurisdiction that "touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process."[169] Courts assessing Factor 1 have documented numerous instances in which state and local officials engaged in intentional race discrimination.[170] These judicial findings record the nature, frequency, and recentness of this conduct.

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165. *See, e.g.*, Niagara Falls Litig. (NY), 65 F.3d 1002, 1021 (2d Cir. 1995); Anthony Litig., 35 F. Supp. 2d 989, 1006 (E.D. Mich. 1999).

166. *See, e.g.*, Meza Litig., 322 F. Supp. 2d 52, 65 (D. Mass. 2004) ("These elections on their face provide evidence of ethnic voting polarization by both Hispanic and non-Hispanic voters in Chelsea. We note that the force of this evidence is diminished to some extent because the election results reveal low turnout rates for Hispanic voters in these elections.").

167. *See, e.g.*, City of Columbia Litig., 850 F. Supp. 404, 418, 420 (D.S.C. 1993) (concluding that plaintiffs' evidence was "simply not sufficient to overcome the evidence that the blacks who lost owe their losses as much to blacks' failure to vote more cohesively or to turn out at all as to failure to achieve white support"); *see also* Sw. Tex. Junior Coll. Dist. Litig. (TX), 964 F.2d 1542, 1550–51 (5th Cir. 1992).

168. *See, e.g.*, Blytheville Sch. Dist. Litig. (AR), 71 F.3d 1382, 1388 (8th Cir. 1995) (suggesting lower turnout may follow from the moving of a polling place in a minority area, a sense of defeat, or the absence of ballot issues that may turn out the minority vote); City of Holyoke Litig. (MA), 72 F.3d 973, 986 (1st Cir. 1995) (noting that "low voter turnout in the minority community sometimes may result from the interaction of the electoral system with the effects of past discrimination, which together operate to discourage meaningful electoral participation"); *see also* Sanchez-Colo. Litig. (CO), 97 F.3d 1303, 1321 (10th Cir. 1996).

169. SENATE REPORT, *supra* note 17, at 27–30.

170. *See* VRI Database Master List, *supra* note 39.

One hundred and fifty-two lawsuits considered Factor 1.[171] Of these, 111 (73%) lawsuits found that Factor 1 was met, including 61 in covered jurisdictions and 50 in non-covered.[172] An additional 30 cases concluded that plaintiffs had failed to establish that the identified history "touched" the present-day ability of members of the minority group to participate in the political process.[173] Of the 111 lawsuits that found Factor 1, 69 reached a decision favorable to the plaintiffs.[174]

Many courts assessing Factor 1 discussed instances of discriminatory conduct dating from the nineteenth century and continuing through much of the twentieth. These accounts addressed literacy tests, grandfather clauses, poll taxes, white primaries, racially discriminatory voter registration requirements as well as state laws mandating segregation, the separation of names by race on voter registration lists, and other official discriminatory practices in education, employment, and housing.[175]

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171. *Id.*

172. *Id.*

173. NAACP v. Fordice Litig. (MS), 252 F.3d 361, 367–68 (5th Cir. 2001); Calhoun County Litig. (MS), 88 F.3d 1393, 1399 (5th Cir. 1996); Niagara Falls Litig. (NY), 65 F.3d 1002, 1021–22 (2d Cir. 1995); LULAC v. Clements Litig. (TX), 999 F.2d 831, 884 (5th Cir. 1993); Sw. Tex. Junior Coll. Dist. Litig. (TX), 964 F.2d 1542, 1555–56 (5th Cir. 1992); Carrollton NAACP Litig. (GA), 829 F.2d 1547, 1561 (11th Cir. 1987); City of Boston Litig. (MA), 784 F.2d 409, 412 (1st Cir. 1986); Wesley Litig. (TN), 791 F.2d 1255, 1261 (6th Cir. 1986); McCarty Litig. (TX), 749 F.2d 1134, 1137 (5th Cir. 1984); Alamosa County Litig., 306 F. Supp. 2d 1016, 1034–35 (D. Colo. 2004); Black Political Task Force Litig., 300 F. Supp. 2d 291, 313 (D. Mass. 2004); Meza Litig., 322 F. Supp. 2d 52, 74 (D. Mass. 2004); France Litig., 71 F. Supp. 2d 317, 330 (S.D.N.Y. 1999); Jones v. Edgar Litig., 3 F. Supp. 2d 979, 981 (C.D. Ill. 1998); Lafayette County Litig., 20 F. Supp. 2d 996, 1003 (N.D. Miss. 1998); City of Chi.-Bonilla Litig., 969 F. Supp. 1359, 1446 (N.D. Ill. 1997); City of Chi. Heights Litig., Nos. 87 C 5112, 88 C 9800, 1997 WL 102543, at *12 (N.D. Ill. Mar. 5, 1997); City of Holyoke Litig., 960 F. Supp. 515, 526 (D. Mass. 1997); Liberty County Comm'rs Litig., 957 F. Supp. 1522, 1557–59 (N.D. Fla. 1997); Aldasoro v. Kennerson Litig., 922 F. Supp. 339, 363–64 (S.D. Cal. 1995); LULAC–N.E. Indep. Sch. Dist. Litig., 903 F. Supp. 1071, 1083 (W.D. Tex. 1995); Armstrong v. Allain Litig., 893 F. Supp. 1320, 1332 (S.D. Miss. 1994); Metro Dade County Litig., 805 F. Supp. 967, 990 (S.D. Fla. 1992); Nipper Litig., 795 F. Supp. 1525, 1544 (M.D. Fla. 1992); Monroe County Litig., 740 F. Supp. 417, 422–23 (N.D. Miss. 1990); Chickasaw County I Litig., 705 F. Supp. 315, 320 (N.D. Miss. 1989) (though the court in the *Chickasaw County* II litigation found this factor met); Pomona Litig., 665 F. Supp. 853, 862 (C.D. Cal. 1987); City of Fort Lauderdale Litig., 617 F. Supp. 1093, 1098–99 (S.D. Fla. 1985); Cincinnati Litig., No. C-1-92-278, 1993 WL 761489, at *15 (S.D. Ohio July 8, 1983); Rybicki Litig., 574 F. Supp. 1147, 1151–52 (N.D. Ill. 1983).

174. *See* VRI Database Master List, *supra* note 39. Seven lawsuits found a violation of Section 2 without considering Factor 1. Ten others identified a violation of Section 2 after considering, but not finding, Factor 1. *Id.*

175. *See, e.g.*, Bone Shirt Litig., 336 F. Supp. 2d 976, 1013–34 (D.S.D. 2004); DeSoto County Litig., 995 F. Supp. 1440, 1442–50 (M.D. Fla. 1997); Emison Litig., 782 F. Supp. 427, 439 n.35 & 440 n.39 (D. Minn. 1992); City of Dallas Litig., 734 F. Supp. 1317, 1320–21 (N.D. Tex. 1990); Chattanooga Litig., 722 F. Supp. 380, 385–89 (E.D. Tenn. 1989); Neal Litig., 689 F. Supp. 1426, 1428 (E.D. Va. 1988); Dillard v. Crenshaw Litig., 640 F. Supp. 1347, 1356–60 (M.D. Ala. 1986); Edgefield County Litig., 650 F. Supp. 1176, 1180–87 (D.S.C. 1986); Gretna

Seventy lawsuits considering evidence of Factor 1 identified official discrimination post-dating the enactment of the VRA.[176] A number of these focused on instances of discriminatory conduct during the period between the VRA's passage in 1965 and the 1982 amendments. Courts in these lawsuits cited official resistance to school desegregation orders, employment discrimination settlements and judgments against local governments,[177] and violations of the VRA itself.[178] Courts took note of various states' and counties' failures to hire minority poll officials,[179] a county registrar's refusal to register black citizens as voters,[180] the "hostility and uncooperation" displayed by public officials in Texas when Mexican-American candidates ran for office,[181] the race-based retention of a majority-vote and post system, and the retention of unenforceable laws mandating segregation.[182] In the *Harris* litigation, the court refused to absolve the State of Alabama of responsibility for discrimination occurring at the local level, given that Alabama continued to allow "the poll official . . . to play a 'gate keeping' role, to assure that if blacks did slip through and register and vote they voted in a certain way."[183]

Judicial findings documenting official, intentional discrimination on the basis of race or language minority status identify a wide range of conduct by public officials. Thirty-three lawsuits identified more than 100 instances of intentionally discriminatory conduct in voting since 1982. Twelve of these lawsuits originated in covered jurisdictions; 21 originated in non-covered. While several findings identified intentional discrimination in the drawing of state reapportionment plans, conduct by local governmental officials

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Litig., 636 F. Supp. 1113, 1116–18 (E.D. La. 1986); Butts v. NYC Litig., 614 F. Supp. 1527, 1544–45 (S.D.N.Y. 1985), *rev'd*, 779 F.2d 141, 150 (2d Cir. 1985) (criticizing district court's Factor 1 finding); Major Litig., 574 F. Supp. 325, 339–40 (E.D. La. 1983).

176. *See, e.g.*, Abilene Litig. (TX), 725 F.2d 1017, 1023 (5th Cir. 1984); Hamrick Litig., No. Civ. 2:91-CV-002-WCO, 1998 WL 476186, at *7 (N.D. Ga. June 10, 1998), *rev'd on other grounds*, 196 F.3d 1216, 1224 (11th Cir. 1999); Mehfoud Litig., 702 F. Supp. 588, 594 (E.D. Va. 1988); Gretna Litig., 636 F. Supp. 1113, 1116 (E.D. La. 1986); Gingles Litig., 590 F. Supp. 345, 359 (E.D.N.C. 1984).

177. *See, e.g.*, Marengo County Litig. (AL), 731 F.2d 1546, 1568 (11th Cir. 1984); City of LaGrange Litig., 969 F. Supp. 749, 757 (N.D. Ga. 1997); Dillard v. Crenshaw Litig., 640 F. Supp. 1347, 1359–60 (M.D. Ala. 1986).

178. *See, e.g.*, Quilter Litig., 794 F. Supp. 695, 730 (N.D. Ohio 1992); City of Greenwood Litig., 599 F. Supp. 397, 400–01 (N.D. Miss. 1984).

179. *See, e.g.*, Edgefield County Litig., 650 F. Supp. 1176, 1182 (D.S.C. 1986) (first black poll officials not hired until 1970); Harris Litig., 601 F. Supp. 70, 72 (M.D. Ala. 1984).

180. Columbus County Litig., 782 F. Supp. 1097, 1103 (E.D.N.C. 1991).

181. Abilene Litig. (TX), 725 F.2d 1017, 1023 (5th Cir. 1984).

182. City of LaGrange Litig., 969 F. Supp. 749, 767 (N.D. Ga. 1997); City of Starke Litig., 712 F. Supp. 1523, 1537 (M.D. Fla. 1989).

183. Harris Litig., 695 F. Supp. 517, 524–25 (M.D. Ala. 1988).

accounted for the vast number of instances of official discrimination identified.[184]

Findings of Intentional Discrimination in Covered Jurisdictions Since 1982—

In Charleston County, South Carolina[185]

- The "consistent and more recent pattern of white persons acting to intimidate and harass African-American voters at the polls during the 1980s and 1990s and even as late as the 2000 general election," including "significant evidence of intimidation and harassment" that was "undeniably racial" and that "never occurred at predominantly white polling places, including those that tended to support Democratic candidates."[186]
- The participation of county officials, including at least one member of the Charleston County Election Commission and at least one county-employed poll manager,[187] in the Ballot Security Group which, in the 1990 election, "sought to prevent African-American voters from seeking assistance in casting their ballots."[188]
- The county's assignment of white poll managers, described as "bulldogs," in unspecified recent elections since 1982, to majority African-American precincts, where they "caused confusion, intimidated African-American voters, . . . had the tendency to be condescending to those voters," and engaged in "inappropriate behavior."[189]
- The "routine" assignment by "the Election Commission . . . [of] one particularly problematic poll

184. See text *infra*, this Section; *see also* VRI Database Master List, *supra* note 39. Precise quantification of these findings is difficult because, as these excerpts demonstrate, some courts describe official policies or multiple actions taken over time as a single example of official discrimination, and other courts specifically mention repeated instances of similar conduct by officials.

185. Charleston County Litig., 316 F. Supp. 2d 268, 286 n.23, 287–89 (D.S.C. 2003); *see also* Charleston County Litig., 365 F.3d 341, 353 n.4 (4th Cir. 2004) (affirming district court's fact findings and finding of a violation).

186. Charleston County Litig., 316 F. Supp. 2d 268, 286 n.23 (D.S.C. 2003).

187. *Id.*

188. *Id.* at 289.

189. *Id.* at 287.

manager to predominantly African-American polling places in different parts of the County during the 1980s and early 1990s. At the polls, this poll manager, who is white, routinely approached elderly African-American women seeking to vote." He would often "make a scene": approaching them, putting his arm around them and speaking loudly, when "[t]hey just wanted to come in and sign up and vote. And it happened repeatedly just to that class of voter."[190]

- The "recurring" official harassment of elderly African-American voters during the 1980s and 1990s, so severe that the Charleston County Circuit Court "issue[d] a restraining order against the Election Commission requiring its agents to cease interfering with the voting process."[191]
- The persistence of problematic "treatment of African-American voters by some white poll managers, even though the Election Commission [had] provided training to poll managers on this subject."[192]
- The refusal of county workers at the polls to provide African-American voters with legally required voting assistance in elections from 1992–2002; including: the discriminatory practice employed by white poll managers working at black-majority precincts of hassling African-American voters who asked for help voting, including "asking questions such as: 'Why do you need assistance? Why can't you read and write? And didn't you just sign in? And you know how to spell your name, why can't you just vote by yourself? And do you really need voter assistance?' "[193]
- The absence of comparable questioning of white voters who were allowed to have their voting assistor of choice without being challenged, since "no evidence exists of any instances of harassment, intimidation, or interference directed against white

190. *Id.* at 288.
191. *Id.*
192. *Id.* at 287.
193. *Id.* at 288.

or African-American voters at predominantly white polling places."[194]

- The county's retention of a poll manager who had exhibited a "threatening attitude" toward black voters at the Joseph Floyd Major Precinct in the 1996 election, after his refusal to respond to a county election commissioner's reprimand; and the retention of this poll manager as a county employee at majority African-American polls in Charleston County in 2004.
- The decision of "the Charleston County Council [to reduce] the salary for the Charleston County Probate Judge in 1991, following the election of the first and only African-American person elected to that position" from $85,000 to $59,000 annually.[195]
- The state legislative delegation's proposal to replace the School Board's non-partisan electoral system with a partisan one and to remove control of budgetary matters from the Board following African-American candidate success in School Board elections in 2000; both proposals were made without communicating at all with members of the School Board at the time.

In South Dakota[196]

- The display of discriminatory "negative reactions" by county voter registrars to Native Americans during voter registration drives in the 1980s, ranging from "unhelpful to hostile."[197]
- The limitation imposed by county officials on the number of voter registration forms given to people intending to register Native American voters despite the absence of a legal limit on the provision of such forms.
- The refusal of county officials to accept Internet voter registration forms from Native American voters.
- The "erroneous rejections of registration cards" from Native American applicants by county officials

194. *Id.*
195. *Id.* at 289.
196. Bone Shirt Litig., 336 F. Supp. 2d 976, 1023–28 (D.S.D. 2004) (covered jurisdictions include the counties of Shannon and Todd, S.D., with all examples discussed by the court provided here).
197. *Id.* at 1025.

who, after apparent protest, accepted them without explaining why they had first been rejected.[198]

- The state's requirement that voters provide photo identification and other new voting requirements enacted by the South Dakota legislature following the 2002 election, passed after a legislative debate that included the following:

  * Statement by Rep. Van Norman that in passing these provisions, "the legislature was retaliating because the Indian vote was a big factor in new registrants and a close senatorial race."[199]

  * Statement by Rep. Ted Klaudt defending driver's license requirements by referring to Native American voters: "The way I feel is if you don't have enough drive to get up and drive to the county auditor . . . maybe you shouldn't really be voting in the first place."[200]

  * Statement by Rep. Stanford Adelstein opposing provisions that would have made voting registration easier and, in reference to Native American voters, claiming: "Having made many efforts to register people . . . I realize that those people we want to vote will be given adequate opportunity. I, in my heart, feel that this bill . . . will encourage those who we don't particularly want to have in the system. . . . I'm not sure we want that sort of person in the polling place. I think the effort of registration . . . is adequate."[201]

- The state legislature's 1996 decision to combine two single-member house districts, including a majority-Native American district where a Native American had won the Democratic primary in 1994, in order to create one multi-member, majority-white house district.
- The 2002 refusal of Bennett County commissioners to move two polling places to Indian housing areas that would "increase convenience for Indian

198. *Id.*
199. *Id.* at 1026.
200. *Id.*
201. *Id.*

voters," after Indian residents petitioned the County for the stations.[202]

- Wholly unsubstantiated public claims made by Bennett County officials just before the 2002 election that Indians involved in voter registration were engaged in voter fraud, and investigations that followed these claims in Pine Ridge and Rosebud, which produced no actual charges but "intimidated Indian voters."[203]
- The 1986 refusal of the Dewey County Auditor to provide Native Americans with sufficient voter registration cards to conduct a voter registration drive on the Cheyenne River Reservation, conduct that prompted a court order instructing the auditor to supply 750 additional cards and extend the registration deadline.
- The 1984 refusal of the Fall River County Auditor "to register Indians who had attempted to register as part of a last-minute voter registration drive on the Pine Ridge Reservation," a refusal that led to a court order the day before the election requiring that voters be allowed to register and cast their ballots.[204]
- The discriminatory retention by Buffalo County of "[a] redistricting plan, which had been in use for decades, [and which] confined virtually all of the county's Indian population to a single district containing approximately 1500 people," leaving white voters in control of the remaining two districts, "which essentially gave them control over the county government," an arrangement that prompted a lawsuit settled in 2004, in which the county "admitt[ed] that the plan was discriminatory."[205]
- The 1999 refusal by Day County officials to let Native Americans vote in a sanitary district election, an action that prompted a lawsuit which ended in a settlement under which "the county and the district

202. *Id.* at 1027.
203. *Id.* at 1026.
204. *Id.* at 1025.
205. *Id.* at 1024.

admitted that the district's boundaries unlawfully denied Indian citizens' right to vote."[206]

In Bleckley County, Georgia[207]

- The county's 1984 decision to replace numerous polling places that "provid[ed] ready access to voters in the outlying areas"[208] with a single precinct for the 219 square mile county and to locate this single precinct in an "all-white civic club"[209] (the Jaycee Barn in Cochran); and the county's decision to use the precinct as the sole polling place for county commissioner and county school board elections throughout the 1980s and up to the court's 1992 decision.

In Dallas, Texas[210]

- The city's attempt to keep a partially at-large election system after minority voters petitioned for its change and city officials recognized the existing system "denied both blacks and Hispanics access to any of the 3 at-large seats."[211]

In Terrell, Texas[212]

- The city's reliance on at-large elections with staggered terms for five member city council, adjudicated on the merits to constitute intentional racial discrimination, compounded by the city's settlement of a lawsuit "alleging that poll workers improperly refused to let certain black citizens vote,"[213] and the city's refusal in 1983 to establish a polling place repeatedly sought by black residents.

In North Johns, Alabama[214]

- The town mayor's 1988 refusal to provide registration forms required by state law to two African-American

206. *Id.* at 1023–24.
207. Holder v. Hall Litig. (GA), 955 F.2d 1563 (11th Cir. 1992) (later reversed by the Supreme Court, Holder v. Hall, 512 U.S. 874 (1994), on the question of whether plaintiffs could challenge single commissioner form of government).
208. *Id.* at 1566 n.3.
209. *Id.* at 1566.
210. City of Dallas Litig., 734 F. Supp. 1317 (N.D. Tex. 1990).
211. *Id.* at 1320.
212. Terrell Litig., 565 F. Supp. 338 (N.D. Tex. 1983).
213. *Id.* at 341.
214. Town of N. Johns Litig., 717 F. Supp. 1471 (M.D. Ala. 1989).

city council candidates, the first African Americans to run for town office after the entry of a consent decree that replaced an at-large regime with a districted one, where "[t]he mayor was aware that Jones and Richardson, as black candidates, were seeking to take advantage of the new court-ordered single-member districting plan and that their election would result in the town council being majority black."[215]

- The town's prosecution of the two successful black candidates for failing to file the forms required by state law that the mayor refused to give them, a failure that a federal court later attributed to the mayor's intentionally discriminatory actions.
- The town's refusal to seat the candidates after they were elected in 1988 until a federal court ordered the town to do so.

In Jefferson County, Alabama[216]

- The express refusal of Jefferson County officials to appoint black workers in white precincts in 1984 on the ground that white voters would not listen to black poll officials, a refusal that a federal court equated with "open and intentional discrimination" that "is lawless and inexcusable." The court stated that "try[ing] to excuse the practice under cover of the purported intolerance of their own constituents is indefensible and repugnant."[217]

In Montgomery, Alabama[218]

- The mayor's proposal of a city ordinance in 1981, following a series of annexations, to lower the African-American population in majority-black district 3 to "the lowest level he understood to be legally possible in order to reduce the possibility that district 3's council member could be reelected."[219] Still in place as of 1983, the ordinance was found to be "in substantial measure the product of a scheme pur-

215. *Id.* at 1476.
216. Harris Litig., 601 F. Supp. 70, 74 (M.D. Ala. 1984).
217. *Id.* at 74.
218. Buskey v. Oliver Litig., 565 F. Supp. 1473 (M.D. Ala. 1983).
219. *Id.* at 1483.

posefully designed and executed to decrease the voting strength of the black electorate in district 3."[220]

In Alabama[221]

- The intentional and systematic failure of the Governor and Attorney General of Alabama to remedy past discrimination and ongoing racial harassment at the polls.
- The conduct of white poll officials who "continue to harass and intimidate black voters" including "numerous instances of where white poll officials refused to help illiterate black voters or refused to allow them to vote, where they refused to allow black voters to cast challenged ballots, and where they were simply rude and even intimidating toward black voters."[222]

Findings of Intentional Discrimination in Non-Covered Jurisdictions Since 1982—

In Berks County, Pennsylvania[223]

- Hostile public statements by officials at the polls to Latino and Spanish-speaking voters, statements such as "This is the U.S.A.–Hispanics should not be allowed to have two last names. They should learn to speak the language and we should make them take only one last name,"[224] and "Dumb Spanish-speaking people . . . I don't know why they're given the right to vote."[225]
- The subjection of Latino voters "to unequal treatment at the polls, including being required to show photo identification where white voters have not been required to do so."[226]
- The county's refusal to "appoint bilingual persons to serve as clerks or machine inspectors, and to fill

220. *Id.*
221. Harris Litig., 695 F. Supp. 517, 524–25, 527 & n.8 (M.D. Ala. 1988).
222. *Id.* at 525.
223. Berks County Litig., 277 F. Supp. 2d 570, 575–77, 580 (E.D. Pa. 2003); Berks County Litig., 250 F. Supp. 2d 525, 529 (E.D. Pa. 2003).
224. Berks County Litig., 277 F. Supp. 2d at 575.
225. Berks County Litig., 250 F. Supp. 2d at 529.
226. Berks County Litig., 277 F. Supp. 2d at 580.

vacant elected poll worker positions" showing an "apparent unwillingness to ensure that poll workers included persons reflective of the community."[227]

- The conduct of poll officials in the City of Reading, who "turned away Hispanic voters because they could not understand their names, or refused to 'deal' with Hispanic surnames."[228]
- The County's imposition of more onerous requirements for applicants seeking to serve as translators at the polls than those applying to be other types of poll officials, a requirement that impeded the court's order requiring the County to hire bilingual poll officials.
- Boasts by county officials and poll workers, flaunting their racially discriminatory motivations and practices to federal officials observing elections in May 2001, November 2001, May 2002 and November 2002, including statements from poll officials in the City of Reading to Justice Department observers "boast[ing] of the outright exclusion of Hispanic voters . . . during the May 15, 2001 municipal primary election."[229]

In Philadelphia, Pennsylvania[230]

- The operation by city election commissioners, in conjunction with campaign workers, of a fraudulent "minority absentee ballot program" to manipulate the outcome of a 1993 city election. Efforts included "specifically target[ing] Latino and African-Americans as groups to saturate with the illegal absentee ballot program," and "deceiving Latino and African-American voters into believing that the law had changed and that there was a 'new way to vote' from the convenience of one's home."[231]

227. *Id.* at 577.
228. Berks County Litig., 250 F. Supp. 2d at 529.
229. Berks County Litig., 277 F. Supp. 2d at 575–576.
230. Marks-Phila. Litig., No. CIV. A. 93-6157, 1994 WL 146113, at *11 (E.D. Pa. Apr. 26, 1994).
231. *Id.*

In Montezuma County, Colorado[232]

- The refusal of county officials during the 1980s and early 1990s to allow residents to register to vote at Towaoc on the Ute Reservation, even though the county created satellite registration in the non-Indian communities of Mancus and Dolores.
- The county's imposition of significant limitations on the hours it would make available mobile voter registration on the Ute reservation, as compared to the non-Indian communities, after the County decided to allow such registration in the 1990s.

In Big Horn County, Montana[233]

- The use of a discriminatory voter registration process, and the appointment of deputy registrars and election judges in 1986 with the County's "intent to discriminate" against Native Americans.
- The county's failure to include "the names of Indians who had registered to vote . . . on voting lists in 1982 and 1984"[234] and the county's removal of the names of Indians who had voted in primary elections from voting lists such that they were not allowed to vote in the subsequent general election.
- The county's refusal to provide "[a]n Indian candidate for the state legislature . . . voter registration cards in 1984,"[235] forcing her to obtain them at the State Capitol.
- County officials' refusal to provide a Native American man more than a scant number of voter registration cards based on the claim that few cards remained, even though the official shortly thereafter provided a white woman with fifty more cards.
- The subjection of Native Americans to a more technical and more difficult voter registration process than whites, in which county officials "looked for minor errors in [Native American] registration

232. Montezuma-Cortez Sch. Dist. Litig., 7 F. Supp. 2d 1152, 1162 (D. Colo. 1998).
233. County of Big Horn (Windy Boy) Litig., 647 F. Supp. 1002, 1008 (D. Mont. 1986).
234. *Id.* at 1008.
235. *Id.*

applications and used them as an excuse to refuse to allow registration."[236]

On the Eastern Shore of Maryland[237]

- The operation of "a kind of unofficial slating organization for white candidates" by some all-white, state-funded volunteer fire departments on the Eastern Shore until at least the mid-1980s.[238]
- The failure of the State of Maryland to stop funding departments engaging in this practice until an amendment to the Code of Fair Practices the Governor made upon the recommendation of the Attorney General in 1988.
- The discriminatory placement of polling places, that continues "[e]ven today, [in] counties on the lower Shore . . . in white-dominated volunteer fire companies, a hostile environment that may depress black electoral participation."[239]
- Through the 1980s, the only "black councilman was allowed to 'attend[] all meetings except the annual banquet, from which he was excluded. His colleagues sent his dinner on a paper plate to his home.' "[240]

In Little Rock, Arkansas[241]

- The state of Arkansas in 1983 and 1989 passing majority-vote requirements immediately after the election of black candidates in Little Rock and West Memphis as "a systematic and deliberate attempt to reduce black political opportunity. . . . [which] is plainly unconstitutional. It replaces a system in which blacks could and did succeed, with one in which they almost certainly cannot. The inference of racial motivation is inescapable."[242]
- Decisions in the 1980s by county officials to move polling places on short notice.

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236. *Id.*
237. Marylanders Litig., 849 F. Supp. 1022, 1057 n.56, 1061 (D. Md. 1994).
238. *Id.* at 1061.
239. *Id.*
240. *Id.* at 1057 n.56.
241. Jeffers Litig., 740 F. Supp. 585, 594–95 (E.D. Ark. 1990); Jeffers Litig., 730 F. Supp. 196, 210 & n.8, 211 (E.D. Ark. 1989).
242. Jeffers Litig., 740 F. Supp. at 594–95.

- The county's appointment, "with isolated exceptions," of deputy voting registrars "only as a result of litigation;" other recent, unspecified efforts to "intimidate black candidates."[243]
- The intimidation in 1986 by an unnamed white county sheriff of a black lawyer, Roy Lewellen, running for State Senate, including: first, warning him "not to run," and, second, when that advice was ignored, an unnamed prosecutor's "institution [of] a widely-publicized criminal prosecution against Mr. Lewellen for witness bribery"[244]—treatment that "a white lawyer, even one who opposed the political powers that be" would not have received;[245] and conduct amounting to "racial intimidation" that shows "that official discrimination designed to suppress black political activity is not wholly a thing of the past, at least not in the Delta."[246]

In Boston, Massachusetts[247]

- The enactment of a redistricting plan in 2001 described by the court as "a textbook case of packing . . . concentrating large numbers of minority voters within a relatively small number of districts," devised by the House leadership, which "knew what it was doing."[248]
- The manipulation of district lines "to benefit two white incumbents" where the State House did not "paus[e] to investigate the consequences of its actions for minority voting opportunities," thereby using race "as a tool to ensure the protection of incumbents."[249]

In New Rochelle, New York[250]

- The enactment of a city council redistricting plan in 2003 that diluted minority voting strength by replacing a majority-minority district with a plurality

243. *Id.*
244. Jeffers Litig., 740 F. Supp. at 210 n.8.
245. *Id.* at 211.
246. *Id.* at 210.
247. Black Political Taskforce Litig., 300 F. Supp. 2d 291, 314–15 (D. Mass. 2004).
248. *Id.* at 314.
249. *Id.* at 315.
250. City of New Rochelle Litig., 308 F. Supp. 2d 152, 158 (S.D.N.Y. 2003).

district, a plan reflecting "a course of conduct which can only be characterized as intentional and deliberate."[251]

In Los Angeles County, California[252]

- The County's reliance in 1990 on a districting plan that was found to be discriminatory because it "intentionally fragmented the Hispanic population among the various districts in order to dilute the effect of the Hispanic vote in future elections and preserve incumbencies of the Anglo members of the Board of Supervisors."[253] A concurring judge observed that this conduct illustrated the County's "single-minded pursuit of incumbency," which led it to "run roughshod over the rights of protected minorities."[254]

In Thurston County, Nebraska[255]

- The County's refusal to adjust its 1990 redistricting process to address a documented increase in the Native American population, and its decision instead to maintain its existing districting system, a course of action found to embody discriminatory intent.

In Illinois[256]

- The state legislature's retention and defense in a 1983 lawsuit of its districting plan for the state legislature, which diluted minority voting strength in order to protect two incumbent white senators in Chicago.
- The state redistricting commission's drawing of district lines with "the immediate purpose . . . to preserve the incumbencies of two white state Senators . . . . [T]his process was so intimately intertwined with, and dependent on, racial discrimination , and dilution of minority voting strength that purposeful dilution has been clearly

251. *Id.* at 158.
252. Garza v. County of L.A. Litig. (CA), 918 F.2d 763, 766, 768–69, 772 (9th Cir. 1990).
253. *Id.* at 769.
254. *Id.* at 778–79 (Kozinski, J., concurring on liability question).
255. County of Thurston Litig. (NE), 129 F.3d 1015, 1022 (8th Cir. 1997).
256. Rybicki Litig., 574 F. Supp. 1147, 1151 (N.D. Ill. 1983) (citing pre-amendment district court opinion in 574 F. Supp. 1082, 1110, 1112 (N.D. Ill. 1982)).

demonstrated in the construction of Commission senate districts 14, 17 and 18."[257]

In Western Tennessee[258]

- "[V]oting rights violations by public officials in rural west Tennessee as late as the 1980's. . . .Official discrimination not only prevents blacks from electing representatives of their choice, it also leads to disillusionment, mistrust, and disenfranchisement . . . . can cause black voters to drop out of the political process and potential black candidates to forgo an election run."[259]
- The city council's amendment of the Bolivar city charter creating a majority-vote requirement for mayoral elections "in response to the success of two black candidates for mayor," which was challenged in a 1983 lawsuit against the city of Bolivar. "The district court approved a class action settlement setting up a new 'system which will ensure the opportunity of black citizens of Bolivar to meaningfully participate in the political process'. . . .[C]ases challenging newly adopted election systems indicate to the court that official discrimination against blacks in voting is not entirely a thing of the past in west Tennessee."[260]

Intentional Discrimination Considered at Other Litigation Stages—

Some courts have credited allegations of current official discrimination in the course of issuing Section 2 plaintiffs a preliminary injunction, action that reflects the view of these courts that plaintiffs were likely to prevail on their claims, but that did not reach the question of whether Section 2 had been violated on the merits. Examples include:

257. *Id.*

258. Rural West II Litig., 29 F. Supp. 2d 448, 459 (W.D. Tenn. 1998); Rural West I Litig., 836 F. Supp. 453, 460–61 (W.D. Tenn. 1993).

259. Rural West II Litig., 29 F. Supp. 2d at 459.

260. Rural West I Litig., 836 F. Supp. at 460–61.

In Crenshaw County, Alabama[261]

- The consistent and repeated creation of at-large systems for local governments by the Alabama legislature, "during periods when there was a substantial threat of black participation in the political process."[262]
- Barriers "consistently erected" by the state "[f]rom the late 1800's through the present [1986] to keep black persons from full and equal participation in the social, economic, and political life of the state," where these systems "are still having their intended racist impact."[263]
- The creation of these "systems . . . in the midst of the state's unrelenting historical agenda, spanning from the late 1800's to the 1980's, to keep its black citizens economically, socially, and politically downtrodden, from the cradle to the grave."[264]

In Haywood County, Tennessee[265]

- The 1982 decision by the Haywood County Commission to replace 10 district seats for the Road Commission with 9 seats elected at-large after the first black road commissioner was elected, a decision the court "finds from the evidence in the record . . . occurred as a result of the purposeful intention to dilute black voting strength in Haywood County, Tennessee."[266]

261. Dillard v. Crenshaw Litig., 640 F. Supp. 1347, 1356–57, 1360–61 (M.D. Ala. 1986) (granting preliminary injunction). This court's findings of official discrimination were later cited in many other Alabama cases. *See, e.g.*, Baldwin Bd. of Educ. Litig., 686 F. Supp. 1459, 1466–67 (M.D. Ala. 1988) (finding that "this court demonstrated in *Crenshaw County* that from the late 1880's to the present the State of Alabama and its political subdivisions have 'openly and unabashedly' discriminated against their black citizens by employing at different times such devices as the poll tax, racial gerrymandering, and at-large elections, and by enacting such laws as the anti-single-shot voting laws, numbered places laws, and the Sayre law").

262. Dillard v. Crenshaw Litig., 640 F. Supp. 1347, 1361 (M.D. Ala. 1986)

263. *Id.* at 1356.

264. *Id.* at 1357.

265. Haywood County Litig., 544 F. Supp. 1122, 1131, 1135 (W.D. Tenn. 1982).

266. *Id.* at 1131.

In Cicero, Illinois[267]

- Town board's adoption in January 2000 of an 18-month residency requirement to register to vote, and its placement on the March primary ballot—a requirement that "was adopted, at least in part, with the racially discriminatory purpose of targeting potential Hispanic candidates for disqualification and thereby seeking to prevent Hispanic voters from having the opportunity to vote for and/or elect candidates of their choice, in violation of Section 2 of the Voting Rights Act."[268]

Courts relied on varied sources when evaluating Senate Factor 1.[269] Sixty-five (58.5% of those finding Factor 1) cited statutes or other official policies;[270] 35 (31.5%) noted actions and statements

267. Town of Cicero Litig., No. Civ.A. 00C 1530, 2000 WL 34342276 (N.D. Ill. Mar. 15, 2000).

268. *Id.* at *1.

269. Thirty-two lawsuits (28.8%) found Factor 1 without reference to any evidence, equally divided between covered and non-covered jurisdictions. *See* De Grandy Litig. (FL), 512 U.S. 997 (1994); Hamrick Litig. (GA), 296 F.3d 1065 (11th Cir. 2002); Old Person Litig. (MT), 312 F.3d 1036 (9th Cir. 2002); Davis v. Chiles Litig. (FL), 139 F.3d 1414 (11th Cir. 1998); Attala County Litig. (MS), 92 F.3d 283 (5th Cir. 1996); Fort Bend Indep. Sch. Dist. Litig. (TX), 89 F.3d 1205 (5th Cir. 1996); Blytheville Sch. Dist. Litig. (AR), 71 F.3d 1382 (8th Cir. 1995); U.S. v. Jones Litig. (AL), 57 F.3d 1020 (11th Cir. 1995); Democratic Party of Ark. Litig. (AR), 902 F.2d 15 (8th Cir. 1990); Baytown Litig. (TX), 840 F.2d 1240 (5th Cir. 1988); Abilene Litig. (TX), 725 F.2d 1017 (5th Cir. 1984); Lubbock Litig. (TX), 727 F.2d 364 (5th Cir. 1984); Opelika Litig. (AL), 748 F.2d 1473 (11th Cir. 1984); City of Minneapolis Litig., No. 02-1139(JRT/FLN), 2004 WL 2212044 (D. Minn. Sept. 30, 2004); Perry Litig., 298 F. Supp. 2d 451 (E.D. Tex. 2004); Albany County Litig., No. 03-CV-502, 2003 WL 21524820 (N.D.N.Y. July 7, 2003); City of New Rochelle Litig., 308 F. Supp. 2d 152 (S.D.N.Y. 2003); St. Bernard Parish Sch. Bd. Litig., No. CIV.A. 02-2209, 2002 WL 2022589 (E.D. La. Aug. 26, 2002); City of Chi.-Barnett Litig., 17 F. Supp. 2d 753 (N.D. Ill. 1998); African-American Voting Rights LDF Litig., 994 F. Supp. 1105 (E.D. Mo. 1997); Chickasaw County II Litig., No. CIV.A. 1:92CV142-JAD, 1997 WL 33426761 (N.D. Miss. Oct. 28, 1997); Jenkins v. Red Clay Sch. Dist. Litig., 116 F.3d 685 (D. Del. 1997); Rural West I Litig., 877 F. Supp. 1096 (W.D. Tenn. 1995); Texarkana Litig., 861 F. Supp. 756 (W.D. Ark. 1992); Rockford Bd. of Educ. Litig., No. 89 C 20168, 1991 WL 299104 (N.D. Ill. Sept. 12, 1991); Holbrook Unified Sch. Dist. Litig., 703 F. Supp. 56 (D. Ariz. 1989); Baldwin Bd. of Educ. Litig., 686 F. Supp. 1459 (M.D. Ala. 1988); Smith-Crittenden County Litig., 687 F. Supp. 1310 (E.D. Ark. 1988); Dallas County Comm'n Litig., 636 F. Supp. 704 (S.D. Ala. 1986); Marengo County Litig., 623 F. Supp. 33 (S.D. Ala. 1985); El Paso Indep. Sch. Dist. Litig., 591 F. Supp. 802 (W.D. Tex. 1984); Dean Litig., 555 F. Supp. 502 (D.R.I. 1982).

Another 7 did so based upon defendants' stipulation to a history of official discrimination, 5 of these in covered jurisdictions. Chisom Litig. (LA), 501 U.S. 380 (1991); Westwego Litig. (LA), 946 F.2d 1109 (5th Cir. 1991); City of Woodville Litig. (MS), 881 F.2d 1327 (5th Cir. 1989); Mehfoud Litig., 702 F. Supp. 588 (E.D. Va. 1988); Edgefield County Litig., 650 F. Supp. 1176 (D.S.C. 1986); Texarkana Litig., 861 F. Supp. 756 (W.D. Ark. 1992); Rockford Bd. of Educ. Litig., No. 89 C 20168, 1991 WL 299104 (N.D. Ill. Sept. 12, 1991).

270. *See, e.g.*, Dillard v. Crenshaw Litig., 640 F. Supp. 1347, 1356–60 (M.D. Ala. 1986).

taken by public officials;[271] 24 (21.6%) discussed expert testimony;[272] 16 (14.4%) mentioned history books, newspapers or scholarly articles,[273] 15 (13.5%) mentioned other witness testimony.[274] Some listed the jurisdiction's status as a covered (or non-covered) jurisdiction under Section 5 of the Voting Rights Act.[275]

Fifty-six lawsuits (50.5% of those finding Factor 1) looked to prior judicial decisions identifying official discrimination in a range of conduct.[276] Some of these decisions found such discrimination in education, housing, employment. Others specifically addressed claims of discrimination in voting, including a jurisdiction's failure to comply with the requirements of Section 5 of the VRA.[277] Numerous cases addressing Factor 1 cited as evidence the Factor 1 findings from a prior Section 2 case in the same state or jurisdiction.[278] This earlier decision typically engaged in lengthy analysis of the historical record, and the subsequent suit in the state cited back to that decision, sometimes without making further findings.[279]

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271. *See, e.g.*, Bone Shirt Litig., 336 F. Supp. 2d 976, 1026 (D.S.D. 2004); Jeffers Litig., 730 F. Supp. 196, 210 (E.D. Ark. 1989).

272. Repeat players cited by courts include: Chandler Davidson, Richard Engstrom, Morgan Kousser, Peyton McCrary, Raphael Cassimere, Jr., David Sansing, Allan Lichtman, Jerrell Shofner, Gary Mormino, Thomas Hofeller, Philip Hauser, William Rogers, Stephan Thernstrom, Abigail Thernstrom, Dr. Mollenkopf, and Lilian Williams. Most experts cited by courts in their Factor 1 discussion were trained historians or university professors with degrees in history or sociology.

273. *See, e.g.*, Berks County Litig., 277 F. Supp. 2d 570, 577 (E.D. Pa. 2003) (citing local newspaper articles); Town of Babylon Litig., 914 F. Supp. 843, 885 n.36 (E.D.N.Y. 1996) (citing ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1987)); Marylanders Litig., 849 F. Supp. 1022, 1062 (D. Md. 1994) (citing Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7, 25 n.63 (Bernard Grofman & Chandler Davidson eds., 1992)); Harris Litig., 695 F. Supp. 517, 522 n.5 (M.D. Ala. 1988) (citing J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910 (1974)).

274. *See, e.g.*, Charleston County Litig., 316 F. Supp. 2d 268, 288 n.23 (D.S.C. 2003); Harris Litig., 695 F. Supp. 517, 525 (M.D. Ala. 1988); Terrazas Litig., 581 F. Supp. 1329, 1349–50 (N.D. Tex. 1984).

275. *See, e.g.*, Town of Babylon Litig., 914 F. Supp. 843, 885 n.38 (E.D.N.Y. 1996); City of Greenwood Litig., 599 F. Supp. 397, 401 (N.D. Miss. 1984).

276. *See, e.g.*, Marengo County Litig. (AL), 731 F.2d 1546, 1568 (11th Cir. 1984).

277. *See, e.g.*, City of Greenwood Litig., 599 F. Supp. 397, 401 (N.D. Miss. 1984).

278. *See, e.g.*, Mallory-Ohio Litig., 38 F. Supp. 2d 525, 541–42 (S.D. Ohio 1997).

279. *See, e.g.*, Jeffers Litig., 730 F. Supp. 196, 204 (E.D. Ark. 1989); Clark Litig., 725 F. Supp. 285, 295 (M.D. La. 1988). *Compare* Chickasaw County II Litig., No. CIV.A. 1:92CV142-JAD, 1997 WL 33426761, at *3 (N.D. Miss. Oct. 28, 1997) (finding Factor 1 and "tak[ing] judicial notice of Mississippi's and Chickasaw County's history of discrimination in the area of voting . . . through the use of poll takes, literacy tests, good moral tests, and other policies and laws," without requiring plaintiffs to establish contemporary political effect), *with* Chickasaw County I Litig., 705 F. Supp. 315, 320 (N.D. Miss. 1989) (finding Factor 1 not met because plaintiffs had not shown current "political detriment").

Twenty-three lawsuits (20.7% of all lawsuits finding the factor) included within their Factor 1 analysis examples of private or unofficial discrimination, although no court relied exclusively on such evidence in finding Factor 1.[280]

Forty-one lawsuits addressed but did not find Factor 1.[281] Some courts deemed instances of discrimination "too remote in time" to count towards Factor 1.[282] Some found that plaintiffs presented no evidence of official discrimination, and refused to take judicial notice of this factor absent such evidence.[283] Several courts deemed Section 5 coverage alone insufficient to satisfy Factor 1, and instead have demanded evidence of official discrimination in the specific locality in question.[284] Courts in covered and non-covered jurisdictions alike have deemed evidence of intentional discrimination in a neighboring locality inadequate, even when that discrimination was of recent vintage.[285]

Thirty of the lawsuits addressing but not finding Factor 1 parsed the factor into two components, namely a history of official discrimination, and a showing that this history "touched" the contemporary right to vote.[286] These courts found the requisite history,

280. *See, e.g.*, De Grandy Litig., 815 F. Supp. 1550, 1573–74 (N.D. Fla. 1992) (citing both English-only legal initiatives and "suspension of a supermarket clerk for speaking Spanish in front of customers and the refusal of a personnel agency to refer people with foreign accents to job openings at a Miami bank" as relevant to showing a history of official discrimination against Latinos in Florida); Armour Litig., 775 F. Supp. 1044, 1055 (N.D. Ohio 1991) (including within Factor 1 the media's use of racial labels to describe an African-American candidate in 1985, the failure in the same year of party officials to support a minority candidate and the 1970 bombing of the house of the first African-American member of the Youngstown School Board in Youngstown, Ohio).

281. *See* VRI Database Master List, *supra* note 39.

282. City of Chi.-Barnett Litig., 969 F. Supp. 1359, 1446 (N.D. Ill. 1997); *see also* Cousin Litig. (TN), 145 F.3d 818, 832 (6th Cir. 1998) (considering relevant to Factor 1 only examples occurring within the last thirty years).

283. Belle Glade Litig. (FL), 178 F.3d 1175 (11th Cir. 1999); Salt River Project Litig. (AZ), 109 F.3d 586, 596 (9th Cir. 1997); St. Louis Bd. of Educ. Litig. (MO), 90 F.3d 1357 (8th Cir. 1996); Watsonville Litig. (CA), 863 F.2d 1407, 1419 (9th Cir. 1988); Suffolk County Litig., 268 F. Supp. 2d 243 (E.D.N.Y. 2003); City of Phila. Litig., 824 F. Supp. 514, 532 (E.D. Pa. 1993); Chapman v. Nicholson Litig., 579 F. Supp. 1504, 1510–12 (N.D. Ala. 1984).

284. *See, e.g.*, Chapman v. Nicholson Litig., 579 F. Supp. 1504, 1510 (N.D. Ala. 1984) ("There was certainly no evidence that black citizens in Jasper have had as much difficulty in voting as has been experienced by black citizens in some Southern communities.").

285. *See, e.g., id.*; Rodriguez Litig., 308 F. Supp. 2d 346, 435 (S.D.N.Y. 2004) (acknowledging as "troubling" the evidence from recent litigation in Yonkers, but deeming this insufficient to establish Factor 1 because Yonkers made up only a fraction of the challenged district); Kent County Litig. (MI), 790 F. Supp. 738, 745 (W.D. Mich. 1992) (finding evidence of a city's official discrimination was not relevant to a challenge to county action).

286. *See* cases cited *supra* note 173.

but deemed evidence of accompanying effect insufficient.[287] In the *Liberty County Commissioners* litigation, for example, the defendants conceded an extensive history of official discrimination and the court recounted this history in detail.[288] The court concluded that this history of discrimination did not "still affect[] the rights of blacks to have equal access to the political process."[289] The primary example of more recent official discrimination was a school employment lawsuit decided in 1986, which "indicate[d] lingering prejudice on the part of whites even in their official capacity . . . [but] did not touch the issues involved in a determination of whether the Voting Rights Act is being violated."[290]

For some courts, affirmative steps taken by a jurisdiction to improve voting rights ameliorated historic discrimination.[291] Others deemed the absence of contemporary examples of discrimination reason to discount evidence of past conduct. For example, a 1997 Massachusetts case noted that "[t]he 1995 election witnessed the complete absence of election-related problems that plagued elections in the 1980's."[292]

For other courts, the very prevalence of discrimination meant it should be discounted. Thus, while some courts in Southern states assumed or outlined a long local and state history of official discrimination,[293] others maintained that this discrimination was too common and too widespread to weigh heavily within the Section 2

287. *Id.*; *see, e.g.*, Monroe County Litig., 740 F. Supp. 417, 422 (N.D. Miss. 1990) ("The court finds no evidence that black voter registration is presently impeded by any historical official discrimination.").

288. Liberty County Comm'rs Litig., 957 F. Supp. 1522, 1557–59 (N.D. Fla. 1997) (upheld by Liberty County Comm'rs Litig., 221 F.3d 1218 (11th Cir. 2000) (affirming district court's finding of no violation)).

289. *Id.* at 1558.

290. *Id.* at 1559 n.86.

291. Aldasoro v. Kennerson Litig., 922 F. Supp. 339, 363–64 (S.D. Cal. 1995) (citing "the numerous laws enacted by the California Legislature in the last 30 years to improve minority voting participation and to liberalize the political process"); *see also* Butts v. NYC Litig. (NY), 779 F.2d 141, 150 (2d Cir. 1985).

292. City of Holyoke Litig., 960 F. Supp. 515, 526 (D. Mass. 1997); *see also* Tensas Parish Sch. Bd. Litig. (LA), 819 F.2d 609, 612 (5th Cir. 1987); City of Woodville Litig., 688 F. Supp. 255, 260 (S.D. Miss. 1988); City of Boston Litig., 609 F. Supp. 739, 745 (D. Mass. 1985).

293. *See* DeSoto County Litig. (FL), 204 F.3d 1335, 1443 (11th Cir. 2000); Brooks Litig. (GA), 158 F.3d 1230, 1233–34 (11th Cir. 1998); Mobile Sch. Bd. Litig. (AL), 706 F.2d 1103, 1104–07 (11th Cir. 1983); Ben Hill County Litig., 743 F. Supp. 864, 865–68 (M.D. Ga. 1990); City of Dallas Litig., 734 F. Supp. 1317, 1320–33, 1401–03 (W.D. Tex. 1990); Kirksey v. Allain Litig., 658 F. Supp. 1183, 1192–93 (S.D. Miss. 1987); Dillard v. Crenshaw Litig., 640 F. Supp. 1347, 1356–60 (M.D. Ala. 1986); Gretna Litig., 636 F. Supp. 1113, 1116–18 (E.D. La. 1986); LULAC-Midland Litig., 648 F. Supp. 596, 600–01, 613–21 (W.D. Tex. 1986); Major Litig., 574 F. Supp. 325, 339–40 (E.D. La. 1983).

analysis.[294] For instance, the court in *City of Woodville* explained that the city "has a past history of racial discrimination as does every other Mississippi town or city."[295]

Some courts in Northern states minimized a local history of discriminatory practices by contrasting that history with the record of what occurred in the South. In the *Butts* litigation, for example, the appellate court took issue with the district court's suggestion that racial discrimination in voting is hardly confined to the South,[296] stating that "[u]nlike many of the jurisdictions typically involved in Voting Rights Act cases, New York has ensured to black citizens the right to vote on the same terms as whites since 1874 (when the fifteenth amendment was ratified)."[297] In another New York lawsuit against the Town of Babylon, the district court noted that "[no]thing in the history of New York even remotely approaches the systematic exclusion of blacks from the political process that existed in the South."[298]

2. Extent of Racially Polarized Voting—Senate Factor 2 calls for an evaluation of the extent of legally significant racially polarized voting.[299] This Report discusses lawsuits finding this factor in the *Gingles* section, Part II.B above. That section includes a consideration of the 105 judicial findings of racially polarized voting since 1982, both before and after the Supreme Court's 1986 *Gingles* decision, for the sake of organizational clarity.

3. Use of Enhancing Practices: At-large Elections, Majority Vote Requirements—Factor 3 inquires about the "extent to which the state

294. *See, e.g.*, NAACP v. Fordice Litig. (MS), 252 F.3d 361, 367 (5th Cir. 2001); Calhoun County Litig. (MS), 88 F.3d 1393, 1399 (5th Cir. 1996); Fort Bend Indep. Sch. Dist. Litig. (TX), 89 F.3d 1205, 1220 (5th Cir. 1996); Little Rock Litig. (AR), 56 F.3d 904, 914 (8th Cir. 1995); U.S. v. Jones Litig. (AL), 57 F.3d 1020, 1025 (11th Cir. 1995); LULAC v. Clements Litig. (TX), 999 F.2d 831, 884 (5th Cir. 1993); Sw. Tex. Junior Coll. Dist. Litig. (TX), 964 F.2d 1542, 1555–56 (5th Cir. 1992); Tensas Parish Sch. Bd. Litig. (LA), 819 F.2d 609, 612 (5th Cir. 1987); Lafayette County Litig., 20 F. Supp. 2d 996, 1003 (N.D. Miss. 1998); LULAC–N.E. Indep. Sch. Dist. Litig., 903 F. Supp. 1071, 1085 (W.D. Tex. 1995); Armstrong v. Allain Litig., 893 F. Supp. 1320, 1332 (S.D. Miss. 1994).

295. City of Woodville Litigation, 688 F. Supp. 255, 260 (S.D. Miss. 1988); *see also* Hamrick Litig. (GA), 296 F.3d 1065, 1224 (11th Cir. 2002).

296. Butts v. NYC Litig., 614 F. Supp. 1527, 1544–45 (S.D.N.Y. 1985) (noting that "[c]ontrary to the popularly held belief that racial discrimination only takes place within the Fifth and Eleventh Circuits, plaintiffs' exhibits . . . support the finding that Black and Hispanic voters in New York City have been the subject of various procedures . . . which have had the effect of abridging their voting rights").

297. Butts v. NYC Litig. (NY), 779 F.2d 141, 150 (2d Cir. 1985) (overturning district court's prior finding of a Section 2 violation); *see also* France Litig., 71 F. Supp. 2d 317, 330 (S.D.N.Y. 1999).

298. Town of Babylon Litig., 914 F. Supp. 843, 886 (E.D.N.Y. 1996); *see also* City of Boston Litig. (MA), 784 F.2d 409, 412 (1st Cir. 1986).

299. SENATE REPORT, *supra* note 17, at 27–30.

or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group."[300] Courts in 52 lawsuits found that at least one practice existed that might enhance the opportunity for discrimination potentially resulting from the practice directly challenged in those lawsuits.[301]

Of the courts that found Factor 3, 36 lawsuits (or 69.2%) reached a favorable outcome for the plaintiff. Thirty-three (63.5%) of the lawsuits finding Factor 3 arose in covered jurisdictions. In 23 of these the plaintiffs ultimately succeeded. Of the 19 lawsuits (36.5%) finding this factor in non-covered jurisdictions, 13 resulted in plaintiff success.[302]

Thirty-four suits found majority-vote requirements, 26 found anti-single shot provisions, such as staggered terms and/or numbered-place requirements, 13 found the use of at-large elections, 11 found unusually large districts, and six found other enhancing practices, including the use of an automatic voter removal or "purge" law (based upon voting frequency), a short interval between an initial election and the runoff election, candidate registration fee, candidate residency requirement, or low financial compensation for elected officials.[303]

Factor 3 differs from the other Senate Factors in that courts addressing it usually engaged in virtually no analysis. Unlike, for example, identifying a racial appeal (Factor 6) or an exclusive slating process (Factor 4), identifying Factor 3 devices is almost always perfectly obvious. The jurisdiction either uses an at-large system or it does not. Most courts have found little to analyze and little to say apart from identifying the practice.

Even so, some courts that found Factor 3 discounted its import, typically by deeming the identified practice as having a minimally discriminatory effect on the ground. These courts suggested that

300. SENATE REPORT, *supra* note 17, at 29. Single shot voting is a practice by which voters can direct their votes to a single candidate running in a multi-member district, and choose not to cast their remaining votes for other candidates running at the same time. Doing so increases the relative weight of their votes by reducing the number of votes other candidates receive. An anti-single shot provision may prevent voters from doing this, typically by disqualifying any ballot where a voter has not used all available votes. *See* QUIET REVOLUTION, *supra* note 6, at 46.

301. *See* VRI Database Master List, *supra* note 39. Of the 52 lawsuits finding Factor 3, 25 were decided in the 1980s (20 violations), 22 in the 1990s (12 violations), and 6 since 2000 (3 violations). *Id.* Note that where a practice enumerated in the Factor 3 list was directly challenged in the lawsuit, a court did not always consider or find Factor 3 independently of the express challenge to the practice.

302. *Id.*

303. *Id.*

while Factor 3 practices may generally foster discriminatory results, no evidence establishing that effect was presented in the particular case.[304]

4. Candidate Slating—Factor 4 asks whether members of the minority group have been denied access to a candidate slating process, assuming such a process exists in the jurisdiction. While the term "slating" is not defined by the Senate Report, the Fifth Circuit has described it as "a process in which some influential non-governmental organization selects and endorses a group or 'slate' of candidates, rendering the election little more than a stamp of approval for the candidates selected."[305] A denial of such access was an important component of a Section 2 claim prior to the 1982 amendments,[306] but the factor appears to be of diminished importance under the amended provision.

Courts in 10 lawsuits expressly found the existence of a discriminatory slating process. Of these, four originated in jurisdictions covered by Section 5. All but one also found a violation of Section 2.[307] An additional three courts identified slating-like conduct without expressly labeling it as such.[308] Courts finding Factor 4 have identified slating in four general circumstances.

Official Slating: Three courts identified official party action as discriminatory slating or slating-like conduct. The *Town of Hempstead* litigation documented a slating process under which the Republican Party Chairman for the County selected candidates to run for office subject to approval by the Party's 69-member executive committee, which invariably affirmed the Chairman's selections

304. *See, e.g.*, Kirksey v. Allain Litig., 658 F. Supp. 1183, 1194 (S.D. Miss. 1987) ("Although it is obvious that abolition of the majority vote requirements and post system without adoption of anti-single-shot voting laws would make it easier in some situations for black candidates to be elected, this Court cannot hold that these provisions as they now exist discriminate against blacks per se."); *see also* NAACP v. Fordice Litig. (MS), 252 F.3d 361, 365 (5th Cir. 2001); City of Rome Litig. (GA), 127 F.3d 1355 (11th Cir. 1997); Niagara Falls Litig. (NY), 65 F.3d 1002, 1020 (2d Cir. 1995); S. Christian Leadership Litig. (AL), 56 F.3d 1281 (11th Cir. 1995); Sw. Tex. Junior Coll. Dist. Litig. (TX), 964 F.2d 1542 (5th Cir. 1992); Alamosa County Litig., 306 F. Supp. 2d 1016 (D. Colo. 2004); City of Cleveland Litig., 297 F. Supp. 2d 901 (N.D. Miss. 2004); Chickasaw County II Litig., No. CIV.A. 1:92CV142-JAD, 1997 WL 33426761 (N.D. Miss. Oct. 28, 1997); Town of Babylon Litig., 914 F. Supp. 843 (E.D.N.Y. 1996); Jeffers Litig., 730 F. Supp. 196 (E.D. Ark. 1989); Terrell Litig., 565 F. Supp. 338 (N.D. Tex. 1983).

305. Westwego Litig. (LA), 946 F.2d 1109, 1116 n.5 (5th Cir. 1991).

306. *See, e.g.*, White v. Regester, 412 U.S. 755, 766–67 (1973); Turner v. McKeithen, 490 F.2d 191, 195 (5th Cir. 1973); Hendrix v. McKinney, 460 F. Supp. 626, 631–32 (M.D. Ala. 1978).

307. *See* VRI Database Master List, *supra* note 39.

308. *See, e.g.*, Marylanders Litig., 849 F. Supp. 1022, 1061 (D. Md. 1994); City of Phila. Litig., 824 F. Supp. 514, 537 & n.22 (E.D. Pa. 1993); Armour Litig., 775 F. Supp. 1044, 1056 (N.D. Ohio 1991).

without debate.[309] The only African-American candidate ever slated was not initially supported by a town-based organization of African-American Republicans, but instead was "a close friend and tennis partner" of the Party Chairman.[310] These circumstances led the appellate court to observe that, in this predominantly white, predominantly Republican town, the lack of access to the Republican slating process meant that "blacks simply are unable to have any preferred candidate elected to the Town Board."[311]

Similarly, in the *City of New Rochelle* litigation, the district court found that candidate selection by party members placed barriers on non-party affiliated candidates and limited the prospects for candidates preferred by the African-American community to gain access to the ballot.[312] So too, in the *Albany County* litigation the district court found a lack of access based on anecdotal evidence coupled with the major parties' failure ever to nominate a minority candidate for county-wide office.[313] Although not directly identified as slating, in the *Bridgeport* litigation, the appellate panel noted that while a black candidate won the 1983 mayoral primary, an influential group called the Democratic Town Committee failed to endorse him. The candidate went on to lose the general election in an overwhelmingly Democratic city.[314]

The *Marylanders* litigation also cited the practice through the mid-1980s of allowing state-funded, all-white fire departments on the Eastern Shore of Maryland to control the candidate slating process, although the court did not expressly address this evidence under Factor 4.[315]

Unofficial Party Slating or Backstabbing: Two courts found unofficial conduct by party officials to constitute slating.[316] In the *City of Springfield* litigation, the court called unofficial party endorsements and support in ostensibly nonpartisan elections "a subtle and covert" form of slating—one that contributed to the failure of African-American candidates to be elected.[317] In the *Bone Shirt* litigation the court cited informal activities by the party organizations that stymied Native American candidacies. The court highlighted the

309. Town of Hempstead Litig. (NY), 180 F.3d 476, 483–86 (2d Cir. 1999).
310. *Id.* at 486.
311. *Id.* at 496.
312. City of New Rochelle Litig., 308 F. Supp. 2d 152, 161 (S.D.N.Y. 2003).
313. Albany County Litig., No. 03-CV-502, 2003 WL 21524820, at *46 (N.D.N.Y. July 7, 2003).
314. Bridgeport Litig. (CT), 26 F.3d 271, 276 (2d Cir. 1994).
315. Marylanders Litig., 849 F. Supp. 1022, 1061 (D. Md. 1994).
316. Bone Shirt Litig., 336 F. Supp. 2d 976, 1036 (D.S.D. 2004); City of Springfield Litig., 658 F. Supp. 1015, 1030 (C.D. Ill. 1987).
317. City of Springfield Litig., 658 F. Supp. 1015, 1030 (C.D. Ill. 1987).

conduct of the chairman of the Democratic Central Committee, who campaigned against his party's nominees for county commissioner in the 2002 general election after Indian candidates unseated non-Indian incumbents in the primary.[318]

Although not expressly characterized as "slating," conduct documented in two other lawsuits may be similarly understood. In the *Armour* litigation, the court cited the failure of party officials to support minority candidates despite rules requiring such support.[319] The *City of Philadelphia* litigation cited campaign materials distributed by the Democratic Party listing all city council candidates running at-large except for one African American and one Latino candidate.[320]

Private Slating: Three courts found that conduct by private organizations denied minority candidates access to slating processes.[321] In the *City of Chicago Heights* litigation, the court cited the activities of an organization called the Concerned Citizens Group, a group that had no African-American members and chose candidates for city council elections. The court noted the absence of evidence showing either that black voters had input into this slating process or that they could gain access to the ballot absent access to that process.[322] In the *City of Gretna* litigation, the district court found that electoral success hinged on the endorsement of a local political faction known as the Miller-White Ticket, and that the Ticket routinely blocked black candidates.[323] In the *Pasadena Independent School District* litigation, the court noted that essential campaign contributions flowed to candidates endorsed by a group called Communities United for Better Schools ("CUBS"). Since a CUBS endorsement typically led to candidate success on Election Day, and because CUBS had only once endorsed a Latino candidate, the court concluded that Factor 4 was satisfied.[324]

Inference of Slating: One court inferred a denial of access to slating processes given the absence of African-American candidates running for office.[325]

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318. Bone Shirt Litig., 336 F. Supp. 2d 976, 1036 (D.S.D. 2004).
319. *See* Armour Litig., 775 F. Supp. 1044, 1056 (N.D. Ohio 1991).
320. City of Phila. Litig., 824 F. Supp. 514, 537 & n.22 (E.D. Pa. 1993).
321. City of Chi. Heights Litig., Nos. 87 C 5112, 88 C 9800, 1997 WL 102543 (N.D. Ill. Mar. 5, 1997); Pasadena Indep. Sch. Dist. Litig., 958 F. Supp. 1196 (S.D. Tex. 1997); Gretna Litig., 636 F. Supp. 1113 (E.D. La. 1986); *see also* Abilene Litig. (TX), 725 F.2d 1017, 1022 (5th Cir. 1984).
322. City of Chi. Heights Litig., Nos. 87 C 5112, 88 C 9800, 1997 WL 102543, at *9 (N.D. Ill. Mar. 5, 1997).
323. Gretna Litig. (LA), 834 F.2d 496, 499 (5th Cir. 1987).
324. Pasadena Indep. Sch. Dist. Litig., 958 F. Supp. 1196, 1223–24 (S.D. Tex. 1997).
325. City of LaGrange Litig., 969 F. Supp. 749, 777 (N.D. Ga. 1997).

Slating Not Found: In 13 cases, plaintiffs introduced what they contended was evidence of slating but courts did not find that minority candidates had been denied access. Courts in six cases rejected evidence regarding private slating processes either because the activities of the group in question did not fit the court's definition of a slating organization[326] or because the slating organizations were defunct by the time litigation was initiated.[327] Anecdotal evidence of slating was conclusorily rejected in another two lawsuits.[328]

Three lawsuits viewed electoral success by minority candidates as evidence of access to slating processes.[329] Additionally, in the *Alamosa County* litigation,[330] the court assumed without deciding that the Democratic Central Committee played a functional role in the selection of county commission candidates, but concluded that anecdotal testimony about ethnically biased comments and "boorish behavior" by some members of the committee was insufficient to establish a "policy or practice" that denied non-white candidates access to slating.[331] Finally, two lawsuits attributed the exclusion of minority candidates from slating processes to partisanship rather than race.[332]

5. Ongoing Effects of Discrimination (Education, Employment, Health)—The fifth Senate Factor calls for evaluation of "the extent to which members of the minority group bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process."[333] Of the 133 lawsuits addressing this factor, 88 found the factor to be met, 45 of which originated in covered jurisdictions. Fifty-eight lawsuits finding Factor 5 ended favorably for the plaintiffs.[334] Courts have evaluated Factor 5 in several different ways.

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326. *See* City of Rome Litig. (GA), 127 F.3d 1355, 1369 (11th Cir. 1997); Westwego Litig. (LA), 946 F.2d 1109, 1115–16 (5th Cir. 1991); Marengo County Litig. (AL), 731 F.2d 1546, 1569 (11th Cir. 1984); City of Norfolk Litig., 605 F. Supp. 377, 390–91 (E.D. Va. 1984).

327. City of Dallas Litig., 734 F. Supp. 1317, 1322 (N.D. Tex. 1990); County of Big Horn (Windy Boy) Litig., 647 F. Supp. 1002, 1016 (D. Mont. 1986).

328. City of Phila. Litig., 824 F. Supp. 514, 533 (E.D. Pa. 1993); Little Rock Litig., 831 F. Supp. 1453, 1460 (E.D. Ark. 1993).

329. Liberty County Comm'rs Litig., 221 F.3d 1218, 1222 (11th Cir. 2000); Jenkins v. Red Clay Sch. Dist. Litig., 780 F. Supp. 221, 235 (D. Del. 1991); City of Austin Litig., No. A-84-CA-189, 1985 WL 19986, at *8 (W.D. Tex. 1985).

330. Alamosa County Litig., 306 F. Supp. 2d 1016 (D. Colo. 2004).

331. *Id.* at 1034.

332. *See, e.g.*, LULAC v. Clements Litig. (TX), 999 F.2d 831, 880 (5th Cir. 1993); City of Fort Lauderdale Litig., 617 F. Supp. 1093, 1103 (S.D. Fla. 1985).

333. SENATE REPORT, *supra* note 17, at 29.

334. *See* VRI Database Master List, *supra* note 39.

Depressed Socioeconomic Status Alone: Twelve courts found Factor 5 when there was a history of discrimination and a showing that the minority group experienced comparatively low socioeconomic status.[335]

Nexus Between Discrimination and Participation: Most courts required some kind of nexus not only between a history of discrimination and lowered socioeconomic status, but also between depressed socioeconomic status and the ability to participate in the political process. In 31 cases, courts assumed or deduced, sometimes aided by expert testimony, that lower socioeconomic status hindered the minority group's ability to participate effectively in the political process and found the factor met.[336] These courts pointed out, for example, that depressed socioeconomic status hinders one's ability to raise money and mount a campaign,[337] and

335. *See* Blaine County Litig. (MT), 363 F.3d 897, 914 (9th Cir. 2004); Westwego Litig. (LA), 946 F.2d 1109, 1115 (5th Cir. 1991); Albany County Litig., No. 03-CV-502, 2003 WL 21524820, at *12 (N.D.N.Y July 7, 2003); City of New Rochelle Litig., 308 F. Supp. 2d 152, 159–60 (S.D.N.Y. 2003); Montezuma-Cortez Sch. Dist. Litig., 7 F. Supp. 2d 1152, 1169–70 (D. Colo. 1998); City of Holyoke Litig., 880 F. Supp. 911, 917–19 (D. Mass. 1995); Emison Litig., 782 F. Supp. 427, 438 (D. Minn. 1992); Garza v. L.A. Litig., 756 F. Supp. 1298, 1339–41 (C.D. Cal. 1990); Baytown Litig., 696 F. Supp. 1128, 1132, 1136 (S.D. Tex. 1987); Houston v. Haley Litig., 663 F. Supp. 346, 352–54 (N.D. Miss. 1987); Wamser Litig., 679 F. Supp. 1513, 1531 (E.D. Mo. 1987); Halifax County Litig., 594 F. Supp. 161, 166–71 (E.D.N.C. 1984).

336. *See* Metts Litig. (RI), 347 F.3d 346, 349 (1st Cir. 2003); Old Person Litig. (MT), 230 F.3d 1113, 1129 (9th Cir. 2000); Davis v. Chiles Litig. (FL), 139 F.3d 1414, 1419 & n.10 (11th Cir. 1998); City of Rome Litig. (GA), 127 F.3d 1355, 1370–71, 1385–86 (11th Cir. 1997); Sanchez-Colo. Litig. (CO), 97 F.3d 1303, 1322–24 (10th Cir. 1996); Blytheville Sch. Dist. Litig. (AR), 71 F.3d 1382, 1390 (8th Cir. 1995); Lubbock Litig. (TX), 727 F.2d 364, 383 (5th Cir. 1984); Berks County Litig., 277 F. Supp. 2d 570, 575, 581 (E.D. Pa. 2003); St. Bernard Parish Sch. Bd. Litig., No. CIV.A. 02-2209, 2002 WL 2022589, at *8–10 (E.D. La. Aug. 26, 2002); Rural West II Litig., 29 F. Supp. 2d 448, 459 (W.D. Tenn. 1998); Chickasaw County II Litig., No. CIV.A. 1:92CV142-JAD, 1997 WL 33426761, at *4 (N.D. Miss. Oct. 28, 1997); City of LaGrange Litig., 969 F. Supp. 749, 757, 776 (N.D. Ga. 1997); Cousin Litig., 904 F. Supp. 686, 708–10 (E.D. Tenn. 1995); LULAC–N.E. Indep. Sch. Dist. Litig., 903 F. Supp. 1071, 1085–86 (W.D. Tex. 1995); Marylanders Litig., 849 F. Supp. 1022, 1060–61 (D. Md. 1994); Rural West I Litig., 836 F. Supp. 453, 461–62 (W.D. Tenn. 1993); Brunswick County, VA Litig., 801 F. Supp. 1513, 1518, 1524 (E.D. Va. 1992); De Grandy Litig., 794 F. Supp. 1076, 1079 (N.D. Fla. 1992); Magnolia Bar Association Litig., 793 F. Supp. 1386, 1409 (S.D. Miss. 1992); Hall Litig., 757 F. Supp. 1560, 1562–63 (M.D. Ga. 1991); City of Dallas Litig., 734 F. Supp. 1317, 1403–05 (N.D. Tex. 1990); Chisom Litig., No. 86-4057, 1989 WL 106485, at *8–9 (E.D. La. Sept. 19, 1989); White Litig., No. 88-0568-R, 1989 U.S. Dist. LEXIS 16117, at *9–11, 22–23 (E.D. Va. Aug. 31, 1989); Baldwin Bd. of Educ. Litig., 686 F. Supp. 1459, 1466–67 (M.D. Ala. 1988); City of Jackson, TN Litig., 683 F. Supp. 1515, 1533–1534 (W.D. Tenn. 1988); Clark Litig., 725 F. Supp. 285, 290–91, 299 (M.D. La. 1988); Mehfoud Litig., 702 F. Supp. 588, 594–95 (E.D. Va. 1988); Smith-Crittenden County Litig., 687 F. Supp. 1310, 1317 (E.D. Ark. 1988); Kirksey v. Allain Litig., 658 F. Supp. 1183, 1194–95 (S.D. Miss. 1987); Operation Push Litig., 674 F. Supp. 1245, 1253–54, 1264–65 (N.D. Miss. 1987); Gretna Litig., 636 F. Supp. 1113, 1116–20 (E.D. La. 1986).

337. *See, e.g.*, Rural West II Litig., 29 F. Supp. 2d 448, 459 (W.D. Tenn. 1998); Cousin Litig., 904 F. Supp. 686, 708–10 (E.D. Tenn. 1995); Chisom Litig., No. 86-4057, 1989 WL

to campaign in large districts.[338] Some noted that lower socioeconomic status may create geographic and social isolation from other members of the community—connection with whom may be critical to engage in effective political action.[339] One district court specifically noted that depressed socioeconomic status makes it difficult for minority candidates to run for particularly low paying public positions.[340]

In the majority of lawsuits, however, courts required concrete evidence of depressed participation, measured through voter registration and turnout statistics. In finding Factor 5, courts in 14 lawsuits in covered jurisdictions documented minority voter registration rates that lag behind the white voter registration rate, compared with three such lawsuits in non-covered jurisdictions.[341] Thirteen lawsuits in non-covered jurisdictions identified lower rates of minority voter turnout notwithstanding equivalent voter registration rates.[342] Courts in five lawsuits in covered jurisdictions found

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106485, at *8–9 (E.D. La. Sept. 19, 1989); Mehfoud Litig., 702 F. Supp. 588, 594–95 (E.D. Va. 1988).

338. *See, e.g.*, City of Rome Litig. (GA), 127 F.3d 1355, 1370–71, 1385–86 (11th Cir. 1997); Cousin Litig., 904 F. Supp. 686, 708–10 (E.D. Tenn. 1995); Columbus County Litig., 782 F. Supp. 1097, 1103–05 (E.D.N.C. 1991); City of Dallas Litig., 734 F. Supp. 1317, 1403–04 (N.D. Tex. 1990).

339. *See, e.g.*, Terrell Litig., 565 F. Supp. 338, 342 (N.D. Tex. 1983) ("It is clear to the Court that a major reason for the white majority's lack of familiarity with many black candidates is the severe de facto segregation of housing in Terrell.").

340. City of Dallas Litig., 734 F. Supp. 1317, 1403–05 (N.D. Tex. 1990) ("The ridiculous pay for Council Members—$50.00 for each meeting—further exacerbates the discriminatory effect of these disparities by limiting the pool of African-Americans and Hispanics who can financially afford to serve on the Council where they would, in effect, volunteer their full time service.").

341. For covered jurisdictions, see City of Rome Litig. (GA), 127 F.3d 1355, 1371 (11th Cir. 1997); Attala County Litig. (MS), 92 F.3d 283, 294 (5th Cir. 1996); Operation Push Litig. (MS), 932 F.2d 400, 405 (5th Cir. 1991); Marengo County Litig. (AL), 731 F.2d 1546, 1552 (11th Cir. 1984); Bone Shirt Litig., 336 F. Supp. 2d 976 (D.S.D. 2004); City of LaGrange Litig., 969 F. Supp. 749, 768 (N.D. Ga. 1997); Mehfoud Litig., 702 F. Supp. 588, 594 (E.D. Va. 1988); Neal Litig., 689 F. Supp. 1426, 1428 (E.D. Va. 1988); LULAC-Midland Litig., 648 F. Supp. 596, 600 (W.D. Tex. 1986); Jordan Litig., 604 F. Supp. 807, 812 (N.D. Miss. 1984); Terrazas Litig., 581 F. Supp. 1329, 1350 (N.D. Tex. 1984); Buskey v. Oliver Litig., 565 F. Supp. 1473, 1476 (M.D. Ala. 1983); Major Litig., 574 F. Supp. 325, 342 (E.D. La. 1983); Mobile Sch. Bd. Litig., 542 F. Supp. 1078, 1093 (S.D. Ala. 1982).

In the three non-covered cases, the courts made general, non-quantitative statements about lower minority registration. *See* Little Rock Litig., 831 F. Supp 1453, 1460 (E.D. Ark. 1993) (quoting expert testimony that blacks "suffer lower voter registration and lower voter turnout" than whites); De Grandy Litig., 794 F. Supp. 1076, 1084 (N.D. Fla. 1992); Garza v. L.A. Litig., 756 F. Supp. 1298, 1323 (C.D. Cal. 1990) (Latino voter registration and turnout in Los Angeles is "considerably lower" than that of non-Hispanics).

342. Blaine County Litig. (MT), 363 F.3d 897, 910–11 (9th Cir. 2004); Sanchez-Colo. Litig. (CO), 97 F.3d 1303, 1324 (10th Cir. 1996); Blytheville Sch. Dist. Litig. (AR), 71 F.3d 1382, 1388 (8th Cir. 1995); Nipper Litig. (FL), 39 F.3d 1494, 1507 (11th Cir. 1994); Democratic Party of Ark. Litig. (AR), 890 F.2d 1423, 1431–33 (8th Cir. 1989); City of Holyoke Litig., 880 F. Supp. 911, 925 (D. Mass. 1995); Marylanders Litig., 849 F. Supp. 1022, 1061 (D. Md.

lower turnout alone,[343] while four additional lawsuits in covered jurisdictions found both low minority registration and low minority turnout.[344] In contrast, 11 courts, with six in covered jurisdictions and five in non-covered, found the factor unsatisfied when presented with nearly equal voting participation rates.[345] As a measure of political participation, several courts view turnout as more probative than registration rates.[346]

In two lawsuits, courts made conclusory assertions that socioeconomic disadvantage did not hinder political participation by the minority group in question.[347] In 10 lawsuits, courts did not find Factor 5 because plaintiffs failed to present sufficient evidence to show the minority group actually suffered from lower political participation.[348]

1994); Bridgeport Litig., Civ. No. 3:93CV1476 (PCD), 1993 U.S. Dist. LEXIS 19741, at *7 (D. Conn. October 27, 1993); City of Phila. Litig., 824 F. Supp. 514, 536 (E.D. Pa. 1993); Columbus County Litig., 782 F. Supp. 1097, 1104 (E.D.N.C. 1991); Jenkins v. Red Clay Sch. Dist. Litig., 780 F. Supp. 221, 234 (D. Del. 1991); City of Jackson, TN Litig., 683 F. Supp. 1515, 1534 (W.D. Tenn. 1988); City of Springfield Litig., 658 F. Supp. 1015, 1027 (C.D. Ill. 1987).

343. Charleston County Litig. (SC), 365 F.3d 341, 344 (4th Cir. 2004); Dallas County Comm'n Litig. (AL), 739 F.2d 1529, 1538 (11th Cir. 1984); Gretna Litig., 636 F. Supp. 1113, 1119 (E.D. La. 1986); Edgefield County Litig., 650 F. Supp. 1176 (D.S.C. 1986); City of Greenwood Litig., 599 F. Supp. 397, 401 (N.D. Miss 1984).

344. Bone Shirt Litig., 336 F. Supp. 2d 976, 1039 (D.S.D. 2004); Neal Litig., 689 F. Supp. 1426, 1428 (E.D. Va. 1988); Mehfoud Litig., 702 F. Supp. 588, 594 (E.D. Va. 1988); Terrazas Litig., 581 F. Supp. 1329, 1350 (N.D. Tex. 1984).

345. Covered cases include: NAACP v. Fordice Litig. (MS), 252 F.3d 361, 367–68 (5th Cir. 2001); France Litig., 71 F. Supp. 2d 317, 332 (S.D.N.Y. 1999); S. Christian Leadership Litig., 785 F. Supp. 1469, 1473, 1486 (M.D. Ala. 1992); Monroe County Litig., 740 F. Supp. 417, 423–24 (N.D. Miss. 1990); City of Norfolk Litig., 605 F. Supp. 377, 391–92 (E.D. Va. 1984); Rocha Litig., No. V-79-26, 1982 U.S. Dist. LEXIS 15164, at *21–22 (S.D. Tex. Aug. 23, 1982). Non-covered cases: Liberty County Commissioners Litig. (FL), 865 F.2d 1566, 1582 (11th Cir. 1988); Metro Dade County Litig., 805 F. Supp. 967, 981, 991–92 (S.D. Fla. 1992); City of Starke Litig., 712 F. Supp. 1523, 1529 (M.D. Fla. 1989); City of Boston Litig., 609 F. Supp. 739, 744–45 (D. Mass. 1985); City of Fort Lauderdale Litig., 617 F. Supp. 1093, 1104–05 (S.D. Fla. 1985).

346. *See, e.g.*, Nipper Litig. (FL), 39 F.3d 1494, 1507–08 (11th Cir. 1994); Dallas County Comm'n Litig. (AL), 739 F.2d 1529, 1537–38 (11th Cir. 1984); Columbus County Litig., 782 F. Supp. 1097, 1103–05 (E.D.N.C. 1991) (finding depressed socioeconomic status and lower levels of minority voter turnout, despite roughly equivalent voter registration numbers); County of Big Horn (Windy Boy) Litig., 647 F. Supp. 1002, 1016–17 (D. Mont. 1986) (same); Gretna Litig., 636 F. Supp. 1113, 1116–20 (E.D. La. 1986) (same).

347. *See* Fort Bend Indep. Sch. Dist. Litig. (TX), 89 F.3d 1205, 1220 (5th Cir. 1996); Town of Hempstead Litig., 956 F. Supp. 326, 342 (E.D.N.Y. 1997).

348. *See* McCarty Litig. (TX), 749 F.2d 1134, 1135–37 (5th Cir. 1984); Rodriguez Litig., 308 F. Supp. 2d 346, 435 (S.D.N.Y. 2004); Alamosa County Litig., 306 F. Supp. 2d 1016, 1035–38 (D. Colo. 2003); Suffolk County Litig., 268 F. Supp. 2d 243, 265 (E.D.N.Y. 2003); City of Chi. Heights Litig., Nos. 87 C 5112, 88 C 9800, 1997 WL 102543, at *10 (N.D. Ill. Mar. 5, 1997); Mallory-Ohio Litig., 38 F. Supp. 2d 525, 542, 566 (S.D. Ohio 1997); Town of Babylon Litig., 914 F. Supp. 843, 887–89 (E.D.N.Y. 1996); Kent County Litig., 790 F. Supp 738,

Other courts looked beyond registration and turnout statistics when assessing Factor 5. Six courts, for example, examined the effect of various forms of de facto racial segregation on the ability of minority groups to participate in the political process.[349] Thus, the district court in the *Charleston County* litigation noted severe societal and housing segregation and found that this ongoing racial separation "makes it especially difficult for African-American candidates seeking county-wide office to reach out to and communicate with the predominately white electorate from whom they must obtain substantial support to win an at-large elections [sic]."[350] The district court in the *Neal* litigation likewise concluded that similar segregation meant "that whites in the County have historically had little personal knowledge of or social contact with blacks . . . . Quite simply, whites do not know blacks and are, as a result, highly unlikely to vote for black candidates."[351]

Causation: Five courts found Factor 5 unsatisfied despite specific evidence of both depressed socioeconomic status and low levels of political participation.[352] These courts required additional evidence showing discrimination directly caused depressed participation.

Some defendants have argued that low participation results not from discrimination, but instead from voter apathy. Courts in four lawsuits agreed.[353] At least five other courts, however, attributed voter apathy to the sources of discrimination Factor 5 identifies.[354] In the *City of Gretna* litigation, for example, the district court noted

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744, 749 (W.D. Mich. 1992); Turner Litig., 784 F. Supp. 553, 576–77 (E.D. Ark. 1991); Chickasaw County I Litig., 705 F. Supp. 315, 320–21 (N.D. Miss. 1989).

349. *See* County of Thurston Litig. (NE), 129 F.3d 1015, 1023 (8th Cir. 1997); LULAC v. Clements Litig. (TX), 986 F.2d 728, 782 & n.41 (5th Cir. 1993); Charleston County Litig., 316 F. Supp. 2d 268, 282–92 (D.S.C. 2003); Neal Litig., 689 F. Supp. 1426, 1428–31 (E.D. Va. 1988); Terrazas Litig., 581 F. Supp. 1329, 1348–51 (N.D. Tex. 1984); Terrell Litig., 565 F. Supp. 338, 341–342 (N.D. Tex. 1983).

350. Charleston County Litig., 316 F. Supp. 2d 268, 291 (D.S.C. 2003).

351. Neal Litig., 689 F. Supp. 1426, 1430 (E.D. Va. 1988).

352. City of St. Louis Litig., 896 F. Supp. 929, 942–43 (E.D. Mo. 1995) (notwithstanding socio-economic disparities, differences in turnout could be attributable to voter apathy); Armstrong v. Allain Litig., 893 F. Supp. 1320, 1332–33 (S.D. Miss. 1994) (same); City of Columbia Litig., 850 F. Supp. 404, 423 (D.S.C. 1993) (same); Sw. Tex. Junior Coll. Dist. Litig., No. DR-88-CA-18, 1991 WL 367969, at *3–7 (W.D. Tex. Feb. 25, 1991) (same); *see also* Carrollton NAACP Litig. (GA), 829 F.2d 1547, 1561 (11th Cir. 1987) (finding that the defendant had sufficiently carried its burden to disprove "any causal connection between economic disparities and reduced political participation by minorities").

353. *See id.*

354. Bone Shirt Litig., 336 F. Supp. 2d 976, 1040 (D.S.D. 2004) ("People living on a day-to-day basis wonder if they can heat their home. Those are not the kinds of people who are the most predisposed to go out and engage in a great deal of political campaigning or activity." (internal quotation omitted)); Attala County Litig. (MS), 92 F.3d 283, 293–95 (5th Cir. 1996); Gretna Litig., 636 F. Supp. 1113, 1120 (E.D. La. 1986); Terrazas Litig., 581 F. Supp. 1329, 1348–51 (N.D. Tex. 1984); Major Litig., 574 F. Supp. 325, 339–41 (E.D. La. 1983).

that "[d]epressed levels of participation in voting and candidacy are inextricably involved in the perception of futility and impotence" engendered by "severe historical disadvantage."[355] The court concluded that "[t]hese historical disadvantages continue through the present day and undoubtedly hinder the ability of the black community to participate effectively in the political process within the City of Gretna."[356]

In two lawsuits, courts required plaintiffs to establish that official discrimination by the defendant jurisdiction caused the current socioeconomic disparities.[357] In three cases, district courts discounted evidence of low socioeconomic status among Latinos because the evidence did not distinguish recent immigrants from longstanding residents. This approach posits that new immigrants cannot bear the effects of discrimination in housing, employment or health within the meaning of Factor 5 and thus the failure to distinguish them from other members of the minority group leaves courts unable to find the factor satisfied.[358]

Intransigence of Inequality: Some courts viewed low socioeconomic status as too intransigent to receive significant weight.[359] In the *Magnolia Bar Association* litigation, the district court concluded that Factor 5 described a condition too common to weigh heavily in plaintiffs' favor. The court observed that because "the socioeconomic standing of blacks vis-à-vis whites has changed little and it is unlikely that standing will improve markedly in the foreseeable future," continuing socioeconomic effects of discrimination "will be a factor on which the plaintiffs in voting rights cases will always win in the foreseeable future."[360]

6. Racial Appeals in Campaigns—The sixth factor in the Senate Report instructs courts to assess whether political campaigns have been characterized by overt or subtle racial appeals.[361] In 33 cases courts identified one or more such appeals and found the factor

355. Gretna Litig., 636 F. Supp. 1113, 1120 (E.D. La. 1986).

356. *Id.*

357. Milwaukee NAACP Litig., 935 F. Supp. 1419, 1427, 1433 (E.D. Wis. 1996) (finding no evidence had traced the continuing socioeconomic disparities to discrimination in the challenged county or state of Wisconsin); Cincinnati Litig., No. C-1-92-278, 1993 WL 761489, at *11 (S.D. Ohio July 8, 1993) ("While the effects of discrimination in such areas as education, employment and housing do hinder the ability of some African-Americans personally to finance political campaigns, the defendants have neither created these conditions nor do they intentionally maintain them.").

358. *See* Pasadena Indep. Sch. Dist. Litig., 958 F. Supp. 1196, 1225 (S.D. Tex. 1997); Aldasoro v. Kennerson Litig., 922 F. Supp. 339, 365 (S.D. Cal. 1995); El Paso Indep. Sch. Dist. Litig., 591 F. Supp. 802, 807, 809–10 (W.D. Tex. 1984).

359. *See, e.g.*, Calhoun County Litig., 813 F. Supp. 1189, 1200–01 (N.D. Miss. 1993).

360. *See* Magnolia Bar Ass'n Litig., 793 F. Supp. 1386, 1409 (S.D. Miss. 1992).

361. SENATE REPORT, *supra* note 17, at 29.

met. Eighteen (or 54.5%) of these 33 lawsuits were in covered jurisdictions, while 15 were in non-covered jurisdictions. Of the 20 successful lawsuits finding this factor, 12 (or 60%) occurred in covered jurisdictions.[362]

Some courts noted that campaigns generally have been marked by racial appeals,[363] but most decisions finding Factor 6 identified appeals in specific campaign years. These courts identified racial appeals in 73 specific elections occurring in 1950, 1954, 1960, 1968, 1970, 1972–1977, 1982–1985, 1987–1992, 1994, 1995, 2000 and 2002.[364] Courts finding Factor 6 identified 47 specific racial appeals or campaigns characterized by racial appeals since 1982. Of these, 30 occurred in covered jurisdictions.[365]

While some courts have stated without elaboration that specific elections have been marked by racial appeals,[366] others have identified racial appeals in a wide range of conduct. Courts have disagreed, however, as to what conduct should be considered a racial appeal.

Identification of the Candidate's Race: In six lawsuits, courts identified as racial appeals a variety of statements in which a candidate's race was identified, including comments by white candidates or their campaign workers that their opponent was black,[367] statements by minority candidates in which they identified their minority status,[368] and newspaper articles that mentioned the race of the candidates.[369]

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362. *See* VRI Database Master List, *supra* note 39.

363. *See, e.g.*, Columbus County Litig., 782 F. Supp. 1097, 1105 (E.D.N.C. 1991).

364. *See Racial Appeals Documented in Section 2 Litigation: Timeline and Citations*, Ellen Katz and the Voting Rights Initiative (2006), *at* http://www.votingreport.org.

365. *See id.*

366. *See, e.g.*, Dillard v. Crenshaw Litig., 649 F. Supp. 289, 295 (M.D. Ala. 1986).

367. *See* LULAC v. Clements Litig. (TX), 999 F.2d 831, 879 (5th Cir. 1993) (finding that a judicial candidate had been labeled a "Black Muslim" by his opponent); City of Dallas Litig., 734 F. Supp. 1317, 1339 (N.D. Tex. 1990) (finding in the 1972 Precinct 7 Constable's race, the incumbent used ads describing his African-American opponent in this manner: "*A black man* (no qualifications of any kind)").

368. *See* Alamosa County Litig., 306 F. Supp. 2d 1016, 1025–26 (D. Colo. 2004) (identifying as a "subtle ethnic appeal" Marguerite Salazar's 1992 campaign for county commission in which "she ran as a designated Hispanic role model immediately after joining the Hispanic Leadership Institute").

369. *See* Bone Shirt Litig., 336 F. Supp. 2d 976, 1041 (D.S.D. 2004) (characterizing as a racial appeal the headline in the state's largest newspaper, trumpeting "HUNHOFF PICKS INDIAN WOMAN AS RUNNING MATE"); Armour Litig., 775 F. Supp. 1044, 1056 (N.D. Ohio 1991) ("[T]hroughout the [1985] primary race, the media focused on Starks' race, consistently describing him as the black candidate for Mayor."); Neal Litig., 689 F. Supp. 1426, 1431–32 (E.D. Va. 1988) (noting a racial appeal in an editorial that identified two candidates as black and "clearly favored the re-election of the 'more experienced' incumbents.").

Photographs: Numerous courts have identified the use of photographs in campaign flyers and advertisements as racial appeals. The majority of these cases involved campaign materials distributed by a white candidate or the candidate's supporters that featured the photograph of an African-American opponent.[370]

No court has deemed the decision by a newspaper to publish candidates' photographs a racial appeal.[371] In the *City of Jackson* litigation, for example, the district court acknowledged that the publication of candidates' photographs might prompt "some white voters [to] vote for a white candidate and some black voters [to] vote for a black candidate," but, the court concluded, "that is merely a fact of political life in Jackson."[372]

Two lawsuits characterized as racial appeals the manipulation of photographs to darken the skin of opposing candidates, be they minority or white. The *Charleston County* litigation recounted the use of this tactic in three separate campaigns occurring in 1988, 1990, and 1992. In each instance, white candidates and their campaigns distributed official campaign literature or placed newspaper ads featuring the darkened photos of African-American opponents.[373] The *City of Philadelphia* litigation discussed the use of similar tactics in two different campaigns. In a state senate campaign in the early 1990s, one white candidate published a brochure containing a darkened photograph of his white opponent next to a photograph of Philadelphia's black mayor.[374] The other involved a televised campaign advertisement in the 1985 district attorney campaign that portrayed light-skinned African-American candidates as having much darker skin.[375]

The Specter of Minority Governance: Courts have held Factor 6 satisfied by a variety of allusions or threats of minority control of

370. *See* S. Christian Leadership Litig. (AL), 56 F.3d 1281, 1290 n.17 (11th Cir. 1995); LULAC v. Clements Litig. (TX), 999 F.2d 831, 879 (5th Cir. 1993); Charleston County Litig., 316 F. Supp. 2d 268, 294–97 (D.S.C. 2003); White v. Ala. Litig., 867 F. Supp. 1519, 1556 (M.D. Ala. 1994); Brunswick County, VA Litig., 801 F. Supp. 1513, 1518 (E.D. Va. 1992); Magnolia Bar Ass'n Litig., 793 F. Supp. 1386, 1410 (S.D. Miss. 1992); Mehfoud Litig., 702 F. Supp. 588, 595 (E.D. Va. 1988); *see also* Charleston County Litig., 316 F. Supp. 2d 268, 295 (D.S.C. 2003) (classifying as a racial appeal a campaign flyer from a race involving two white candidates that featured the photograph of an African-American elected official unassociated with either of the white candidates).

371. *See, e.g.*, Jenkins v. Red Clay Sch. Dist. Litig., 780 F. Supp. 221, 237 (D. Del. 1991) (concluding that a newspaper article with accompanying photographs of black and white candidates was not a racial appeal because the "candidates [were] not referred to in any disparaging manner"); City of Jackson, TN Litig., 683 F. Supp. 1515, 1534–35 (W.D. Tenn. 1988).

372. City of Jackson, TN Litig., 683 F. Supp. 1515, 1534–35 (W.D. Tenn. 1988).

373. Charleston County Litig., 316 F. Supp. 2d 268, 294–97 (D.S.C. 2003).

374. City of Phila. Litig., 824 F. Supp. 514, 537 (E.D. Pa. 1993).

375. *Id.*

government. Conduct of this sort includes references by white candidates or their campaigns that minority voters will engage in "bloc voting" and turn out in high numbers,[376] that a minority will be elected if whites do not turn out,[377] and that minority candidates, when elected, will appoint other minorities to positions of power.[378]

Statements by white candidates that the minority community wants to "take over" the local government and the country are similarly characterized.[379] In the *Armour* litigation, for example, campaign workers for a white 1985 mayoral candidate went door-to-door telling voters that if the black candidate was elected, "his cabinet would be black."[380] They also drove a sound truck around Youngstown announcing that should the minority candidate be elected "we will have a black police chief, we will have a black fire chief," and adding "we cannot have that."[381] More recently, in the *Bone Shirt* litigation, the district court identified racial appeals occurring during the 2002 primary elections for county commission, in which three Native American candidates confronted accusations that Indians were seeking to "take over the county politically . . . [and] trying to take land back and put it in trust."[382]

In-group and Out-group: Two courts identified as racial appeals campaign advertisements making reference to a candidate's being "one of us"[383] or promising to stand against vandalism and crime

376. *See, e.g.*, City of Dallas Litig., 734 F. Supp. 1317, 1339 n.34 (N.D. Tex. 1990) (noting that a white slating group warned of the "Mass Block Voting Tactics" in the black areas of South Dallas in 1970); *id.* at 1348 ("Folsom also distributed a leaflet charging that Weber was attempting to win the election with a 'massive black turnout,' and threatening that 'Garry Weber's South Dallas Machine is going to elect the next mayor' thanks to the efforts of 'professional black campaigners who will turn out unprecedented numbers of blacks voting for Weber.' "); Neal Litig., 689 F. Supp. 1426, 1431–32 (E.D. Va. 1988) (quoting newspaper editorial statement that a black candidate's campaign was " 'of great concern to many county residents' because [he] could earn 'solid black support' to defeat the veteran incumbent").

377. *See, e.g.*, Jeffers Litig., 730 F. Supp. 196, 212 (E.D. Ark. 1989) ("In the Mayor's race in Pine Bluff in 1975, for example, a supporter of a white candidate publicly warned that if white voters didn't turn out, there would be a black mayor.").

378. *See, e.g.*, Armour Litig., 775 F. Supp. 1044, 1056 (N.D. Ohio 1991).

379. *See, e.g.*, City of Phila. Litig., 824 F. Supp. 514, 536 n.19 (E.D. Pa. 1993) ("In the 1983 mayoral election, Mayor Goode testified that his opponent, former Mayor Frank Rizzo, attempted to associate Mayor Goode with Jesse Jackson and Harold Washington, implying that Mayor Goode's candidacy was part of 'a movement by blacks to take over all across the country.' ").

380. Armour Litig., 775 F. Supp. 1044, 1056 (N.D. Ohio 1991).

381. *Id.*

382. Bone Shirt Litig., 336 F. Supp. 2d 976, 1041 (D.S.D. 2004).

383. Jordan Litig., 604 F. Supp. 807, 813 n.8 (N.D. Miss. 1984) ("One campaign television commercial sponsored by the white candidate whose slogan was 'He's one of us' opened and closed with a view of Confederate monuments accompanied by this audio message: You know, there's something about Mississippi that outsiders will never, ever

that "drive our people and our businesses out" of the community.[384] In the *City of Holyoke* litigation the district court categorized as a racial appeal the "us versus them" sentiment featured in one candidate's 1987 campaign materials where "[t]he 'us' was fairly clearly the longtime white residential community, the 'them' the more recent Hispanic minority."[385] The district court noted, for example, the campaign's focus on "teach[ing] the 'Spanish' English . . . as an answer to increasing crime and vandalism" and featured an advertisement with a "large picture of an Hispanic young man, cigarette dangling from his lips and the caption 'The people who really should read this, can't.' "[386]

Race-baiting: In the *Charleston County* litigation, the district court identified as a racial appeal the efforts to increase turnout among voters perceived to be "anti-black."[387] In 1990, the campaign of a candidate for Lieutenant Governor of South Carolina paid Benjamin Hunt, Jr., "a nearly illiterate African-American man" to run in a congressional primary.[388] The candidate took no part in the campaign beyond allowing his picture to be taken while standing in front of a Kentucky Fried Chicken restaurant. The would-be Lieutenant Governor's campaign mailed out thousands of leaflets featuring this picture with the caption "Hunt for Congress."[389]

Also counting as racial appeals are statements suggesting racial strife or even violence will ensue if minority candidates or candidates associated with minority interests were supported or elected.[390]

Guilt by Association: Efforts to link a candidate with polarizing figures or organizations have been deemed racial appeals. Three courts, for example, have identified as racial appeals statements by white candidates linking a minority candidate with Jesse Jackson or

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understand. The way we feel about our family and God, and the traditions that we have. There is a new Mississippi, a Mississippi of new jobs and new opportunity for all our citizens. [video pan of black factory workers] We welcome the new, but we must never, ever forget what has gone before. [video pan of Confederate monuments] We cannot forget a heritage that has been sacred through our generations.").

384. City of Holyoke Litig., 880 F. Supp. 911, 922 (D. Mass. 1995).

385. *Id.*

386. *Id.*

387. Charleston County Litig., 316 F. Supp. 2d 268, 296 (D.S.C. 2003).

388. *Id.*

389. *Id.*

390. *See, e.g.*, City of Dallas Litig., 734 F. Supp. 1317, 1368 (W.D. Tex. 1990) (counting as a racial appeal a 1989 newspaper column indicating that "a 'protest vote' for lawyer and 'civic gadfly,' Peter Lesser . . . could lead to racial violence and white flight"); *id.* at 1348 (citing a leaflet that accused opponent's campaign of "planting lies and rekindling old fires that could set Black/White relations back 20 years," and told black voters "[n]o one, Black or White, will benefit from the hostilities between the Races [that] Garry Weber's hate-campaign is trying to force").

Louis Farrakhan and the Nation of Islam.[391] Another characterized as a racial appeal statements by an African-American candidate that his white opponent was supported by the Ku Klux Klan.[392]

Courts have also found evidence supporting a finding of Factor 6 in efforts to link a white opponent with minority elected officials or issues of minority concern. For example, two district courts classified as racial appeals the campaign literature of white candidates who featured photographs of their opponents, also white, alongside pictures of African-American elected officials.[393] Another district court identified as a racial appeal a private slating organization's reference to a white candidate's association with a black candidate and his support for voter registration in the minority community.[394]

Discussion of Racially Charged Issues: In five lawsuits courts identified as racial appeals candidates' statements on certain racially

391. *See, e.g.*, Metro Dade County Litig., 805 F. Supp. 967, 981–82 (S.D. Fla. 1992) ("Recent elections demonstrate how successfully candidates and their supporters have engaged in a tactic of 'guilt by association' to defeat Black opponents. . . . For example, voters have been told that Black candidates share common goals with Jesse Jackson or Nelson Mandela, two political figures strongly supported in the Black community, but opposed in some Cuban and Jewish communities."); City of Phila. Litig., 824 F. Supp. 514, 536 n.19 (E.D. Pa. 1993) ("Mayor Goode testified that in the 1987 mayoral primary election, Ed Rendell, Goode's opponent, attempted to associate Mayor Goode with Louis Farrakhan, a controversial Muslim leader."); City of Dallas Litig., 734 F. Supp. 1317, 1365 (N.D. Tex. 1990) ("On March 4, 1988, a Dallas Morning News article reported that a candidate for Criminal District Court No. 2, who was running against the African-American incumbent, mailed 77,000 fliers criticizing her opponent because he had changed his name to 'Baraka' after converting to Islam and becoming 'a follower of Malcolm X, the slain Islamic leader and black nationalist.'").

392. Wamser Litig., 679 F. Supp. 1513, 1515 (E.D. Mo. 1987) ("In his 1987 primary campaign, Roberts [an African-American] made overt racial appeals to black voters. Roberts accused a white opponent–Osborn–of being backed by 'the Klan.'").

393. Charleston County Litig., 316 F. Supp. 2d 268, 295 (D.S.C. 2003) (noting a campaign flyer from a 2000 race involving two white candidates that featured the darkened photograph of an African-American school board member from a separate district whose permission to use the picture had neither been sought nor granted); City of Phila. Litig., 824 F. Supp. 514, 537 n.20 (E.D. Pa. 1993) (mentioning campaign material distributed in an early 1990s state senate race between two white candidates where one candidate published a darkened picture of his white opponent in a brochure along with the picture of Philadelphia's black mayor).

394. City of Dallas Litig., 734 F. Supp. 1317, 1339 n.34 (W.D. Tex. 1990) ("During the run-off election for two State Representative districts in June of 1970, the 'Democratic Committee for Responsible Government' attacked a white candidate . . . because he was 'running in South Dallas . . . as a team' with a black candidate . . . and because he had raised money 'for voter registration activities, mostly in predominately Black or Latin-American neighborhoods.'"); *see also* Gingles Litig., 590 F. Supp. 345, 364 (E.D.N.C. 1984) (noting crude cartoons and pamphlets of the campaigns marked by outright white supremacy in the 1890s which featured white political opponents in the company of black political leaders and later appeals with the same theme).

charged issues. These issues included illegal immigration,[395] low income housing,[396] busing and school desegregation,[397] and crime.[398] In the *Town of Hempstead* litigation, the district court found a racial appeal in a campaign brochure distributed by a candidate for town council in 1987. The brochure noted the candidate's awareness of "his community's proximity to the City of New York," his opposition to those who would seek to "Queensify" the town, and his concern about the danger of "urban crime spilling over the county border." The brochure celebrated the candidate's efforts to "sensitize[] local patrolmen to the special concerns of the community," a statement the court identified as a reference to an "unofficial border patrol policy" under which the police were to stop black youth from Queens, "find out their business and ensure that they 'go back where they belong.' "[399]

One district court identified as a racial appeal public debate on a racially charged issue, absent any linkage to any particular candidate or campaign.[400] Another viewed such debate as evidence supporting the inference that other campaigns are characterized by racial appeals.[401]

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395. Garza v. L.A. Litig., 756 F. Supp. 1298, 1341 (C.D. Cal. 1990) ("Mr. Brophy distributed mailers which included Mr. Alatorre's photograph and alluded that Alatorre was sympathetic to undocumented aliens.").

396. City of Holyoke Litig., 880 F. Supp. 911, 922 (D. Mass. 1995) ("Proulx, for his part, attacked Dunn for not calling for a moratorium on all subsidized housing programs in Holyoke. Proulx explained that he supported such a moratorium with one important exception—subsidized elderly housing. The vast majority of government subsidized elderly housing in Holyoke was occupied by white non-Hispanic senior citizens."); Butts v. NYC Litig., 614 F. Supp. 1527, 1531 (S.D.N.Y. 1985) ("Badillo's opponents distributed literature misrepresenting or emphasizing Badillo's position on issues said to have racial connotations, such as scatter site subsidized housing.").

397. Town of Hempstead Litig., 956 F. Supp. 326, 342 (E.D.N.Y. 1997) ("In a late 1970s campaign for a State Senate seat from an Assembly District within the Town, the incumbent Republican appealed to the fears of Town residents that black students from Queens would be bused to schools in the Town. The campaign literature used pictures of black children in school buses to convey the message that voting for the Democratic opponent would result in such busing."); City of Dallas Litig., 734 F. Supp. 1317, 1348 (N.D. Tex. 1990) ("In *Place 9* [city council elections in 1976], Jesse Price campaigned against Bill Blackburn on a platform that included opposition to busing for school desegregation—and opposition to any court order requiring busing—saying he intended to 'hang Blackburn's stand on busing around his neck.' ").

398. Town of Hempstead Litig., 956 F. Supp. 326, 342–43 (E.D.N.Y. 1997); City of Holyoke Litig., 880 F. Supp. 911, 922 (D. Mass. 1995) ("Dunn's campaign literature featured the slogan 'It takes guts,' coupled with a teach the 'Spanish' English theme as an answer to increasing crime and vandalism.").

399. Town of Hempstead Litig., 956 F. Supp. at 343.

400. City of LaGrange Litig., 969 F. Supp. 749, 777 (N.D. Ga. 1997) ("[P]ublic debate about the consolidation of the local schools was marked by racial appeals and arguments.").

401. City of Greenwood Litig., 599 F. Supp. 397, 403 (N.D. Miss. 1984).

Not all courts treat the presence of racially charged issues in campaigns or general public debate as racial appeals. Three district courts rejected plaintiffs' contentions that candidates' discussion of busing and school desegregation should be classified as racial appeals.[402] The district court in the *City of Norfolk* litigation stated that the inclusion of such issues in campaigns was of "legitimate public concern and not an appeal to racial prejudices," and noted that both black and white candidates addressed the issue of busing "reluctantly and often only when questioned by the public about their stance."[403] Similarly, the court in the *St. Louis Board of Education* litigation stated that while school desegregation has "an undeniable racial dimension," plaintiffs presented no evidence that the issue was raised "in an effort to appeal to members of a particular race."[404] In the *Jenkins v. Red Clay School District* litigation, plaintiffs introduced into evidence a candidate's flyer that warned of increasing percentages of minority students at local high schools and the potential for "*major disruption* for our children!!!" While the court characterized the flyer as "shrill," it declined to characterize it as a racial appeal because it did not identify the race of any candidate nor "malign" them because of it.[405]

One district court refused to characterize debate about at-large and single-member districts as a racial appeal.[406] Another district court refused to "consider every discussion of or question about" Indian exemption from certain taxes a racial appeal, notwithstanding the district court's recognition that "white voters harbor a resentment over this issue, making white support for Indian candidates unlikely."[407]

Racial Bias in Press Coverage: Racial bias exhibited by the press has been deemed a racial appeal in two cases. In the *Bone Shirt* litigation, the court credited as evidence of racial appeals unsubstantiated and false news stories circulating throughout 2002 linking Native Americans to voter fraud.[408] Likewise, in the *City of Dallas* litigation, a 1989

402. St. Louis Bd. of Educ. Litig., 896 F. Supp. 929, 943 (E.D. Mo. 1995); Jenkins v. Red Clay Sch. Dist. Litig., 780 F. Supp. 221, 237–38 (D. Del. 1991); City of Norfolk Litig., 605 F. Supp. 377, 392 (E.D. Va. 1984).

403. City of Norfolk Litig., 605 F. Supp. 377, 392 (E.D. Va. 1984).

404. St. Louis Bd. of Educ. Litig.,896 F. Supp. 929, 943 (E.D. Mo. 1995).

405. Red Clay Sch. Dist. Litig., 780 F. Supp. 221, 237–38 (D. Del. 1991).

406. City of Austin Litig. (TX), 871 F.2d 529, 534 (5th Cir. 1989) (noting the lower court's dismissal of "appellants' contention that subliminal racial appeals accompanied the voters' rejection in 1985 of an amendment proposing single-member districts").

407. County of Big Horn (Windy Boy) Litig., 647 F. Supp. 1002, 1017–18 (D. Mont. 1986) ("Unlike plaintiffs, this court does not consider every discussion of or question about the taxation issue to be a racial campaign appeal.").

408. Bone Shirt Litig., 336 F. Supp. 2d 976, 1041 (D.S.D. 2004).

newspaper column warning that a vote for the African-American candidate running against the incumbent white mayor "could lead to racial violence and white flight" was classified as a racial appeal.[409]

Candidate Intimidation: Some courts have characterized as racial appeals conduct directed at minority candidates as opposed to voters. In the *Jeffers* litigation, for example, the court termed a racial appeal a black candidate's receipt of anonymous calls where the caller used obscenities and racial slurs as well as a later incident in which the same candidate was run off the road by a group of individuals wearing hoods.[410] *Jeffers* also deemed government retaliation against an unsuccessful minority candidate to be a racial appeal. Prior to his political involvement, the candidate had enjoyed a business relationship with the county that was terminated after his campaign.[411]

In the *Garza v. Los Angeles* litigation, the district court cited "substantial evidence" of racial appeals including hostility directed at a Latino candidate for city council who "had doors slammed in his face" while campaigning in a predominantly white neighborhood, and had his campaign literature destroyed.[412]

Racial Slurs or Stereotypes: Courts have also deemed a racial appeal the public use of racial epithets and slurs by white candidates running against black candidates.[413] One district court found a white official's admission before the court in 2002 that he casually and regularly used the word "nigger" to be a racial appeal, even though the plaintiffs made no allegation that racial appeals existed.[414]

So too, courts have identified stereotypes about minority candidates' lack of qualifications as racial appeals. The district court in the *Brunswick County, VA* litigation pointed to materials distributed in a 1991 election for Virginia State Senate. Although ultimately successful, the African-American female candidate was referred to as "'a welfare bureaucrat' and 'an inner-city resident' in her opponent's campaign literature."[415]

Additional examples described by the district court in the *City of Dallas* litigation include a 1970 advertisement where the white

409. City of Dallas Litig., 734 F. Supp. 1317, 1368 (N.D. Tex. 1990).
410. Jeffers Litig., 730 F. Supp. 196, 212–13 (E.D. Ark. 1989).
411. *Id.*
412. Garza v. L.A. Litig., 756 F. Supp. 1298, 1341 (C.D. Cal. 1990).
413. Jeffers Litig., 730 F. Supp. 196, 212 (E.D. Ark. 1989) ("[A]t a public rally [a white candidate running against a black candidate] used profanity and a racial epithet—not in his actual speech, to be sure, but in open conversation.").
414. St. Bernard Parish Sch. Bd. Litig., No. 02-2209, 2002 U.S. Dist. LEXIS 16540, at *33–34 (E.D. La. Aug. 26, 2002).
415. Brunswick County, VA Litig., 801 F. Supp. 1513, 1518 (E.D. Va. 1992).

incumbent described his opponent simply as "*A black man* (no qualifications of any kind)."[416] In the same case, the district court noted a boast made by a white female candidate and printed in the League of Women Voters 1972 voter guide that "[e]vidence of [her] proven ability" was the fact that no white men had filed to run against her, and that her only opponents were black men.[417] The district court in the *Neal* litigation identified a similar type of racial appeal in an editorial run in the local newspaper. The editorial announced the race of two black candidates only to go on to urge voters "not to vote on account of race, but rather on merit." Still, the editorial noted that one of the elections involving an African-American candidate was "of great concern to many county residents" because the black candidate could win "solid black support" and defeat the white incumbent. The editorial weighed in for the re-election of the "more experienced" incumbents.[418]

In most cases, plaintiffs seeking to prove Factor 6 introduce campaign literature and advertisements from previous elections, documentation of media coverage, and witness testimony from minority and non-minority candidates, elected officials, and community members. In the *Wamser* litigation, the district court looked beyond these usual sources of evidence and appeared to dismiss the defendant's expert testimony on racial appeals, based on the judge's own experience—"Dr. Wendel's observation that other political campaigns are devoid of racial appeals would be most credible perhaps to persons who were not in St. Louis during the recent campaign for the City school board."[419]

Several lawsuits identifying racial appeals discounted their import. Some characterized the appeals as merely "isolated" incidents.[420] Others called the appeals ineffective because the targeted candidate was elected, at times with significant white

416. City of Dallas Litig., 734 F. Supp. 1317, 1339 (N.D. Tex. 1990).

417. *Id.*

418. Neal Litig., 689 F. Supp. 1426, 1432 (E.D. Va. 1988).

419. Wamser Litig., 679 F. Supp. 1513, 1527 (E.D. Mo. 1987).

420. LULAC v. Clements Litig. (TX), 999 F.2d 831, 879 (5th Cir. 1993) (en banc) ("Nothing in the district court's opinion indicates that these racial appeals were anything more than isolated incidents."); Milwaukee NAACP Litig., 935 F. Supp. 1419, 1433 (E.D. Wis. 1996) ("[P]laintiffs . . . are able to point to only one judicial election which appears to have involved racial appeals: the 1996 general election between Judge Stamper and Robert Crawford. Assuming that the Stamper/Crawford election did, in fact, involve hostile racial conduct, one election in the past 25 years is hardly enough to prove a pattern."); City of Springfield Litig., 658 F. Supp. 1015, 1032 (C.D. Ill. 1987) (noting a racial slur directed at a black candidate at a luncheon meeting in 1982 and stating that this "single occurrence cannot support a claim that political campaigns in Springfield are carried out through subtle or overt racial appeals").

support.[421] In the *Alamosa County* litigation, the court identified "a fundamental electoral truth—that to be elected in Alamosa County, a candidate must appeal to both Anglo and Hispanic voters."[422] Racial appeals by Latino candidates certainly did not weigh in favor of a finding of vote dilution.

Eight lawsuits held that racial appeals occurred too long ago to be probative in contemporary claims.[423] Appeals deemed too remote include those occurring more than 30 years earlier,[424] as well as those occurring a decade past.[425] Two courts discounted evidence of racial appeals as outdated by noting a new political reality characterized by "racial harmony."[426]

In the *Charleston County* litigation, the court identified numerous racial appeals, but concluded without explanation that "[e]vidence of racial appeals has not materially assisted the Court in reaching a conclusion" on Section 2 liability.[427] Likewise, in the *Magnolia Bar Association* litigation, the district court acknowledged the presence of both overt and subtle racial appeals in campaigns, while concluding that "the appeal for voters by both black and white candidates crosses racial lines, thereby minimizing the importance of this factor under the totality of the circumstances."[428]

7. *Success of Minority Candidates*—Under Senate Factor 7, courts must evaluate the "extent to which members of the minority group have been elected to public office in the jurisdiction."[429] Of the lawsuits analyzed, 143 specifically addressed this factor, and 90 found a lack of minority candidate success.[430] Of these, 66 (or 73.3%) also

421. S. Christian Leadership Litig. (AL), 56 F.3d 1281, 1290 (11th Cir. 1995) (finding that appeals were "ineffective" as targeted black candidates won their races); LULAC v. Clements Litig. (TX), 999 F.2d 831, 879 (5th Cir. 1993) (en banc) ("In the only judicial election affected by a racial appeal, Judge Baraka, the black candidate, won both the Republican primary and the general election, winning a majority of the white vote in both elections."); Alamosa County Litig., 306 F. Supp. 2d 1016, 1025–26 (D. Colo. 2004) (noting ethnic appeals only by minority candidates who subsequently lost their elections).

422. Alamosa County Litig., 306 F. Supp. 2d 1016, 1025–26 (D. Colo. 2004).

423. City of Chi.-Barnett Litig., 969 F. Supp. 1359, 1449 (N.D. Ill. 1997); Liberty County Comm'rs Litig., 957 F. Supp. 1522, 1565 (N.D. Fla. 1997); Town of Babylon Litig., 914 F. Supp. 843, 889 (E.D.N.Y. 1996); Sanchez-Colo. Litig., 861 F. Supp. 1516, 1529 (D. Colo. 1994); City of Columbia Litig., 850 F. Supp. 404, 424 (D.S.C. 1993); Chattanooga Litig., 722 F. Supp. 380, 396 (E.D. Tenn. 1989); City of Boston Litig., 609 F. Supp. 739, 744–45 (D. Mass. 1985); El Paso Indep. Sch. Dist. Litig., 591 F. Supp. 802, 810 (W.D. Tex. 1984).

424. El Paso Indep. Sch. Dist. Litig., 591 F. Supp. 802, 810 (W.D. Tex. 1984).

425. Town of Babylon Litig., 914 F. Supp. 843, 889 (E.D.N.Y. 1996).

426. City of Columbia Litig., 850 F. Supp. 404, 424. (D.S.C. 1993); *see also* City of Boston Litig., 609 F. Supp. 739, 745 (D. Mass. 1985).

427. Charleston County Litig., 316 F. Supp. 2d 268, 304 (D.S.C. 2004).

428. Magnolia Bar Ass'n Litig., 793 F. Supp. 1386, 1410 (S.D. Miss. 1992).

429. SENATE REPORT, *supra* note 17, at 29.

430. *See* VRI Database Master List, *supra* note 39.

resulted in a favorable outcome for the plaintiffs. Fifty-one (56.7%) of the Factor 7 findings were in covered jurisdictions, while 39 (43.3%) were in non-covered jurisdictions.[431]

Courts evaluating Factor 7 generally examined minority success over the course of several elections, typically spanning decades.[432] Several cases distinguished elections occurring before the lawsuit was initiated from those occurring afterward, and often discounted evidence of post-filing minority success as the result of a strategic effort to frustrate the lawsuit.[433]

Unsurprisingly, Factor 7 weighed heavily in the plaintiffs' favor in cases where electoral results revealed a total failure or near-total failure of minority candidates to be elected.[434] Conversely, Factor 7 favored defendants where electoral results showed significant minority candidate success.[435]

A complete lack of modern electoral success was found more often in covered than in non-covered jurisdictions. In covered jurisdictions, 24 lawsuits challenging 32 governing bodies specifically found that no minority candidate had ever been elected in the post-1964 era.[436] Fourteen lawsuits in non-covered jurisdictions

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431. *See id.*

432. *See, e.g.*, Sanchez-Colo. Litig. (CO), 97 F.3d 1303, 1319 (10th Cir. 1996); Jefferson Parish I Litig. (LA), 926 F.2d 487 (5th Cir. 1991).

433. *See, e.g.*, City of Santa Maria Litig. (CA), 160 F.3d 543, 548 (9th Cir. 1998); Chickasaw County II Litig., No. CIV.A. 1:92CV142-JAD, 1997 WL 33426761, at *4 (N.D. Miss. Oct. 28, 1997); City of Springfield Litig., 658 F. Supp. 1015, 1031 (C.D. Ill. 1987).

434. *See, e.g.*, Seastrunk Litig. (LA), 772 F.2d 143, 153 (5th Cir. 1985); Albany County Litig., No. 03-CV-502, 2003 WL 21524820, at *11 (N.D.N.Y. July 7, 2003).

435. *See, e.g.*, Little Rock Litig., 831 F. Supp. 1453, 1460 (E.D. Ark. 1993).

436. *See* Hardee County Litig. (FL), 906 F.2d 524, 525 (11th Cir. 1990); Carrollton NAACP Litig. (GA), 829 F.2d 1547, 1559–61 (11th Cir. 1987); Seastrunk Litig. (LA), 772 F.2d 143, 153 (5th Cir. 1985); Lubbock Litig. (TX), 727 F.2d 364, 383–84 (5th Cir. 1984); Marengo County Litig. (AL), 731 F.2d 1546, 1572 (11th Cir. 1984); Opelika Litig. (AL), 748 F.2d 1473, 1476 (11th Cir. 1984); St. Bernard Parish Sch. Bd. Litig., No. CIV.A. 02-2209, 2002 WL 2022589, at *10 (E.D. La. Aug. 26, 2002); LULAC–N.E. Indep. Sch. Dist. Litig., 903 F. Supp. 1071, 1084–85 (W.D. Tex. 1995); Calhoun County Litig., 813 F. Supp. 1189, 1193 (N.D. Miss. 1993); Holder v. Hall Litig., 757 F. Supp. 1560, 1564–65 (M.D. Ga. 1991); Monroe County Litig., 740 F. Supp. 417, 424 (N.D. Miss. 1990); Westwego Litig., NO. 84-5599, 1989 WL 73332, at *5 (E.D. La. June 28, 1989); Chickasaw County I, 705 F. Supp. 315, 319–20 (N.D. Miss. 1989); Jefferson Parish I Litig., 691 F. Supp. 991, 995 (E.D. La. 1988); Mehfoud Litig., 702 F. Supp. 588, 590 (E.D. Va. 1988); Baytown Litig., 696 F. Supp. 1128, 1136 (S.D. Tex. 1987); Houston v. Haley Litig., 663 F. Supp. 346, 354 (N.D. Miss. 1987); Dillard v. Crenshaw Litig., 640 F. Supp. 1347, 1360 (M.D. Ala. 1986); Gretna Litig., 636 F. Supp. 1113, 1122 (E.D. La. 1986); Halifax County Litig., 594 F. Supp. 161, 165 (E.D.N.C. 1984); Jordan Litig., 604 F. Supp. 807, 812 (N.D. Miss. 1984); City of Greenwood Litig., 534 F. Supp. 1351, 1354 (N.D. Miss. 1982); Dallas County Comm'n Litig., 548 F. Supp. 794, 850–51 (S.D. Ala. 1982); Rocha Litig., No. V-79-26, 1982 U.S. Dist. LEXIS 15164, at * 16–17 (S.D. Tex. Aug. 23, 1982).

challenging 17 governing bodies made the same finding.[437] In 22 suits, courts in non-covered areas found significant and sustained electoral success in the defendant jurisdictions[438] while the same finding was made in only eight covered suits.[439]

Electoral results do not constitute the entire inquiry under Factor 7. Numerous courts have also considered the record of minority electoral success in conjunction with population statistics. While Section 2 is explicit that the statute provides no right to proportional representation,[440] some courts have viewed proportional minority representation (or its absence) as informing the Factor 7 inquiry. Several courts deemed the absence of such representation to suggest a lack of minority electoral success under Factor 7,[441]

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437. *See* Blaine County Litig. (MT), 363 F.3d 897, 900 (9th Cir. 2004); Davis v. Chiles Litig. (FL), 139 F.3d 1414, 1417–18 (11th Cir. 1998); Sanchez-Colo. Litig. (CO), 97 F.3d 1303, 1319 (10th Cir. 1996); Watsonville Litig. (CA), 863 F.3d 1407, 1417 (9th Cir. 1988); Escambia County Litig. (FL), 638 F.2d 1239, 1240–41 (5th Cir. 1981); Montezuma-Cortez Sch. Dist. Litig., 7 F. Supp. 2d 1152, 1170 (D. Colo. 1998); Cousin Litig., 840 F. Supp. 1210, 1219 (E.D. Tenn. 1994); DeSoto County Litig., 868 F. Supp. 1376, 1380 (M.D. Fla. 1994); Emison v. Growe, 782 F. Supp. 427, 437 (D. Minn. 1992); Armour Litig., 775 F. Supp. 1044, 1056 (N.D. Ohio 1991); City of Jackson, TN Litig., 683 F. Supp. 1515, 1535 (W.D. Tenn. 1988); Smith-Crittendon County Litig., 687 F. Supp. 1310, 1311 (E.D. Ark. 1988); City of Springfield Litig., 658 F. Supp. 1015, 1031 (C.D. Ill. 1987); Haywood County Litig., 544 F. Supp. 1122, 1135 (W.D. Tenn. 1982).

438. Old Person Litig. (MT), 230 F.3d 1113, 1129 (9th Cir. 2000); Jenkins v. Red Clay Sch. Dist. Litig. (DE), 116 F.3d 685, 695–96 (3d Cir. 1997); Little Rock Litig. (AR), 56 F.3d 904, 911 (8th Cir. 1995); Nat'l City Litig. (CA), 976 F.2d 1293, 1294 (9th Cir. 1992); City of Fort Lauderdale Litig. (FL), 787 F.2d 1528, 1533 (11th Cir. 1986); Alamosa County Litig., 306 F. Supp. 2d 1016, 1024 (D. Colo. 2004); Black Political Task Force Litig., 300 F. Supp. 2d 291, 313 (D. Mass. 2004); Rodriguez Litig., 308 F. Supp. 2d 346, 436–37 (S.D.N.Y 2004); Guy Litig., No. Civ.A. 00-831-KAJ, 2003 WL 22005853, at *3 (D. Del. Aug. 20, 2003); African-American Voting Rights LDF Litig., 994 F. Supp. 1105, 1125 (E.D. Mo. 1997); City of Chi.-Barnett Litig., 969 F. Supp. 1359, 1449 (N.D. Ill. 1997) (finding for both Barnett and Bonilla plaintiffs' suits); City of Holyoke Litig., 960 F. Supp. 515, 526 (D. Mass. 1997); Milwaukee NAACP Litig., 935 F. Supp. 1419, 1433 (E.D. Wis. 1996); Aldasoro Litig., 922 F. Supp. 339, 343–44 (S.D. Cal. 1995); Cincinnati Litig., No. C-1-92-278, 1993 WL 761489, at *23 (S.D. Ohio July 8, 1993); City of Phila. Litig., 824 F. Supp. 514, 537–58 (E.D. Pa. 1993); Kent County Litig., 790 F. Supp. 738, 748–49 (W.D. Mich. 1992); Nash Litig., 797 F. Supp. 1488, 1506 (W.D. Mo. 1992); Orange County Litig., 783 F. Supp. 1348, 1359–60 (M.D. Fla. 1992); Stockton Litig., No. S-87-1726 EJG, 1988 U.S. Dist. LEXIS 17601, at *18 (E.D. Cal. Mar. 10, 1988); City of Boston Litig., 609 F. Supp. 739, 748 (D. Mass. 1985).

439. City of Rome Litig. (GA), 127 F.3d 1355, 1381 (11th Cir. 1997); Lucas Litig. (GA), 967 F.2d 549, 553 (11th Cir. 1992); City of Austin Litig. (TX), 871 F.2d 529, 538 (5th Cir. 1989); City of Cleveland Litig., 297 F. Supp. 2d 901, 907–08 (N.D. Miss. 2004); Perry Litig., 298 F. Supp. 2d 451, 499–500 (E.D. Tex. 2004); S.C. Democratic Party Litig., No. 4-04-CV-2171-25, 2004 U.S. Dist. LEXIS 27299, at *7 (D.S.C. Sept. 3, 2004); City of Columbia Litig., 850 F. Supp. 404, 425 (D.S.C. 1993); Butts v. NYC Litig., 614 F. Supp. 1527, 1547 (S.D.N.Y. 1985).

440. *See* 42 U.S.C. § 1973(b) (2005) (providing that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population").

441. *See, e.g.*, Bridgeport Litig., No. 3:93CV1476 (PCD), 1993 WL 742750, at *3 (D. Conn. Oct. 27, 1993); Operation Push Litig., 674 F. Supp. 1245, 1265 (N.D. Miss. 1987).

while others viewed evidence that minority officeholders approached or exceeded the proportion of minorities in the electorate as proof of minority electoral success.[442]

The nature and prominence of the offices to which minority candidates had been elected also informed the Factor 7 inquiry. Some courts deemed the absence of minority candidates in top offices evidence of a lack of minority success, notwithstanding minority election to "lesser" positions.[443] Other courts viewed minority success in these "lesser" elections as sufficient evidence of minority electoral success, even where minority candidates did not win top offices.[444]

Many courts compared minority electoral success in endogenous elections to elections for governing bodies not challenged in the same suit. For some courts, the success of minority candidates in exogenous elections was sufficient evidence of minority electoral success, even where minority candidates did not win any office in the challenged jurisdiction.[445] Most, however, emphasized that such exogenous elections were less probative of electoral difficulty or success.[446] Some courts accorded almost no weight to exogenous electoral evidence,[447] and several appellate courts reversed district court decisions which found plaintiffs had failed to meet Factor 7 based on exogenous electoral success.[448]

Some courts cited the appointment of minority officials to support a finding that Factor 7 had,[449] or had not been met.[450] Where, for instance, minority electoral "success" hinges on the advantages of incumbency secured through appointment, some courts have found that such "success" has little bearing on the ability of minority candidates to win elections generally.[451]

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442. *See, e.g.*, City of Rome Litig. (GA), 127 F.3d 1355, 1381 (11th Cir. 1997); Suffolk County Litig., 268 F. Supp. 2d 243, 266 (E.D.N.Y. 2003). *But see* Old Person Litig. (MT), 312 F.3d 1036, 1048 (9th Cir. 2002); Terrazas Litig., 581 F. Supp. 1329, 1355–56 (N.D. Tex. 1984).

443. *See, e.g.*, Bridgeport Litig., No. 3:93CV1476 (PCD), 1993 WL 742750, at *3 (D. Conn. Oct. 27, 1993).

444. *See, e.g.*, Butts v. NYC Litig. (NY), 779 F.2d 141, 150 (2d Cir. 1985).

445. *See, e.g.*, Meza Litig., 322 F. Supp. 2d 52, 72 (D. Mass. 2004).

446. *See, e.g.*, NAACP v. Fordice Litig. (MS), 252 F.3d 361, 370 (5th Cir. 2001); Lafayette County Litig., 20 F. Supp. 2d 996, 1003 (N.D. Miss. 1998).

447. *See, e.g.*, Smith-Crittenden County Litig., 687 F. Supp. 1310, 1317 (E.D. Ark. 1988); City of Jackson, TN Litig., 683 F. Supp. 1515, 1535 (W.D. Tenn. 1988).

448. *See, e.g.*, Sanchez-Colo. Litig. (CO), 97 F.3d 1303, 1324–25 (10th Cir. 1996); Carrollton NAACP Litig. (GA), 829 F.2d 1547, 1560–61 (11th Cir. 1987).

449. *See, e.g.*, Bone Shirt Litig., 336 F. Supp. 2d 976, 1042–43 (D.S.D. 2004); Metro Dade County Litig., 805 F. Supp. 967, 982 (S.D. Fla. 1992).

450. *See* City of Rome Litig. (GA), 127 F.3d 1355, 1384 n.18 (11th Cir. 1997); Niagara Falls Litig. (NY), 65 F.3d 1002, 1021 (2d Cir. 1995).

451. *See, e.g.*, Town of Hempstead Litig. (NY), 180 F.3d 476, 495 (2d Cir. 1999).

Several lawsuits looked beyond electoral results to assess the number of minority candidates participating in given races. Some courts noted that the failure of minority citizens to "offer themselves" as candidates weighed against finding a lack of minority electoral success.[452] Other courts, however, considered the possibility that a dearth of minority candidates might itself stem from "the very barriers to political participation that Congress has sought to remove"[453] and weighed the small number of minority candidates in favor of plaintiffs.[454] A few lawsuits included within the Factor 7 inquiry undertake an examination of the qualifications of successful and unsuccessful minority candidates. Evidence suggesting that minority candidates were not serious or viable weighed against plaintiffs in the *Fort Bend Independent School District* litigation,[455] while the defeat of well-qualified minority candidates contributed to findings of a lack of minority electoral success in a small number of cases.[456] The failure of prominent white Democrats to rally behind a minority candidate contributed to finding Factor 7 in at least one case.[457]

Under certain circumstances, courts discounted evidence of minority electoral success or an apparent lack thereof. Some lawsuits, for example, viewed the defeat of minority candidates by relatively small margins as mitigating evidence of limited minority electoral success.[458] At least one lawsuit discounted the election of a minority candidate where that candidate was "emphatically not the candidate of choice of the county's African-American voters."[459]

Several courts examining Factor 7 tended to discount minority electoral success absent evidence that the minority candidate received the support of white voters. Apparently agreeing with the Supreme Court's characterization of the majority-minority district as the "politics of second best,"[460] these courts seemed to place more weight on minority success in at-large elections than in majority-minority districts.[461] So too, a few courts discounted as

452. *See, e.g.*, McCarty Litig. (TX), 749 F.2d 1134, 1135 (5th Cir. 1984); Jenkins v. Red Clay Sch. Dist. Litig., 780 F. Supp. 221, 226 n.2 (D. Del. 1991).

453. Calhoun County Litig. (MS), 88 F.3d 1393, 1398 (5th Cir. 1996).

454. *See, e.g., id.*; City of LaGrange Litig., 969 F. Supp. 749, 776 (N.D. Ga. 1997).

455. Fort Bend Indep. Sch. Dist. Litig. (TX), 89 F.3d 1205, 1215 (5th Cir. 1996).

456. Blaine County Litig. (MT), 363 F.3d 897, 900, 914 (9th Cir. 2004); Gretna Litig., 636 F. Supp. 1113, 1122 (E.D. La. 1986).

457. *See* Bridgeport Litig., 26 F.3d 271, 276 (2d Cir. 1994).

458. *See, e.g.*, Niagara Falls Litig. (NY), 65 F.3d 1002, 1022 (2d Cir. 1995); City of Pomona Litig., 665 F. Supp. 853, 861 (C.D. Cal. 1987).

459. Charleston County Litig., 316 F. Supp. 2d 268, 279 n.14 (D.S.C. 2003).

460. *See* De Grandy Litigation, 512 U.S. 997, 1020 (1994) (internal citation omitted).

461. *See, e.g.*, NAACP v. Fordice Litig. (MS), 252 F.3d 361, 371 (5th Cir. 2001); Stockton Litig. (CA), 956 F.2d 884, 891 (9th Cir. 1992); City of Cleveland Litig., 297 F. Supp. 2d 901,

evidence of minority electoral success the experience of an African-American official, first appointed to the city board and then re-elected because the official not only enjoyed the benefits of incumbency but also never faced a white opponent.[462] Conversely, another court credited as evidence of minority electoral success the election of candidates who had originally been appointed to office where these candidates subsequently developed "sustained biracial coalitions" and retained their positions through more than "sheer power of incumbency."[463]

8. Significant Lack of Responsiveness—In addition to the seven "typical" factors listed above, the Senate Report adds two additional factors "that in some cases have had probative value" in establishing a Section 2 violation. The first is whether there "is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group."[464] Of the lawsuits surveyed, 107 lawsuits addressed this factor and 20 (or 18.7%) found responsiveness lacking.[465] Of those finding the factor, 15 (or 75%) ended favorably for the plaintiffs.[466] Ten (50%) of the lawsuits that found a significant lack of responsiveness were in jurisdictions covered under Section 5; 10 (50%) were not.[467]

The Senate Report did not define responsiveness, and courts have rarely attempted a general definition, opting instead to evaluate Factor 8 based on case-specific examples.[468] The cases nevertheless suggest that courts have viewed responsiveness as having a substantive and procedural component.

Substantive Responsiveness: Most courts addressing Factor 8 have examined the substantive policies enacted or implemented by the jurisdiction. Evidence of affirmative discrimination directed at the minority group has unsurprisingly been found to establish a lack of

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908 (N.D. Miss. 2004); Niagara Falls Litig., 913 F. Supp. 722, 748–49 (W.D.N.Y 1994); City of Boston Litig., 609 F. Supp. 739, 748 (D. Mass. 1985).

462. *See, e.g.*, Texarkana Litig., 861 F. Supp. 756, 764 (W.D. Ark. 1992); Columbus County Litig., 782 F. Supp. 1097, 1102 (E.D.N.C. 1991); Clark Litig., 725 F. Supp. 285, 299 (M.D. La. 1988); Terrell Litig., 565 F. Supp. 338, 347–48 (N.D. Tex. 1983).

463. *See, e.g.*, City of Rome Litig. (GA), 127 F.3d 1355, 1384 n.18 (11th Cir. 1997).

464. SENATE REPORT, *supra* note 17, at 29.

465. *See* VRI Database Master List, *supra* note 39.

466. *See id.*

467. *See id.*

468. *But see* Holder v. Hall Litig. (GA), 117 F.3d 1222, 1227 (11th Cir. 1997) ("An official is responsive if he/she ensures that minorities are not excluded from municipal posts, even-handedly allocates municipal services, and addresses minority complaints."); Niagara Falls Litig. (NY), 65 F.3d 1002, 1023 n.24 (2d Cir. 1995) ("The 'responsiveness' inquiry here involves review of tangible efforts of elected officials and the impact of these efforts on particular members of the community.").

responsiveness,[469] while 24 lawsuits found the absence of such evidence sufficient proof that elected officials are responsive.[470] In lawsuits challenging judicial elections, courts similarly equated nondiscrimination with responsiveness, with none of the eight lawsuits to address unresponsiveness in this context finding Factor 8.[471] Courts have also deemed as responsive efforts by local officials to address or correct discriminatory practices,[472] while the failure of localities to make such efforts supports finding Factor 8.[473]

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469. Jenkins v. Red Clay Sch. Dist. Litig. (DE), 116 F.3d 685, 698 (3d Cir. 1997); Marengo County Litig. (AL), 731 F.2d 1546, 1572 (11th Cir. 1984); Town of Hempstead Litig., 956 F. Supp. 326, 344 (E.D.N.Y. 1997); Bridgeport Litig., No. 3:93CV1476 (PCD), 1993 U.S. Dist. LEXIS 19741 (D. Conn. Oct. 27, 1993); City of Phila. Litig., 824 F. Supp. 514, 538 (E.D. Penn. 1993); Baldwin Bd. of Educ. Litig., 686 F. Supp. 1459, 1467 (M.D. Ala. 1988); City of Jackson, TN Litig., 683 F. Supp. 1515, 1535 (W.D. Tenn. 1988); Terrell Litig., 565 F. Supp. 338, 343 (N.D. Tex. 1983); Mobile Sch. Bd. Litig., 542 F. Supp. 1078, 1104–07 (S.D. Ala. 1982).

470. NAACP v. Fordice Litig. (MS), 252 F.3d 361, 372 (5th Cir. 2001); Holder v. Hall Litig. (GA), 117 F.3d 1222, 1227 (11th Cir. 1997); City of Woodville Litig. (MS), 881 F.2d 1327, 1335 (5th Cir. 1989); Baytown Litig. (TX), 840 F.2d 1240, 1250–51 (5th Cir. 1988); Houston v. Haley Litig. (MS), 859 F.2d 341, 347 (5th Cir. 1988); Dallas County Bd. of Educ. Litig. (AL), 739 F.2d 1529, 1540 (11th Cir. 1984); Escambia County Litig. (FL), 748 F.2d 1037, 1045 (5th Cir. 1984); Opelika Litig. (AL), 748 F.2d 1473, 1476 (11th Cir. 1984); Alamosa County Litig., 306 F. Supp. 2d 1016, 1039 (D. Colo. 2004); Hamrick Litig., 155 F. Supp. 2d 1355, 1378 (N.D. Ga. 2001); City of LaGrange Litig., 969 F. Supp. 749, 770 (N.D. Ga. 1997); Harris v. Houston Litig., 10 F. Supp. 2d 721, 726 (S.D. Tex. 1997); Texarkana Litig., 861 F. Supp. 756, 765 (W.D. Ark. 1992); Chickasaw County I Litig., 705 F. Supp. 315, 321 (N.D. Miss. 1989); City of Starke Litig., 712 F. Supp. 1523, 1538 (M.D. Fla. 1989); Jeffers Litig., 730 F. Supp. 196, 213 (E.D. Ark. 1989); Westwego Litig., No. 84-5599, 1989 U.S. Dist. LEXIS 7298, at *14 (E.D. La. 1989); City of Norfolk Litig., 679 F. Supp. 557, 585 (E.D. Va. 1988); City of Woodville Litig., 688 F. Supp. 255, 257 (S.D. Miss. 1988); Pomona Litig., 665 F. Supp. 853, 862 (C.D. Cal. 1987); City of Austin Litig., No. A-84-CA-189, 1985 WL 19986, at *12 (W.D. Tex. Mar. 12, 1985); City of Fort Lauderdale Litig., 617 F. Supp. 1093, 1107 (S.D. Fla. 1985); Terrell Litig., 565 F. Supp. 338, 343 (N.D. Tex. 1983); City of Greenwood Litig., 534 F. Supp. 1351 (N.D. Miss. 1982).

471. Cousin Litig. (TN), 145 F.3d 818, 833 (6th Cir. 1998); S. Christian Leadership Litig. (AL), 56 F.3d 1281, 1295 (11th Cir. 1995); Nipper Litig. (FL), 39 F.3d 1494, 1591–92 (11th Cir. 1994); Mallory-Ohio Litig., 38 F. Supp. 2d 525, 543 (S.D. Ohio 1997); Bradley v. Work Litig., 916 F. Supp. 1446, 1467 (S.D. Ind. 1996); Milwaukee NAACP Litig., 935 F. Supp. 1419, 1433 (E.D. Wis. 1996); Chisom Litig., No. 86-4057, 1989 WL 106485, at *11 (E.D. La. Sept. 19, 1989); Kirksey v. Allain Litig., 658 F. Supp. 1183, 1203 (S.D. Miss. 1987).

472. *See, e.g.*, Fort Bend Indep. Sch. Dist. Litig. (TX), 89 F.3d 1205, 1220 (5th Cir. 1996); Cincinnati Litig., No. C-1-92-278, 1993 U.S. Dist. LEXIS 21009, at *36 (S.D. Ohio July 8, 1993); Monroe County Litig., 740 F. Supp. 417, 424 (N.D. Miss. 1990); Houston v. Haley Litig., 663 F. Supp. 346, 355 (N.D. Miss. 1987); City of Fort Lauderdale Litig., 617 F. Supp. 1093, 1107 (S.D. Fla. 1985); City of Norfolk Litig., 605 F. Supp. 377, 394 (E.D. Va. 1984); Dallas County Bd. of Educ. Litig., 548 F. Supp. 794, 821 (S.D. Ala. 1982).

473. *See, e.g.*, Bridgeport Litig., No. 3:93CV1476 (PCD), 1993 U.S. Dist. LEXIS 19741, at *15–16 (D. Conn. Oct. 27, 1993); Jenkins v. Red Clay Sch. Dist. Litig., 780 F. Supp. 221, 240 (D. Del. 1991); Operation Push Litig., 674 F. Supp. 1245, 1265 (N.D. Miss. 1987); Citizen Action Litig., No. N 84–431, 1984 U.S. Dist. LEXIS 24869, at *12 (D. Conn. Sept. 27, 1984); Terrell Litig., 565 F. Supp. 338, 347 (N.D. Tex. 1983); Mobile Sch. Bd. Litig., 542 F. Supp. 1078, 1106 (S.D. Ala. 1982).

Many lawsuits suggested, though, that nondiscrimination alone was insufficient to establish responsiveness and looked instead for evidence of affirmative measures serving the minority community. Under this approach, the failure to adopt an affirmative action policy signaled unresponsiveness,[474] while adopting such a plan suggested responsiveness.[475] The failure to hire or to appoint minority employees showed a lack of responsiveness,[476] and some lawsuits found inclusive hiring practices an indication of responsiveness.[477] So too, the provision of bilingual education supported a finding of responsiveness.[478]

Some courts have suggested that equal funding of particular projects—road paving in particular—is insufficient to establish responsiveness, where the needs of minority communities had long been neglected.[479] Some courts found a lack of responsiveness where elected officials failed to fund projects in minority neighborhoods,[480] (particularly while funding comparable projects in white neighborhoods),[481] or failed to participate in federal programs which would fund such projects.[482] Courts have found responsiveness where officials provided minority communities dis-

474. *See, e.g.*, Town of Hempstead Litig. (NY), 180 F.3d 476, 487 (2d Cir. 1999); Bridgeport Litig., No. 3:93CV1476 (PCD), 1993 U.S. Dist. LEXIS 19741 (D. Conn. Oct. 27, 1993).

475. *See, e.g.*, Niagara Falls Litig. (NY), 65 F.3d 1002, 1023 (2d Cir. 1995); El Paso Indep. Sch. Dist. Litig., 591 F. Supp. 802, 811 (W.D. Tex. 1984).

476. *See, e.g.*, Town of Hempstead Litig. (NY), 180 F.3d 476, 487 (2d Cir. 1999); Carrollton NAACP Litig. (GA), 829 F.2d 1547, 1561 (11th Cir. 1987); Columbus County Litig., 782 F. Supp. 1097, 1105 (E.D.N.C. 1991); Chickasaw County I Litig., 705 F. Supp. 315, 321 (N.D. Miss. 1989); City of Starke Litig., 712 F. Supp. 1523, 1538 (M.D. Fla. 1989); Operation Push Litig., 674 F. Supp. 1245, 1265 (N.D. Miss. 1987).

477. *See, e.g.*, Holder v. Hall Litig. (GA), 117 F.3d 1222, 1227 (11th Cir. 1997); City of Austin Litig. (TX), 871 F.2d 529, 534 (5th Cir. 1989); Houston v. Haley Litig. (MS), 859 F.2d 341, 347 (5th Cir. 1988); City of Chi.-Barnett Litig., 969 F. Supp. 1359, 1449 (N.D. Ill. 1997); Niagara Falls Litig., 913 F. Supp. 722, 749 (W.D.N.Y. 1994); Calhoun County Litig., 813 F. Supp. 1189, 1201 (N.D. Miss. 1993); City of Columbia Litig., 850 F. Supp. 404, 425 (D.S.C. 1993).

478. Aldasoro v. Kennerson Litig., 922 F. Supp. 339, 366 (S.D. Cal. 1995); El Paso Indep. Sch. Dist. Litig., 591 F. Supp. 802, 811 (W.D. Tex. 1984); Rybicki Litig., 574 F. Supp. 1082, 1122 (N.D. Ill. 1982).

479. *See, e.g.*, City of Dallas Litig., 734 F. Supp. 1317, 1407 (N.D. Tex 1990).

480. *See, e.g.*, Town of Hempstead Litig., 956 F. Supp. 326, 344 (E.D.N.Y. 1997); Columbus County Litig., 782 F. Supp. 1097, 1105 (E.D.N.C. 1991). *But see* City of LaGrange Litig., 969 F. Supp. 749, 770 (N.D. Ga. 1997) ("Several of Plaintiff's witnesses testified that the council had failed to address certain problems within the African-American community. However, these examples seemed to reflect the typical shortcomings of government entities rather than an institutional unresponsiveness to the minority community.").

481. *See, e.g.*, City of Phila. Litig., 824 F. Supp. 514, 538 (E.D. Pa. 1993); *see also* City of Jackson, TN Litig., 683 F. Supp. 1515, 1535 (W.D. Tenn. 1988) (historical evidence).

482. *See, e.g.*, Terrell Litig., 565 F. Supp. 338, 343 (N. D. Tex. 1983); Rocha Litig., No. V-79-26, 1982 U.S. Dist. LEXIS 15164, at *18 (S.D. Tex. Aug. 23, 1982).

proportionately large amounts of funding[483] and directed funds to minority neighborhoods for improvements.[484] A few courts viewed the acceptance of federal aid or efforts to secure such aid directed to minority interests as evidence of responsiveness,[485] while others viewed the same conduct as "suspect" because it required no actual commitment on the part of the jurisdiction to minority interests.[486]

Procedural Responsiveness: A number of courts viewed responsiveness more as a question of process than of outcome. Here, courts focus on communication between elected officials and their minority constituents and the extent to which elected representatives advocate for measures that serve the particularized needs of the minority community. The effort to secure enactment or implementation of such measures matters as much as, if not more than, achieving the desired outcome.

Officials are unresponsive under this model when they actively oppose or otherwise evince hostility to the desires of the minority community,[487] when they are unable to identify any concerns particular to their constituent minority community,[488] when they fail to address these concerns, and when they do not respond to requests from or advocate for the needs of the minority community.[489] For instance, the *Jeffers* litigation considered the reluctance of white legislators to co-sponsor "bills of interest to black voters," the

483. *See, e.g.*, City of Austin Litig. (TX), 871 F.2d 529, 534–35 (5th Cir. 1989); Rural West II Litig., 29 F. Supp. 2d 448, 459–60 (W.D. Tenn. 1998); Chickasaw County II Litig., No. 1:92CV142-JAD, 1997 U.S. Dist. LEXIS 22087, at *8 (N.D. Miss. Oct. 28, 1997); Town of Babylon Litig., 914 F. Supp. 843, 890 (E.D.N.Y. 1996); Sanchez-Colo. Litig., 861 F. Supp. 1516, 1530 (D. Colo. 1994); City of Columbia Litig., 850 F. Supp. 404, 425 (D.S.C. 1993); Monroe County Litig., 740 F. Supp. 417, 424 (N.D. Miss. 1990).

484. *See, e.g.*, McCarty Litig. (TX), 749 F.2d 1134, 1137 (5th Cir. 1984); Hamrick Litig., 155 F. Supp. 2d 1355, 1378 (N.D. Ga. 2001); Liberty County Comm'rs Litig., 957 F. Supp. 1522, 1566 (N.D. Fla. 1997); City of Springfield Litig., 658 F. Supp. 1015, 1032 (C.D. Ill. 1987); Houston v. Haley Litig., 663 F. Supp. 346, 355 (N.D. Miss. 1987).

485. *See, e.g.*, Houston v. Haley Litig. (MS), 859 F.2d 341, 347 (5th Cir. 1988); Dallas County Comm'n Litig. (AL), 739 F.2d 1529, 1540 (11th Cir. 1984); Hamrick Litig., 155 F. Supp. 2d 1355, 1378 (N.D. Ga. 2001); El Paso Indep. Sch. Dist. Litig., 591 F. Supp. 802, 811 (W.D. Tex. 1984).

486. City of Dallas Litig., 734 F. Supp. 1317, 1407 (N.D. Tex. 1990); *see also* Lubbock Litig. (TX), 727 F.2d 364, 382 (5th Cir. 1984).

487. Bone Shirt Litig., 336 F. Supp. 2d 976, 1044 (D.S.D. 2004) (discussing numerous legislative bills that affect the Indian community; noting the consistent opposition by certain members of the legislature to any legislation that the Indian community lobbied for, including voting against bills with overwhelming support and no organized opposition, and keeping bills that affect only the minority community from reaching a floor vote).

488. *See, e.g.*, Mehfoud Litig., 702 F. Supp. 588, 595 (E.D. Va. 1988).

489. *See, e.g.*, Town of Hempstead Litig. (NY), 180 F.3d 476, 487 (2d Cir. 1999); Sisseton Indep. Sch. Dist. Litig. (SD), 804 F.2d 469, 477 (8th Cir. 1986); Montezuma-Cortez Sch. Dist. Litig., 7 F. Supp. 2d 1152, 1170 (D. Colo. 1998); Sanchez-Colo. Litig., 861 F. Supp. 1516, 1530 (D. Colo. 1994); Columbus County Litig., 782 F. Supp. 1097, 1105 (E.D.N.C. 1991); City of Springfield Litig., 658 F. Supp. 1015, 1032 (C.D. Ill. 1987).

difficulties faced by both black constituents and black members of the Arkansas State Legislature when lobbying for such support, and the practice of at least one white state representative to refer black constituents to black members of the state legislature, rather than meeting with them.[490]

By contrast, responsiveness is shown when an official knows and supports causes favored by minority voters,[491] meets with minority constituents,[492] and seeks out minority groups or otherwise purposely includes them in the decision making process.[493] In 12 lawsuits, courts found responsiveness when an elected official was dependent on minority votes either for election or to implement a desired policy.[494]

Such "dependent" officials tend to meet with their minority constituents, seek out their views, familiarize themselves with their concerns, and advocate on their behalf. In the same way, the Supreme Court in the recent *Perry* litigation suggested that a lack of responsiveness may be shown by the simple fact that minority voters refuse to support an elected official.[495]

According to judicial findings, responsive officials actively solicit minority votes, either via "door-knocking" or seeking endorsements from minority organizations.[496] They promote voter

490. Jeffers Litig., 730 F. Supp. 196, 214 (E.D. Ark. 1989).

491. *See, e.g.*, Black Political Task Force Litig., 300 F. Supp. 2d 291, 313 (D. Mass. 2004); Cincinnati Litig., No. C-1-92-278, 1993 U.S. Dist. LEXIS 21009, at *37–38 (S.D. Ohio July 8, 1993); Monroe County Litig., 740 F. Supp. 417 (N.D. Miss. 1990); *see also* Jeffers Litig., 730 F. Supp. 196, 213 (E.D. Ark. 1989) ("Members of the House like Representatives Cunningham, McGinnis, Flanagin, and Dawson are anything but unresponsive. They are well aware that a large proportion of their constituency is black, and they make assiduous and sincere efforts to represent these voters.").

492. *See, e.g.*, Holder v. Hall Litig. (GA), 117 F.3d 1222, 1227 (11th Cir. 1997); Liberty County Comm'rs Litig., 957 F. Supp. 1522, 1567 (N.D. Fla. 1997); Niagara Falls Litig., 913 F. Supp. 722, 749 (W.D.N.Y. 1994).

493. *See, e.g.*, Black Political Task Force Litig., 300 F. Supp. 2d 291, 313 (D. Mass. 2004); Calhoun County Litig., 813 F. Supp. 1189, 1201 (N.D. Miss. 1993); Terrazas Litig., 581 F. Supp. 1329, 1350 (N.D. Tex. 1984).

494. City of Rome Litig. (GA), 127 F.3d 1355, 1386–87 (11th Cir. 1997); Ketchum Litig. (IL), 740 F.2d 1398, 1405 (7th Cir. 1984); Hamrick Litig., 155 F. Supp. 2d 1355, 1378 (N.D. Ga. 2001); City of Chi.–Bonilla Litig., 969 F. Supp. 1359, 1450 (N.D. Ill. 1997); Town of Babylon Litig., 914 F. Supp. 843, 890 (E.D.N.Y. 1996); Attala County Litig., No. 1:91CV209-D-D, 1995 U.S. Dist. LEXIS 21569, at *19 (N.D. Miss. Mar. 20, 1995); Rural West I Litig., 877 F. Supp. 1096, 1106 (W.D. Tenn. 1995); Calhoun County Litig., 813 F. Supp. 1189, 1201 (N.D. Miss. 1993); Cincinnati Litig., No. C-1-92-278, 1993 U.S. Dist. LEXIS 21009, at *36 (S.D. Ohio July 8, 1993); Armour Litig., 775 F. Supp. 1044, 1058 (N.D. Ohio 1991); Rybicki Litig., 574 F. Supp. 1147, 1151 (N.D. Ill. 1983); City of Greenwood Litig., 534 F. Supp. 1351 (N.D. Miss. 1982).

495. Perry Litig. (TX), 126 S. Ct. 2594, 2622 (2006).

496. Rural West II Litig., 29 F. Supp. 2d 448, 459–60 (W.D. Tenn. 1998); Rural West I Litig., 836 F. Supp. 453, 463 (W.D. Tenn. 1993); City of Jackson, TN Litig., 683 F. Supp. 1515, 1535 (W.D. Tenn. 1988); Houston v. Haley Litig., 663 F. Supp. 346, 354 (N.D. Miss. 1987).

registration, or otherwise encourage political participation by the minority community.[497] By contrast, a lack of responsiveness has been found when jurisdictions did not facilitate minority political participation by failing, for instance, to establish a polling place in a minority community or to appoint as volunteer registrars minority community members offering their services.[498]

9. Tenuous Policy Justification for the Challenged Practice—The second additional factor the Senate Report lists for consideration, called in this report Factor 9, is "whether the policy underlying the . . . practice . . . is tenuous."[499] Governmental policy underlying a practice is "less important under the results test" than it was under the intent test.[500] It remains relevant, however, both because a bad purpose or policy "is circumstantial evidence that the device has a discriminatory result," and because "the tenuousness of the justification for a state policy may indicate that the policy is unfair."[501]

Of the lawsuits analyzed, 67 considered whether the policy underlying the challenged practice or procedure was tenuous. Twenty-three of these lawsuits, 13 coming from Section 5-covered jurisdictions and 10 from non-covered jurisdictions, held the identified justification to be tenuous. Of this total, 22 lawsuits also reached a favorable outcome for the plaintiffs. The vast majority of lawsuits ending favorably for the plaintiffs, however, did not find Factor 9: most did not consider tenuousness, and the remainder accepted the justification proffered.[502]

Twelve lawsuits addressed Factor 9 in cases where defendants offered no justification for the challenged policy, with eight courts deeming this non-justification tenuous.[503] Four did not, either

497. *See* France Litig., 71 F. Supp. 2d 317, 333 (S.D.N.Y. 1999); Chickasaw County II Litig., No. 1:92CV142-JAD, 1997 U.S. Dist. LEXIS 22087, at *8 (N.D. Miss. Oct. 28, 1997); City of LaGrange Litig., 969 F. Supp. 749, 770 (N.D. Ga. 1997); Calhoun County Litig., 813 F. Supp. 1189, 1201 (N.D. Miss. 1993); El Paso Indep. Sch. Dist. Litig., 591 F. Supp. 802, 811 (W.D. Tex. 1984); Terrazas Litig., 581 F. Supp. 1329, 1350 (N.D. Tex. 1984).

498. Marengo County Litig. (AL), 731 F.2d 1546, 1572 (11th Cir. 1984); Operation Push Litig., 674 F. Supp. 1245, 1265 (N.D. Miss. 1987); Citizen Action Litig., No. N 84-431, 1984 U.S. Dist. LEXIS 24869, at *12–13 (D. Conn. Sept. 27, 1984); Terrell Litig., 565 F. Supp. 338, 343 (N.D. Tex. 1983).

499. SENATE REPORT, *supra* note 17, at 29.

500. Marengo County Litig. (AL), 731 F.2d 1546, 1571 (11th Cir. 1984).

501. *Id.*

502. *See* VRI Database Master List, *supra* note 39.

503. Marengo County Litig. (AL), 731 F.2d 1546, 1571 (11th Cir. 1984); Armour Litig., 775 F. Supp. 1044, 1058 (N.D. Ohio 1991); Monroe County Litig., 740 F. Supp. 417, 424 (N.D. Miss. 1990); Baldwin Bd. of Educ. Litig., 686 F. Supp. 1459, 1467 (M.D. Ala. 1988); Wamser Litig., 679 F. Supp. 1513, 1531–32 (E.D. Mo. 1987), *rev'd and dismissed for lack of standing by*, 883 F.2d 617 (8th Cir. 1989); City of Greenwood Litig., 599 F. Supp. 397, 404 (N.D. Miss. 1984); El Paso Indep. Sch. Dist. Litig., 591 F. Supp. 802, 811–12 (W.D. Tex. 1984); Major v. Treen Litig., 574 F. Supp. 325, 352 (E.D. La. 1983).

because the plaintiffs presented no evidence on tenuousness, or because the court itself came up with what it deemed to be a legitimate justification for the policy.[504]

Defendants offered a number of substantive justifications for plans challenged under Section 2. Most courts accepted these justifications as not tenuous. Those that did not generally deemed the reason proffered to be (1) false, (2) impermissible, or (3) outweighed by other considerations.

In a number of cases, for example, defendants claimed challenged districting plans preserved municipal and other political boundaries. Most courts accepted this justification as non-tenuous,[505] although one deemed this goal tenuous where the jurisdiction did not consistently adhere to it.[506] So too, when defendants claimed the challenged policy was based on political will, some courts accepted this justification,[507] but others did not when they found it was not the true underlying reason for the policy.[508]

Several jurisdictions defended their at-large districts on the ground that the practice fostered accountability and responsiveness among elected representatives. Many courts accepted this policy justification as non-tenuous,[509] but some did not, including a few that rejected the argument because they had already found the jurisdiction was unresponsive under Factor 8.[510] Courts, however, have consistently upheld as non-tenuous the claim that defendant jurisdictions designed at-large judicial election systems to prevent judges from being too responsive to particular constituents.[511]

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504. Lubbock Litig. (TX), 727 F.2d 364, 383 (5th Cir. 1984); McCarty Litig. (TX), 749 F.2d 1134 (5th Cir. 1984); Smith-Crittenden County Litig., 687 F. Supp. 1310 (E.D. Ark. 1988); City of Jackson, TN Litig., 683 F. Supp. 1515 (W.D. Tenn. 1988).

505. *See, e.g.*, Forest County Litig., 194 F. Supp. 2d 867 (E.D. Wis. 2002); Rural West I Litig., 836 F. Supp. 453 (W.D. Tenn. 1993); Chattanooga Litig., 722 F. Supp. 380 (E.D. Tenn. 1989); City of Jackson, TN Litig., 683 F. Supp. 1515 (W.D. Tenn. 1988).

506. Rural West II Litig. (TN), 209 F.3d 835 (6th Cir. 2000).

507. Liberty County Comm'rs Litig. (FL), 221 F.3d 1218 (11th Cir. 2000); Town of Babylon Litig., 914 F. Supp. 843 (E.D.N.Y. 1996); Niagara Falls Litig., 913 F. Supp. 722 (W.D.N.Y. 1994); City of Austin Litig., No. A-84-CA-189, 1985 WL 19986 (W.D. Tex. Mar. 12, 1985).

508. *See, e.g.*, Bone Shirt Litig., 336 F. Supp. 2d 976, 1048 (D.S.D. 2004); Terrell Litig., 565 F. Supp. 338, 341 (N.D. Tex. 1983).

509. City of Rome Litig. (GA), 127 F.3d 1355 (11th Cir. 1997); Jenkins v. Red Clay Sch. Dist. Litig. (DE), 116 F.3d 685 (3d Cir. 1997); City of Holyoke Litig., 960 F. Supp. 515 (D. Mass. 1997); Pasadena Indep. Sch. Dist. Litig., 958 F. Supp. 1196 (S.D. Tex. 1997); Holder v. Hall Litig., 757 F. Supp. 1560 (M.D. Ga. 1991); City of Dallas Litig., 734 F. Supp. 1317 (N.D. Tex. 1990); City of Norfolk Litig., 679 F. Supp. 557 (E.D. Va. 1988).

510. Blaine County Litig. (MT), 363 F.3d 897, 914 (9th Cir. 2004); Escambia County Litig. (FL), 748 F.2d 1037, 1045 (5th Cir. 1984); Town of Hempstead Litig., 956 F. Supp. 326, 346 (E.D.N.Y. 1997); City of Springfield Litig., 658 F. Supp. 1015, 1033 (C.D. Ill. 1987).

511. *See, e.g.*, Prejean Litig. (LA), 227 F.3d 504, 516 (5th Cir. 2000); Davis v. Chiles Litig. (FL), 139 F.3d 1414, 1421 (11th Cir. 1998); S. Christian Leadership Litig. (AL), 56 F.3d 1281, 1295 (11th Cir. 1995); Nipper Litig. (FL), 39 F.3d 1494, 1534 (11th Cir. 1994); LULAC

Many jurisdictions defended their districting choices or other electoral practices on the ground that the plans or practices protected incumbents or other political allies. Some courts accepted this justification as non-tenuous.[512] And yet, a number of courts, including the Supreme Court in the recent *Perry* litigation, deemed this justification tenuous when protecting white incumbents necessarily diluted minority voting strength and the defendant was aware of this consequence.[513] Indeed, some courts have concluded that these policies amount to intentional racial discrimination.[514]

In several lawsuits, jurisdictions defended challenged practices on grounds of efficiency or ease of administration, and many courts accepted these justifications.[515] The court in the *Operation Push* litigation, however, found the "administrative ease" justification for a dual registration system to be tenuous, concluding that "[m]ere inconvenience to the state is no justification for burdening citizens in the exercise of their protected right to register to vote."[516]

In several lawsuits, jurisdictions invoked historical practice to justify challenged electoral practices. Most courts accepted this justification as nontenuous.[517] In the *Milwaukee NAACP* litigation, for example, the court noted that Wisconsin's historic practice of electing judges at-large, a practice dating to 1848, set the default basis for what was reasonable in the state.[518] In the *Kirksey v. Allain* litigation, however, the court found historic practice to be a

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v. Clements Litig. (TX), 999 F.2d 831, 857–58 (5th Cir. 1993); France Litig., 71 F. Supp. 2d 317, 333 (S.D.N.Y. 1999); Cousin Litig. (TN), 904 F. Supp. 686, 712 (E.D. Tenn. 1995); Magnolia Bar Ass'n Litig., 793 F. Supp. 1386, 1411 (S.D. Miss. 1992).

512. *See, e.g.*, Prejean Litig. (LA), 83 F. App'x 5, 11 (5th Cir. 2003); Escambia County Litig. (FL), 638 F.2d 1239, 1245 (5th Cir. 1981); Fund for Accurate & Informed Representation Litig., 796 F. Supp. 662, 670, 672 (N.D.N.Y. 1992).

513. *See, e.g.*, Perry Litig. (TX), 126 S. Ct. 2594, 2623 (2006); *see also* Gingles Litig., 590 F. Supp. 345, 374 (E.D.N.C. 1984).

514. *See, e.g.*, Ketchum Litig. (IL), 740 F.2d 1398, 1408 (7th Cir. 1984); Black Political Taskforce Litig., 300 F. Supp. 2d 291, 313 (D. Mass. 2004); Buskey v. Oliver Litig., 565 F. Supp. 1473, 1483 (M.D. Ala. 1983).

515. *See, e.g.*, NAACP v. Fordice Litig. (MS), 252 F.3d 361, 373–74 (5th Cir. 2001); City of Phila. Litig. (PA), 28 F.3d 306, 334–35 (3d Cir. 1994); Cincinnati Litig. (OH), 40 F.3d 807, 814 (6th Cir. 1994); Aldasoro v. Kennerson Litig., 922 F. Supp. 339, 366, 377 (S.D. Cal. 1995); Armstrong v. Allain Litig., 893 F. Supp. 1320, 1336 (S.D. Miss. 1994); Calhoun County Litig., 813 F. Supp. 1189, 1202 (N.D. Miss. 1993); Lafayette County Litig., 841 F. Supp. 751, 768 (N.D. Miss. 1993).

516. Operation Push Litig., 674 F. Supp. 1245, 1266 (N.D. Miss. 1987).

517. *See, e.g.*, Holder v. Hall Litig., 757 F. Supp. 1560, 1565 (M.D. Ga. 1991); Houston v. Haley Litig., 663 F. Supp. 346, 347 (N.D. Miss. 1987); Dallas County Comm'n Litig., 636 F. Supp. 704, 709 (S.D. Ala. 1986); City of Fort Lauderdale Litig., 617 F. Supp. 1093, 1107 (S.D. Fla. 1985).

518. Milwaukee NAACP Litig. (WI), 116 F. 3d 1194 (7th Cir. 1997).

tenuous justification for using a numbered post system because other judicial bodies in the state no longer used it.[519]

Some jurisdictions defended challenged practices on the ground that the Fourteenth Amendment and the VRA required the adopted policy. Some courts have held such claims to be non-tenuous.[520] In the *Bone Shirt* litigation, however, the district court found this justification to be tenuous, holding that Section 2 did not require South Dakota to create a district that was 90% Native American, and rejecting the State's claim that low turnout among Native American voters rendered such a district necessary in order for Native Americans to elect their preferred candidate. *Bone Shirt* held that Section 2 does not compel a district with this concentration of minority residents, and that the statute in fact prohibits packing of this sort as a form of racial vote dilution.[521]

10. Proportionality as a Tenth Factor?—In 1994, *Johnson v. De Grandy* introduced "proportionality" as a consideration in the totality of the circumstances analysis.[522] The Court stated that proportionality—which "links the number of majority-minority voting districts to minority members' share of the relevant population"—is not a "safe harbor" insulating a jurisdiction from liability under Section 2, but that its existence weighs against a finding of vote dilution.[523]

Eighteen lawsuits both considered and made a finding on proportionality or the lack thereof, treating it as a distinct factor under the totality of the circumstances test.[524] The 10 lawsuits that found

519. Kirksey v. Allain Litig., 658 F. Supp. 1183, 1195–96 (S.D. Miss. 1987).

520. *See, e.g.*, Sanchez-Colo. Litig. (CO), 97 F.3d 1303, 1325 (10th Cir. 1996); Terrazas Litig., 581 F. Supp. 1329, 1357 (N.D. Tex. 1984).

521. Bone Shirt Litig., 336 F. Supp. 2d 976, 1048 (D.S.D. 2004).

522. As explained by the Court, proportionality is distinct from proportional representation, which links the proportion of minority officeholders to the minority group's share of the relevant population. *See* De Grandy Litig. (FL), 512 U.S. 997, 1014 n.11 (1994).

523. *Id.*

524. Old Person Litig. (MT), 312 F.3d 1036 (9th Cir. 2002); Liberty County Comm'rs Litig. (FL), 221 F.3d 1218 (11th Cir. 2000); Rural West II Litig. (TN), 209 F.3d 835 (6th Cir. 2000); City of Chi.-Bonilla Litig. (IL), 141 F.3d 699 (7th Cir. 1998); County of Thurston Litig. (NE), 129 F.3d 1015 (8th Cir. 1997); St. Louis Bd. of Educ. Litig. (MO), 90 F.3d 1357 (8th Cir. 1996); City of St. Louis Litig. (MO), 54 F.3d 1345 (8th Cir. 1995); Little Rock Litig. (AR), 56 F.3d 904 (8th Cir. 1995); City of Columbia Litig. (SC), 33 F.3d 52, 1994 WL 449081 (4th Cir. Aug. 22, 1994) (unpublished table decision); Black Political Task Force Litig., 300 F. Supp. 2d 291 (D. Mass. 2004); Bone Shirt Litig., 336 F. Supp. 2d 976 (D.S.D. 2004); Perry Litig., 298 F. Supp. 2d 451 (E.D. Tex. 2004); Rodriguez Litig., 308 F. Supp. 2d 346 (S.D.N.Y. 2004); Campuzano Litig., 200 F. Supp. 2d 905 (N.D. Ill. 2002); African–American Voting Rights LDF Litig., 994 F. Supp. 1105 (E.D. Mo. 1997); City of Holyoke Litig., 960 F. Supp. 515 (D. Mass. 1997); Rural West I Litig., 877 F. Supp. 1096 (W.D. Tenn. 1995); City of Austin Litig., 857 F. Supp. 560 (E.D. Mich. 1994).

proportionality identified no violation of Section 2.[525] Five lawsuits found a lack of proportionality,[526] and of these four identified a Section 2 violation.[527] One lawsuit found neither proportionality nor a violation of Section 2.[528] Most courts considered proportionality one of many factors, although in the *City of St. Louis* litigation, the appellate court affirmed the grant of summary judgment in favor of defendants solely on the basis of "sustained proportionality."[529]

De Grandy spoke of proportionality as involving districts with a "clear majority" of minority voters.[530] Some courts assessing proportionality have consequently refused to consider the presence of "opportunity" or "coalition" districts,[531] or districts with a majority minority population where low voter turnout or other factors means the majorities in these districts are not "effective."[532]

De Grandy found proportionality by comparing the number of majority-Hispanic districts to the proportion of Hispanics of voting age living in the Miami-Dade area, as opposed to making that comparison statewide.[533] Lower courts have generally followed this approach.[534] The *Rural West I* court acknowledged the difficulty it faced "in using regional statistics . . . because there are several equally valid ways to decide precisely which districts should be included in a regional analysis."[535] In *Rural West II,* the Sixth Circuit

525. Liberty County Comm'rs Litig. (FL), 221 F.3d 1218 (11th Cir. 2000); St. Louis Bd. of Educ. Litig. (MO), 90 F.3d 1357 (8th Cir. 1996); City of St. Louis Litig. (MO), 54 F.3d 1345 (8th Cir. 1995); Little Rock Litig. (AR), 56 F.3d 904 (8th Cir. 1995); City of Columbia Litig. (SC), 33 F.3d 52 (4th Cir. 1994); Rodriguez Litig., 308 F. Supp. 2d 346 (S.D.N.Y. 2004); Campuzano Litig., 200 F. Supp. 2d 905 (N.D. Ill. 2002); City of Holyoke Litig., 960 F. Supp. 515 (D. Mass. 1997); African–American Voting Rights LDF Litig., 994 F. Supp. 1105 (E.D. Mo. 1997); Austin Litig., 857 F. Supp. 560 (E.D. Mich. 1994).

526. Old Person Litig. (MT), 312 F.3d 1036 (9th Cir. 2002); Rural West II Litig. (TN), 209 F.3d 835 (6th Cir. 2000); County of Thurston Litig. (NE), 129 F.3d 1015 (8th Cir. 1997); Black Political Task Force Litig., 300 F. Supp. 2d 291 (D. Mass. 2004); Bone Shirt Litig., 336 F. Supp. 2d 976 (D.S.D. 2004).

527. Rural West II Litig. (TN), 209 F.3d 835 (6th Cir. 2000); County of Thurston Litig. (NE), 129 F.3d 1015 (8th Cir. 1997); Black Political Task Force Litig., 300 F. Supp. 2d 291 (D. Mass. 2004); Bone Shirt Litig., 336 F. Supp. 2d 976 (D.S.D. 2004).

528. Old Person Litig. (MT), 312 F.3d 1036, 1050 (9th Cir. 2002).

529. City of St. Louis Litig. (MO), 54 F.3d 1345, 1357 (8th Cir. 1995).

530. De Grandy Litig. (FL), 512 U.S. 997, 1023 (1994).

531. *See, e.g.*, Black Political Task Force Litig., 300 F. Supp. 2d 291, 312 (D. Mass. 2004).

532. Perry Litig., 298 F. Supp. 2d 451, 494, 495 & n.134 (E.D. Tex. 2004).

533. De Grandy Litig. (FL), 512 U.S. 997, 1022 (1994). As such the Court "[had] no occasion to decide which frame of reference should have been used" had the matter not already been agreed upon by the parties in the district court. *Id.*

534. Rural West II Litig. (TN), 209 F.3d 835, 843–44 (6th Cir. 2000); Bone Shirt Litig., 336 F. Supp. 2d 976, 1048–49 (D.S.D. 2004); Rural West I Litig., 877 F. Supp. 1096, 1109–10 (W.D. Tenn. 1995); Austin Litig., 857 F. Supp. 560, 570–71 (E.D. Mich. 1994).

535. Rural West I Litig., 877 F. Supp. 1096, 1109–10 (W.D. Tenn. 1995).

explained its regional, rather than statewide, focus, finding that "neither over-proportionality in one area of the State nor substantial proportionality in the State as a whole should ordinarily be used to offset a problem of vote dilution in one discrete area of the State."[536] The district court in *Austin* offered a distinct explanation for its regional focus, pointing out that it limited "the geographic scope of [its] assessment to Wayne and Oakland Counties, because the plaintiffs d[id] not dispute the State's drawing of district lines except in those areas."[537]

Still, the district court in *Perry* examined proportionality statewide,[538] an approach the Supreme Court ratified this past June.[539] The Court noted that plaintiffs had alleged "statewide vote dilution based on a statewide plan," which made examination of proportionality on a statewide basis the appropriate measure.[540]

Two courts substituted proportional representation for proportionality when confronted with challenges to at-large elections for which no majority-minority districts existed.[541] The district court in the *Liberty County* litigation made the same substitution,[542] but the appellate court reversed, emphasizing that proportionality and proportional representation are distinct concepts, and that "Section 2 explicitly disclaims any 'right to have members of a protected class elected in numbers equal to their proportion in the population.' "[543]

Conclusion

This June, the Supreme Court handed down its first major Section 2 decision in a number of years. *LULAC v. Perry* held that Texas violated Section 2 when it adopted a districting plan that placed part of the City of Laredo into one congressional district and the rest into another.[544] That action displaced nearly 100,000 Latino residents from a congressional district that previously en-

536. Rural West II Litig. (TN), 209 F.3d 835, 843 (6th Cir. 2000).
537. Austin Litig., 857 F. Supp. 560, 569 (E.D. Mich. 1994).
538. Perry Litig., 298 F. Supp. 2d 451, 494 (E.D. Tex. 2004).
539. Perry Litig. (TX), 126 S. Ct. 2594, 2620 (2006).
540. *Id.*
541. Blytheville Sch. Dist. Litig. (AR), 71 F.3d 1382, 1389 n.6 (8th Cir. 1995); City of St. Louis Litig., 896 F. Supp. 929, 943 (E.D. Mo. 1995).
542. Liberty County Comm'rs Litig., 957 F. Supp. 1522, 1570 (N.D. Fla. 1997).
543. Liberty County Comm'rs Litig. (FL), 221 F.3d 1218, 1224 n.5 (11th Cir. 2000) (quoting 42 U.S.C. § 1973(b)).
544. Perry Litig. (TX), 126 S. Ct. 2594 (2006).

compassed Laredo and in which Latino voters refused to support the Republican incumbent. At the same time, the Justices let stand the dismantling of a so-called "coalition" district in Fort Worth. Leaving open the question whether Section 2 protects coalition districts—where minority voters comprising a minority of the district's population enjoy effective control in deciding the district's representative—Justice Kennedy's controlling opinion in *Perry* holds that African-American voters in Fort Worth did not exercise such control, mainly because the Democrat incumbent whom they supported never faced a challenger in the Democratic primary.[545]

Perry highlights many ways in which opportunities for minority political participation have both changed and remained the same in the years since Congress amended the statute in 1982. Prior to that amendment, African-American voters were unable to exercise meaningful influence in Mobile, Alabama, where white Democrats long controlled city government and the at-large elections in which city commissioners were elected. A quarter century later, the Republican-controlled Texas government finds it cannot splinter the vibrant, "politically-active" Latino community in Laredo into two single-member districts, but that it may shatter a safe, Democratic district in Fort Worth, where the elected representative consistently received African-American support both in the primary and the general election.

Shortly after the Supreme Court handed down *Perry*, President Bush signed into law a twenty-five year extension of the expiring provisions of the Voting Rights Act.[546] His signature shifted the debate on reauthorization from the question whether Congress should reauthorize the statute to the question whether it has the power to do so. The legal challenge to reauthorization that is certain to be brought will assert that discrimination in covered jurisdictions is no longer sufficiently dire to warrant the retention of preclearance, and that covered jurisdictions are no longer sufficiently different from non-covered ones to justify keeping only covered jurisdictions subject to Section 5.

Perry highlights why these claims are difficult to assess, and in particular the extent to which the preclearance process constrains behavior in covered jurisdictions to a significant degree.[547] These

545. *Id.* at 2624–25.

546. The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Aemdnemtns Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

547. *See, e.g.*, Henderson v. Perry, 399 F. Supp. 2d 756, 773 (E.D. Tex. 2005) ("By the time the plan now under attack was first proposed, the Voting Rights Act had effectively taken six Democratic Party seats off the table, rendering them untouchable . . . ."); Tex. House Journal, 78th Leg., 3rd Sess. 462 (Tex. 2003) (statement by Representative Phil King)

constraints shape present opportunities for minority political participation in covered jurisdictions and render predicting the nature and scope of such opportunities absent preclearance a challenging task.

Decisions like *Perry* nevertheless provide an important lens through which to consider this prospect. Judicial findings in such decisions offer a basis upon which to evaluate opportunities for minority political participation in covered and non-covered jurisdictions alike. Analysis of these findings gives rise to a complex portrait of political participation nationwide, and a footing that can be used to compare jurisdictions subject to Section 5 and those that operate free from its constraints.

To be sure, the resulting portrait is necessarily incomplete, reflecting the limits that inhere in relying on published Section 2 decisions as a source describing political participation nationwide. Claims must be filed, resources devoted to their prosecution, and judgments must be reached and published. Attorneys involved vary in skill, diligence, and their access to resources, while judges adjudicating these claims have differing inclinations to read the statute expansively or narrowly, articulate the findings they make, and publish the judgments they reach. And yet, the Section 2 cases themselves suggest that these factors may well vary in similar ways nationwide. If so, the differences in judicial findings in Section 2 lawsuits in covered and non-covered jurisdictions suggest real differences operating on the ground, differences that should inform and shape the current debate on reauthorization.

("quite frankly, it's very, very difficult to draw a district in South Texas because of the Voting Rights Act and the only way you can do it, is to do it in the manner in which we did"); *see also* Karlan, *supra* note 28, at 16 ("Jurisdictions that know that a change will not be precleared may decide not even to attempt making it.").

ACKNOWLEDGEMENTS

The Voting Rights Initiative is the product of the extraordinary efforts of many people. We are particularly grateful to University of Michigan Law School Dean Evan Caminker and Associate Dean Steven Croley, Deans of Students David Baum and Charlotte Johnson, and to Michael Barr, Amy Bishop, Daniel Halberstam, Mary Lebert, Margaret Leary, Tara Perry, MaryAnn Sarosi, Hannah Smotrich, and Sandy Zeff. Special thanks to Shawn DeLoach, Kurt Kaiser, Diana Perpich and the entire Sitemaker team at the University of Michigan, Westlaw, LexisNexis and Toree Randall, and web designers Jeff Christy and Travis Schau. The Voting Rights Initiative benefited immeasurably from guidance given by several experts in the voting rights field: Debo Adegbile, Chandler Davidson, Julie Fernandes, Jon Greenbaum, Daniel Levitas, Peyton McCrary, Laughlin McDonald, and Nina Perales. For financial support, VRI thanks the Law School Fund and the Office of Public Service at the University of Michigan Law School, and the Earl Warren Institute for Race, Ethnicity and Diversity, Boalt Hall School of Law, U.C. Berkeley. VRI also thanks the Michigan Election Law Project for supporting this research. Finally, VRI owes great appreciation to the Journal of Law Reform editorial board, especially Robert Koch, Joshua Meeuwse, Jason Weinstein, and Kate Zell. The VRI Database and Master List are located at http://www.votingreport.org.

The Voting Rights Initiative, January 2005–May 2006

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APPENDIX

This Appendix includes three tables providing an abridged view of the master list and the Section 2 lawsuits analyzed in this study. For the full data included in the master list, visit: http://www.votingreport.org.

Table A provides basic data on the lawsuits. Table B lists Senate Factor and legal findings. Table C offers a timeline of citations for racial appeals in campaigns, cited in Part II.C.6. The below guides give an explanation of the field contents of Tables A and B.

GUIDE TO TABLE A

Field Name	Explanation of Contents
Litigation Title	Shorthand reference title for each lawsuit or litigation string of cases.
Citation	The citation of the final word case is given for ease of reference, but is used to represent all opinions in the lawsuit analyzed as a whole. Shepardize or key-cite this citation to find all related opinions in the lawsuit that may include factor findings.
Court	Abbreviation for the court making the final published merits or success determination.
Year	Year the final word case was decided.
State	State where the lawsuit was filed. Note that some states are fully covered and some are partially covered by Section 5, so some lawsuits brought in a covered county may originate in a state which is not fully covered.
Jurisd.	y = Suit was brought in a jurisdiction covered by Section 5, requiring that all voting changes be precleared. n = Non-covered jurisdiction.
Type	Case Type = L refers to Liability (the final word case is one where the legal question before the court was whether or not the defendant had violated Section 2); P = Preliminary (where the question before the court was a pre-merits question, such as whether to grant a preliminary injunction); R = Remedy (where the question was how to craft a remedy after a Section 2 violation was found); S = Settlement (where the question was whether to approve a consent decree or settlement agreement between the parties); F = Fees (where the question was whether to grant a prevailing plaintiff or intervenor attorney's fees).
Gov. Body	Governing Body is the level of government responsible for the practice challenged in the lawsuit. For example, if the plaintiff is challenging the at-large election of school board officials, "school" is in this column.
Practice	Practice Challenged is the electoral law or practice which the plaintiff claims violates Section 2. At-large = At-large election system. Elec. Procedure = Election administration procedures or requirements for voting, voter registration, or running for office. Reapp = Reapportionment or redistricting plan. MV = Majority vote requirement. Other includes all other practices challenged, such as felon disfanchisement statutes, annexation, appointment of public officials.

TABLE A: BASIC DATA FOR SECTION 2 LAWSUITS, 1982–2005, BY LITIGATION TITLE

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
Abilene	*725 F.2d 1017*	*5th Cir.*	*1984*	*TX*	*y*	*L*	*city*	*At-large*
African American Citizens for Change	24 F.3d 1052	8th Cir.	1994	MO	n	P	city	Other: appointment of police commissioners
African American Legal Defense Fund	8 F.Supp.2d 330	S.D.N.Y.	1998	NY	y	L	city	Other: public school system funding and appointment of NY Bd of Educ.
African-American Voting Rights LDF	994 F. Supp. 1105	E.D. Mo.	1997	MO	n	L	state	At-large
Ahoskie	998 F.2d 1266	4th Cir.	1993	NC	y	R	city	At-large
Alamance County	99 F.3d 600	4th Cir.	1996	NC	n	L	county	At-large
Alamo Heights Indep. School District	168 F.3d 848	5th Cir.	1999	TX	y	L	school	At-large
Alamosa County	306 F. Supp. 2d 1016	D. Colo.	2004	CO	n	L	county	At-large
Albany County	2003 WL 21524820	N.D.N.Y.	2003	NY	n	P	county	Reapp
Aldasoro v. Kennerson	922 F.Supp. 339	S.D. Cal.	1995	CA	n	L	school	At-large
Al-Hakim	892 F. Supp. 1464	M.D. Fla.	1995	FL	y	L	county	At-large
Anson County	1990 WL 123822	W.D.N.C.	1990	NC	y	S	school	At-large (staggered)
Anthony	35 F.Supp. 2d 989	E.D. Mich.	1999	MI	n	L	county	Other: merger of courts
Arakaki	314 F.3d 1091	9th Cir.	2002	HI	n	L	state	Elec. Procedure: race-specific req't for candidacy for public office/OHA
Armour	775 F.Supp. 1044	N.D. Ohio	1991	OH	n	L	state	Reapp
Armstrong v. Allain	893 F.Supp. 1320	S.D. Miss.	1994	MS	y	L	school	Majority Vote Requirement (60%)
Ashe v. NYC	1988 WL 95427	E.D.N.Y.	1988	NY	y	P	city	Elec. Procedure: challenging discrim. voting registration and voting procedure

TABLE A, CONTINUED

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
Attala County	92 F.3d 283	5th Cir.	1996	MS	y	L	city	Reapp
Austin	857 F.Supp. 560	E.D. Mich.	1994	MI	n	L	state	Reapp
Autauga County Board of Education	858 F. Supp. 1118	M.D. Ala.	1994	AL	y	F	school	At-large
Baines	288 F.Supp.2d 376	W.D.N.Y.	2003	NY	n	L	city	At-large, Reapp
Baker	85 F.3d 919	2d Cir.	1996	NY	n	L	state	Other: Felon disenfranchisement
Balderas	2001 U.S. Dist. LEXIS 25006	E.D. Tex.	2001	TX	y	L	state	Reapp
Baldwin Board of Education	686 F. Supp. 1459	M.D. Ala.	1988	AL	y	L	school	At-large
Baldwin County Commission	376 F. 3d 1260	11th Cir.	2004	AL	y	L	county	At-large
Bandemer	603 F. Supp. 1479	S.D. Ind.	1984	IN	n	L	state	Reapp
Baytown	840 F.2d 1240	5th Cir.	1988	TX	y	L	city	At-large, MV
Beaufort County	936 F.2d 159	4th Cir.	2004	NC	y	S	county	At-large
Belle Glade	178 F.3d 1175	11th Cir.	1999	FL	n	L	city	Other: Housing Authority's decision not to annex an African American-dominated housing project to the city
Ben Hill County	743 F.Supp. 864	M.D. Ga.	1990	GA	y	P	school	Elec. Procedure: using grand juries to select members of county boards of education
Benavidez	34 F.3d 825	9th Cir.	1994	CA	n	P	state	Reapp
Berks County	277 F. Supp. 2d 570	E.D. Pa.	2003	PA	n	L	county	Elec. Procedure: regarding the way poll officials acted toward Hispanic voters
Bexar County	385 F.3d 853	5th Cir.	2004	TX	y	L	county	Reapp
Black Political Task Force	300 F. Supp. 2d 291	D. Mass.	2004	MA	n	L	state	Reapp

TABLE A, CONTINUED

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
Black v. McGuffage	209 F.Supp.2d 889	N.D. Ill.	2002	IL	n	P	state	Elec. Procedure: 1) punch card voting systems, 2) voting systems that lack effective error notification, 3) voting systems with inadequate education of voters, inadequate training of and assistance from elec. judges, and inadequate ballot delivery
Bladen County	1989 WL 253428	E.D.N.C.	1989	NC	y	F	county	At-large
Blaine County	363 F.3d 897	9th Cir.	2004	MT	n	L	county	At-large
Blytheville School District	71 F.3d 1382	8th Cir.	1995	AR	n	L	school	At-large, MV
Bond	875 F.2d 1488	10th Cir.	1989	CO	n	L	county	At-large
Bone Shirt	336 F.Supp.2d 976	D.S.D.	2004	SD	y	L	state	Reapp
Bradley v. Work	154 F.3d 704	7th Cir.	1998	IN	n	L	county	Other: Judicial appointment: Nominating cmte sends names to Gov.; retention election held later
Brewer	876 F.2d 448	5th Cir.	1989	TX	y	L	school	At-large
Bridgeport	512 U.S. 1283	U.S.	1994	CT	n	P	city	Reapp
Brooks	158 F.3d 1230	11th Cir.	1998	GA	y	L	state	Majority Vote Requirement for primary elections
Brunswick County, NC	1996 U.S. App. LEXIS 20237	4th Cir.	1996	NC	n	L	county	At-large (modified)
Brunswick County, VA	984 F.2d 1393	4th Cir.	1993	VA	y	L	county	Reapp
Buskey v. Oliver	565 F. Supp. 1473	M.D. Ala.	1983	AL	y	L	city	Reapp
Butts v. NYC	779 F.2d 141	2d Cir.	1985	NY	y	L	city	Majority Vote Requirement
Calhoun County	88 F.3d 1393	5th Cir.	1996	MS	y	L	county	Reapp
Cambridge	799 F.2d 137	4th Cir.	1996	MD	n	P	city	At-large

TABLE A, CONTINUED

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
Campaign for a Progressive Bronx	631 F.Supp. 975	S.D.N.Y.	1986	NY	y	F	city	Elec. Procedure: voter regis. & voting problems in prim elec.
Campos v. Houston	113 F.3d 544	5th Cir.	1997	TX	y	L	city	At-large
Campuzano	200 F.Supp.2d 905	N.D. Ill.	2002	IL	n	L	state	Reapp
Cano	211 F. Supp. 2d 1208	C.D. Cal.	2002	CA	n	L	state	Reapp
Carr	1994 U.S. Dist. LEXIS 11087/ 1994 WL 419656	D. La.	1994	LA	y	P	state	Other: Judicial appointment ad hoc
Carrollton NAACP	829 F.2d 1547	11th Cir.	1987	GA	y	L	county	At-large (single comm'r)
Chapman v. Nicholson	579 F. Supp. 1504	N.D. Ala.	1984	AL	y	L	city	At-large
Charles Mix County	386 F.Supp.2d 1108	D.S.D.	2005	SD	n	P	county	Reapp
Charleston County	365 F.3d 341	4th Cir.	2004	SC	y	L	county	At-large
Chalman	44 F.3d 923	11th Cir.	1995	GA	y	S	city	At-large
Chattanooga	722 F. Supp. 380	E.D. Tenn.	1989	TN	n	L	city	At-large
Chickasaw County I	705 F.Supp. 315	N.D. Miss.	1989	MS	y	L	county	Reapp
Chickasaw County II	1997 U.S. Dist. LEXIS 22087; 1997 WL 33426761	N.D. Miss.	1997	MS	y	L	county	Reapp
Chilton County Board of Education	868 F.2d 1274	11th Cir.	1989	AL	y	S	county	At-large, MV
Chisom	970 F.2d 1408	5th Cir.	1992	LA	y	S	state	Reapp
Chula Vista	723 F. Supp. 1384	S.D. Cal.	1989	CA	n	L	city	At-large
Cincinnati	40 F.3d 807	6th Cir.	1994	OH	n	L	city	At-large
Citizen Action	1984 U.S. Dist. Lexis 24869	D. Conn.	1984	CT	n	P	city	Elec. Procedure: denial of requests to blacks & Latinos wanting to be voter registrars
City of Arcadia	868 F.Supp. 1376	M.D. Fla.	1994	FL	n	L	city	At-large
City of Austin	871 F.2d 529	5th Cir.	1989	TX	y	L	city	At-large, MV
City of Boston	784 F.2d 409	1st Cir.	1986	MA	n	L	city	Reapp

TABLE A, CONTINUED

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
City of Chicago Heights	1997 WL 102543	N.D. Ill.	1997	IL	n	L	city	At-large
City of Chicago-Barnett	17 F.Supp.2d 753	N.D. Ill.	1998	IL	n	L	city	Reapp
City of Chicago-Bonilla	141 F.3d 699	7th Cir.	1998	IL	n	L	city	Reapp
City of Cleveland	297 F.Supp.2d 901	N.D. Miss.	2004	MS	y	L	city	Reapp, At-large, Other
City of Cocoa	117 F.3d 1238	11th Cir.	1997	FL	n	S	city	At-large
City of Columbia	33 F.3d 52	4th Cir.	1994	SC	y	L	city	At-large
City of Crystal Springs	626 F.Supp. 987	S.D. Miss.	1986	MS	y	F	city	Reapp
City of Dallas	734 F. Supp. 1317	N.D. Tex.	1990	TX	y	L	city	At-large (8-3)
City of Dover	123 F.R.D. 85	D. Del.	1988	DE	n	F	city	At-large, Elec. Procedure dual registration system
City of Fort Lauderdale	804 F.2d 611 / 1986 U.S. App. LEXIS 37448 (787 F.2d 1528)	11th Cir.	1986	FL	n	L	city	At-large
City of Greenville	1998 WL 930709	N.D. Miss.	1998	MS	y	F	city	Reapp
City of Greenwood	599 F.Supp. 397	N.D. Miss.	1984	MS	y	L	city	At-large
City of Hampton	919 F.Supp. 212	E.D. Va.	1996	VA	y	P	city	At-large
City of Holyoke	960 F. Supp. 515	D. Mass.	1997	MA	n	L	city, school	At-large
City of Houston	806 F.2d 634	5th Cir.	1986	MS	y	R	city	At-large
City of Indianapolis	976 F.2d 357	7th Cir.	1992	IN	n	L	city	At-large
City of Jackson, MS	714 F.2d 42	5th Cir.	1983	MS	y	P	city	At-large
City of Jackson, TN	683 F.Supp. 1515	W.D. Tenn.	1988	TN	n	L	city	At-large
City of LaGrange	969 F. Supp. 749	N.D. Ga.	1997	GA	y	L	city	At-large
City of Miami Beach	113 F.3d 1563	11th Cir.	1997	FL	n	L	city	At-large
City of Minneapolis	2004 U.S. Dist. Lexis 19708	D. Minn.	2004	MN	n	L	city	Reapp
City of New Rochelle	308 F.Supp.2d 152	S.D.N.Y.	2003	NY	n	L	city	Reapp
City of Norfolk	883 F.2d 1232	4th Cir.	1989	VA	y	L	city	At-large

TABLE A, CONTINUED

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
City of Pearland	945 F.Supp. 1069	S.D.Tex.	1996	TX	y	P	city	Other: annexation
City of Peoria	659 F. Supp. 394	C.D. Ill.	1987	IL	n	P	school	At-large
City of Philadelphia	28 F.3d 306	3d Cir.	1994	PA	n	L	state	Elec. Procedure: voter purge law
City of Pine Bluff	794 F.2d 678	8th Cir.	1986	AR	n	P	city	At-large
City of Pittsburgh	686 F.Supp. 97	3d Cir.	1988	PA	n	S	city	At-large
City of Quitman	148 F.3d 472	5th Cir.	1998	MS	y	R	city	At-large
City of Roanoke	162 F. Supp. 2d 1335	M.D. Ala.	2001	AL	y	L	school	Other: Appointment
City of Rome	127 F.3d 1355	11th Cir.	1997	GA	y	L	city	At-large
City of San Antonio	937 F.Supp. 587	W.D. Tex.	1996	TX	y	L	city	Other: Term Limits Provision, Ordinance 73584
City of Santa Maria	160 F.3d 543	9th Cir.	1998	CA	n	P	city	At-large
City of Sarasota	611 F. Supp. 25	M.D. Fla.	1985	FL	n	R	city	At-large
City of Springfield	658 F.Supp. 1015	C.D. Ill.	1987	IL	n	L	city	At-large
City of St. Louis	54 F.3d 1345	8th Cir.	1995	MO	n	L	city	Reapp
City of Starke	712 F. Supp. 1523	M.D. Fla.	1989	FL	n	L	city	At-large
City of Statesville	606 F.Supp. 569	W.D.N.C.	1985	NC	n	S	city	At-large
City of Tampa	693 F.Supp. 1051	M.D. Fla.	1988	FL	y	S	city	At-large
City of Thomasville	401 F. Supp. 2d 489	M.D.N.C.	2005	NC	n	S	city	At-large
City of Woodville	881 F.2d 1327	5th Cir.	1989	MS	y	L	city	At-large
Clark	777 F.Supp. 445	M.D. La.	1990	LA	y	L	state	At-large
Cleveland County	142 F.3d 468	D.C. Cir.	1998	NC	y	S	county	At-large
Cleveland School District OH	193 F.3d 389	6th Cir.	1999	OH	n	P	school	Other: law changing election method for school dist and authority of the mayor
Coleman	990 F. Supp. 221	S.D.N.Y.	1997	NY	n	P	school	Elec. Procedure: discrim. distrib. of absentee ballots

TABLE A, CONTINUED

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
Columbus County	782 F.Supp. 1097	E.D.N.C.	1991	NC	n	L	county	At-large
Common Cause/California	2002 WL 1766436	C.D. Cal.	2002	CA	n	S	state	Elec. Procedure: punch card ballots
Common Cause/Georgia	406 F.Supp.2d 1326	N.D. Ga.	2005	GA	y	P	state	Elec. Procedure: voter ID
Concerned Citizens	63 F.3d 413	5th Cir.	1995	TX	y	L	county	Reapp
Corbett	202 F. Supp. 2d 972	E.D. Mo.	2002	MO	n	L	county	Reapp
County of Big Horn (Windy Boy)	647 F. Supp. 1002	D. Mont.	1986	MT	n	L	county	At-large
County of Thurston	129 F.3d 1015	8th Cir.	1997	NE	n	L	county	Reapp
Cousin	145 F.3d 818	6th Cir.	1998	TN	n	L	county	At-large
Cross	704 F.2d 143	5th Cir.	1983	GA	y	P	city	At-large
Cumberland County	927 F.2d 595	4th Cir.	1991	NC	y	P	county	At-large
Dallas County Board of Education	791 F.2d 831	11th Cir.	1986	AL	y	L	county	At-large
Dallas County Commission	636 F.Supp. 704	S.D. Ala.	1986	AL	y	L	county	At-large
Dallas Independent school District	2001 U.S. Dist. LEXIS 5837	N.D. Tex.	2001	TX	y	P	school	Reapp
Davis v. Chiles	139 F.3d 1414	11th Cir.	1998	FL	n	L	county	At-large
De Grandy	512 U.S. 997	U.S.	1994	FL	n	L	state	Reapp
Dean	555 F. Supp. 502	D.R.I.	1982	RI	n	P	city	Elec. Procedure: Poll location
Democratic Party of Arkansas	902 F.2d 15	8th Cir.	1990	AR	n	L	state	Majority Vote Requirement
Democratic Party of Virginia	323 F.Supp.2d 696	E.D. Va.	2004	VA	y	P	state	Elec. Procedure: refusal to allow cand. on ballot, ballot complaints
Denis	1994 U.S. Dist. LEXIS 15819	S.D.N.Y.	1994	NY	y	P	city	Elec. Procedure: ballot placement of a candidate & elec. irregularities
DeSoto County	204 F.3d 1335	11th Cir.	2000	FL	n	L	county	At-large
Detroit School Reform Board	293 F.3d 352	6th Cir.	2002	MI	n	L	school	Other: creation of replacement school board by the state.

TABLE A, CONTINUED

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
Dickinson	817 F.Supp. 737	S.D. Ind.	1992	IN	n	F	state	At-large
Dillard v. Crenshaw	640 F. Supp. 1347	M.D. Ala.	1986	AL	y	P	county	At-large
Dilworth v. Clark	129 F.Supp.2d 966	S.D. Miss.	2000	MS	y	P	state	Elec. Procedure: Candidate Denied Name on Ballot
Dorsey v. Barber	2005 WL 2211176	N.D. Ohio	2005	OH	n	P	local	Other: arrest interfered with voter reg.
Durham County	1997 U.S. App. LEXIS 31794 (129 F.3d 116)	4th Cir.	1997	NC	n	L	county	Reapp
Edgefield County	650 F. Supp. 1176	D.S.C.	1986	SC	y	L	county	At-large
El Paso Independent School District	591 F. Supp. 802	W.D. Tex.	1984	TX	y	L	school	At-large
Elections Board	793 F. Supp. 859	W.D. Wis.	1992	WI	n	L	state	Reapp
Emison	507 U.S. 25	U.S.	1993	MN	n	L	state	Reapp
Escambia County	748 F.2d 1037	11th Cir.	1984	FL	n	L	county	At-large
Farrakhan	359 F.3d 1116	9th Cir.	2004	WA	n	L	state	Other: felon disfranchisement law
Forest County	336 F. 3d 570	7th Cir.	2003	WI	n	L	county	Reapp
Forrest County	814 F.Supp. 1327	S.D. Miss.	1993	MS	y	P	county	Reapp
Fort Bend Independent School District	89 F.3d 1205	5th Cir.	1996	TX	y	L	school	At-large
France	71 F.Supp.2d 317	S.D.N.Y.	1999	NY	y	L	state, city	At-large
Fund for Accurate and Informed Representation	796 F.Supp. 662	N.D.N.Y.	1992	NY	n	L	state	Reapp
Gadsden County	691 F.2d 978	11th Cir.	1982	FL	n	L	school	At-large
Gaona	989 F.2d. 299	9th Cir.	1993	CA	n	P	state	Reapp
Garza v. Los Angeles	918 F.2d 763	9th Cir.	1990	CA	n	L	county	Reapp
Gingles	478 U.S. 30	U.S.	1986	NC	n	L	state	At-large
Granville County	860 F.2d 110	4th Cir.	1988	NC	y	R	county	At-large

TABLE A, CONTINUED

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
Green	1996 WL 524395	E.D.N.Y.	1996	NY	y	P	school	Other: suspension of elected black school board member and subsequent appointment
Grenada County	1989 WL 251321	N.D. Miss.	1989	MS	y	F	county	Reapp
Gretna	834 F.2d 496	5th Cir.	1987	LA	y	L	city	At-large, MV
Guy	2003 WL 22005853	D. Del.	2003	DE	n	P	city	At-large
Halifax County	594 F.Supp. 161	E.D.N.C.	1984	NC	y	P	county	At-large
Hall v. Virginia	385 F.3d 421	4th Cir.	2004	VA	y	P	state	Reapp
Hamrick	296 F.3d 1065	11th Cir.	2002	GA	y	L	city	At-large
Hardee County	906 F.2d 524	11th Cir.	1990	FL	y	L	county	At-large
Harris	695 F. Supp. 517	M.D. Ala.	1988	AL	y	L	state	Elec. Procedure: hiring of poll officials
Harris v. Houston	151 F.3d 186	5th Cir.	1998	TX	y	P	city	Other: annexation
Harrison	1992 WL 95909	E.D. Pa.	1992	PA	n	L	state	Reapp
Hastert Reapportionment	777 F.Supp. 634	N.D. Ill.	1991	IL	n	L	state	Reapp
Hayden	2004 WL 1335921	S.D.N.Y.	2004	NY	n	L	state	Other: felon disfranchisement
Haywood County	544 F. Supp. 1122	W.D. Tenn.	1982	TN	n	P	county	At-large
Hernandez	714 F. Supp. 963	N.D. Ill.	1989	IL	n	P	county	Elec. Procedure: practice of appointing only 2 deputy registrars
Hispanics v. NAACP	958 F.2d 24	2d Cir.	1992	NY	n	P	city	Reapp
Holbrook Unified School District	703 F. Supp. 56	D. Ariz.	1989	AZ	y	P	school	At-large
Holder v. Hall	512 U.S. 874	U.S.	1994	GA	y	L	county	At-large (single comm'r)
Houston v. Haley	869 F.2d 807	5th Cir.	1989	MS	y	L	city	Reapp, At-large
Howard	1994 WL 118211	D.D.C.	1994	DC	n	L	city	At-large
Howard v. Gilmore	2000 U.S. App. LEXIS 2680	4th Cir.	2000	VA	y	P	state	Other: felon disfranchisement

TABLE A, CONTINUED

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
Hudson County Board	949 F.2d 665	3d Cir.	1991	NJ	n	S	county	Elec. Procedure: discriminatory treatment of voters
Irby	889 F.2d 1352	4th Cir.	1989	VA	y	L	school	Other: Appointment
Jacksonville Coalition	351 F. Supp. 2d 1326	M.D. Fla.	2004	FL	n	P	county	Elec. Procedure: creation of only 5 early polling sites
Jeffers	730 F. Supp. 196	E.D. Ark.	1989	AR	n	L	state	Reapp
Jefferson Citizens - Parish II	2003 WL 1595167	E.D. La.	2003	LA	y	P	city	At-large (5-2)
Jefferson County	798 F.2d 134	5th Cir.	1986	TX	y	F	county	Reapp
Jefferson Parish I	926 F.2d 487	5th Cir.	1991	LA	y	L	city	At-large, Reapp
Jefferson Parish School Board	1989 WL 3801	E.D. La.	1989	LA	y	S	city	Reapp
Jenkins v. Red Clay School District	116 F.3d 685	D. Del.	1997	DE	n	L	county	At-large
Johnson v. Bush	405 F.3d 1214	11th Cir.	2005	FL	n	L	state	Other: felon disfranchisement
Jones v. Alabama	2001 U.S. Dist. LEXIS 3909	S.D. Ala.	2001	AL	y	P	state	Elec. Procedure: identifying party in primary
Jones v. Edgar	3 F.Supp.2d 979	C.D. Ill.	1998	IL	n	P	state	Other: felon disfranchisement
Jordan	604 F.Supp. 807	N.D. Miss.	1984	MS	y	L	state	Reapp
Joseph v. LaCoste	2005 WL 1838444	N.D. Ill.	2005	IL	n	P	school	Other: appointment
Kansas City	752 F. Supp. 897	W.D. Mo.	1990	MO	n	P	city	Other: Term limits amendment
Kent County	76 F.3d 1381	6th Cir.	1996	MI	n	L	county	Reapp
Kershaw County	838 F.Supp. 237	D.S.C.	1993	SC	y	R	county	At-large
Ketchum	740 F.2d 1398	7th Cir.	1984	IL	n	L	city	Reapp
Kingman Park	348 F.3d 1033	D.C. Cir.	2003	DC	n	L	city	Reapp
Kirksey v. Allain	658 F.Supp. 1183	S.D. Miss.	1987	MS	y	L	state	At-large, MV
Knight v. Alabama	1990 U.S. Dist. LEXIS 19604	N.D. Ala.	1990	AL	y	P	state	Other: Establishing satellite univ. campuses
Knox-Milwaukee County	607 F. Supp. 1112	E.D. Wis.	1985	WI	n	P	county	Reapp

TABLE A, CONTINUED

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
Kuhn v. Tompson	304 F.Supp.2d 1313	M.D. Ala.	2004	AL	y	P	state	Other: removal of Justice Roy Moore
Lafayette County	20 F.Supp.2d 996	N.D. Miss.	1998	MS	y	L	county	Reapp
LaPaille	786 F.Supp. 704	N.D. Ill.	1992	IL	n	L	state	Reapp
Lawrence County	814 F.Supp. 1346	S.D. Miss.	1993	MS	y	L	county	Reapp
Lawrimore County	121 F.3d 698	4th Cir.	1997	SC	y	F	city	Other: annexation
Liberty County Commissioners	221 F.3d 1218	11th Cir.	2000	FL	n	L	county	At-large
Little Rock	56 F.3d 904	8th Cir.	1995	AR	n	L	school	Reapp
Local Unions 20	223 F.Supp.2d 491	S.D.N.Y.	2002	NY	n	P	other	Other
Love	1992 WL 96307	S.D. Ga.	1992	GA	y	S	county	At-large
Lubbock	727 F.2d 364	5th Cir.	1984	TX	y	L	city	At-large
Lucas	967 F.2d 549	11th Cir.	1992	GA	y	L	school	Elec. Procedure: Timing and presentation of school bond referendum
LULAC - Midland	648 F. Supp. 596	W.D. Tex.	1986	TX	y	L	school	At-large (3-4 Plan/5-2 Plan)
LULAC - North East I.S.D.	903 F. Supp. 1071	W.D. Tex.	1995	TX	y	L	school	At-large
Lulac v. Clements: All 9 Counties	999 F.2d 831	5th Cir.	1993	TX	y	L	county	At-large
Lulac v. Roscoe I.S.D.	123 F.3d 843	5th Cir.	1997	TX	y	L	school	At-large
Madison County	610 F.Supp. 240	S.D. Miss.	1985	MS	y	L	county	Elec. Procedure: Ballot invalidation by Board of Elec. Comm'rs
Magnolia Bar Association	994 F.2d 1143	5th Cir.	1993	MS	y	L	state	Reapp
Major	574 F. Supp. 325	E.D. La.	1983	LA	y	L	state	Reapp
Maldonado v. Pataki	2005 WL 3454714	E.D.N.Y.	2005	NY	n	P	state	Other: state law creating additional judgeship
Mallory-Hamilton County	922 F.2d 1273	6th Cir.	1991	OH	n	S	county	At-large

TABLE A, CONTINUED

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
Mallory-Ohio	173 F.3d 377	6th Cir.	1999	OH	n	L	state	At-large
Marengo County	623 F. Supp. 33	S.D. Ala.	1985	AL	y	L	county	At-large
Marion County	2005 WL 1939910	S.D. Ind.	2005	IN	n	P	county	Reapp
Marks-Philadelphia	1994 WL 146113	E.D. Pa.	1994	PA	n	L	state	Elec. Procedure: involving improper use of absentee ballots
Martinez v. Bush	234 F. Supp. 2d 1275	S.D. Fla.	2002	FL	n	L	state	Reapp
Marylanders	849 F. Supp. 1022	D. Md.	1994	MD	n	L	state	Reapp
Maxey	1996 WL 529024	S.D.N.Y.	1996	NY	n	L	state	Reapp
McCarty	749 F.2d 1134	5th Cir.	1984	TX	y	L	school	At-large
Mehfoud	702 F. Supp. 588	E.D. Va.	1988	VA	y	L	county	Reapp
Merced	574 F.Supp. 498	S.D.N.Y.	1983	NY	y	L	city	Reapp
Metro Dade County	985 F.2d 1471	11th Cir.	1993	FL	n	L	county	At-large
Metts	363 F.3d 8	1st Cir.	2004	RI	n	P	state	Reapp
Mexican American Bar Association	755 F.Supp. 735	W.D. Tex.	1990	TX	y	P	state	At-large
Meza	322 F. Supp. 2d 52	D. Mass.	2004	MA	n	L	state	Reapp
Milwaukee NAACP	116 F. 3d 1194	7th Cir.	1997	WI	n	L	state	At-large
Mobile School Board	706 F.2d 1103	11th Cir.	1983	AL	y	L	school	At-large
Monroe County	740 F.Supp. 417	N.D. Miss.	1990	MS	y	L	county	Reapp
Montero	861 F.2d 603	10th Cir.	1988	CO	n	P	state	Other: Petition to get a proposed constitutional amendment on the ballot
Montezuma-Cortez School District	7 F. Supp. 2d 1152	D. Colo.	1998	CO	n	L	school	At-large
Montiel v. Davis	215 F. Supp. 2d 1279	S.D. Ala.	2002	AL	y	L	state	Reapp
Muntaqim	366 F.3d 102	2d Cir.	2004	NY	n	L	state	Other: felon disfranchisement
NAACP v. Fordice	252 F.3d 361	5th Cir.	2001	MS	y	L	state	Reapp

TABLE A, CONTINUED

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
Nash	797 F. Supp. 1488	W.D. Mo.	1992	MO	n	L	state	Reapp
National City	976 F.2d 1293	9th Cir.	1992	CA	n	L	city	At-large
Neal	689 F. Supp. 1426	E.D. Va.	1988	VA	y	L	county	At-large
Newman v. Hunt	787 F.Supp. 193	M.D. Ala.	1992	AL	y	P	state	Other: appointment of new white county comm'r by the Governor after death of black county comm'r
Niagara County	826 F.Supp. 664	W.D.N.Y.	1993	NY	n	S	county	Reapp
Niagara Falls	65 F.3d 1002	2d Cir.	1995	NY	n	L	city	At-large
Nipper	39 F.3d 1494	11th Cir.	1994	FL	n	L	county	At-large
Old Person	312 F.3d 1036	9th Cir.	2002	MT	n	L	state	Reapp
O'Lear	222 F.Supp. 2d 850	E.D. Mich.	2002	MI	n	P	state	Reapp
Opelika	748 F.2d 1473	11th Cir.	1984	AL	y	L	city	At-large
Operation Push	932 F.2d 400	5th Cir.	1991	MS	y	L	state	Elec. Procedure: Mississippi voter registration statute and accompanying proced.
Orange County	783 F. Supp. 1348	M.D. Fla.	1992	FL	n	L	county	At-large
Osburn	369 F.3d 1283	11th Cir.	2004	GA	y	L	state	Elec. Procedure: open primary
Page	144 F. Supp. 2d 346	D. N.J.	2001	NJ	n	L	state	Reapp
Parker v. Ohio	263 F. Supp. 2d 1100	S.D. Ohio	2003	OH	n	L	state	Reapp
Pasadena Independent School District	165 F.3d 368	5th Cir.	1999	TX	y	L	school	At-large (staggered, numbered post)
Perez	629 F.Supp. 734	S.D.N.Y.	1985	NY	y	F	city	Elec. Procedure: ballot placement of a candidate
Perry	548 U.S. Slip. Op.	U.S.	2006	TX	y	L	state	Reapp

TABLE A, CONTINUED

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
Phillips County	850 F.2d 406	8th Cir.	1988	AR	n	P	county	Elec. Procedure: ballot handling and counting, presence of black candidate representative in polls barred, poll official training
Pomona	883 F.2d 1418	9th Cir.	1989	CA	n	L	city	At-large
Prejean	83 Fed.Appx. 5	5th Cir.	2003	LA	y	L	state	Reapp
Prewitt v. Moore	840 F.Supp. 436	N.D. Miss.	1993	MS	y	L	state	Other: State statutes authorizing appointment of temporary judges
Quilter	507 U.S. 146	U.S.	1993	OH	n	L	state	Reapp
Ramos	1991 WL 18183	N.D. Ill.	1991	IL	n	P	state	Reapp
Rangel	8 F.3d 242	5th Cir.	1993	TX	y	L	state	At-large
Reyes v. Stefaniak	1995 WL 38958	N.D. Ill.	1995	IL	n	F	city	Reapp
Richmond County Board	1988 U.S. Dist. LEXIS 16729	E.D. Va.	1998	VA	y	R	county	Reapp
Rocha	1982 U.S. Dist. LEXIS 15164	S.D. Tex.	1982	TX	y	L	county	Reapp
Rockford Board of Education	1991 WL 299104	N.D. Ill.	1991	IL	n	P	school	Reapp
Rodriguez	308 F.Supp.2d 346	S.D.N.Y.	2004	NY	n	L	state	Reapp
Rural West I	877 F. Supp. 1096	W.D. Tenn.	1995	TN	n	L	state	Reapp
Rural West II	209 F.3d 835	6th Cir.	2000	TN	n	L	state	Reapp
Rybicki	574 F.Supp. 1147	N.D. Ill.	1983	IL	n	L	state	Reapp
Salt River Project	109 F.3d 586	9th Cir.	1997	AZ	y	L	county	Elec. Procedure: voter registration requirements
San Diego County	1993 WL 379838	9th Cir	1993	CA	n	L	county	Reapp
Sanchez-Colorado	97 F.3d 1303	10th Cir.	1996	CO	n	L	state	Reapp
Save Our Aquifer v. San Antonio	237 F. Supp. 2d 721	W.D. Tex.	2002	TX	y	P	city	Other: petition to oppose golf course

TABLE A, CONTINUED

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
Schweitzer	596 F.Supp. 935	E.D. Mo.	1984	MO	n	P	city	Other: individual city officials' comments about candidate for sheriff
Seastrunk	772 F.2d 143	5th Cir.	1985	LA	y	L	school	Reapp
Sensley	385 F.3d 591	5th Cir.	2004	LA	y	L	county	Reapp
Shelley	344 F.3d 914	9th Cir.	2003	CA	n	P	state	Elec. Procedure: punch-card ballots
Sisseton Independent School District	804 F.2d 469	8th Cir.	1986	SD	n	L	school	At-large, Elec. Procedure
Slagle	821 F. Supp. 1162	W.D. Tex.	1993	TX	y	P	state	Reapp
Smith-Crittenden County	687 F. Supp. 1310	E.D. Ark.	1988	AR	n	L	state	At-large
South Carolina Democratic Party	2004 U.S. Dist. LEXIS 27299 / 2004 WL 3262756	D.S.C.	2004	SC	y	L	state	Elec. Procedure: Decision to hold new primary elec. because of widespread fraud taking place during the original elec.
Southern Christian Leadership	56 F.3d 1281	11th Cir.	1995	AL	y	L	state	At-large, MV
Springfield Park District	851 F.2d 937	7th Cir.	1988	IL	n	L	city	At-large
St. Bernard Parish School Board	2002 U.S. Dist. LEXIS 16540; 2002 WL 2022589	D. La.	2002	LA	y	P	city	Reapp, at-large
St. Francisville	135 F.3d 996	5th Cir.	1998	LA	y	F	city	Reapp
St. Louis Board of Education	90 F.3d 1357	8th Cir.	1996	MO	n	L	county	At-large
Stewart v. Blackwell	444 F.3d 843	6th Cir.	2006	OH	n	P	state	Elec. Procedure: voting machines
Stockton	956 F.2d 884	9th Cir.	1992	CA	n	L	city	At-large, MV, Other
Suffolk County	268 F.Supp.2d 243	E.D.N.Y.	2003	NY	n	P	county	Reapp
Sumter County	775 F.2d 1509	11th Cir.	1985	GA	y	L	county	Reapp
SW Texas Junior College Dist.	964 F.2d 1542	5th Cir.	1992	TX	y	L	state	At-large
Tangipahoa	2004 WL 1638106	E.D. La.	2004	LA	y	P	city	Reapp

TABLE A, CONTINUED

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
Tensas Parish School Board	819 F.2d 609	5th Cir.	1987	LA	y	L	city	Reapp
Terrazas	581 F. Supp. 1329	N.D. Tex.	1984	TX	y	L	state	Reapp
Terrell	565 F. Supp. 338	N.D. Tex.	1983	TX	y	L	city	At-large, Other
Texarkana	861 F. Supp. 756.	W.D. Ark.	1992	AR	n	L	city	At-large
Town of Babylon	914 F.Supp. 843	E.D.N.Y.	1996	NY	n	L	city	At-large
Town of Cicero	2000 WL 34342276	N.D. Ill.	2000	IL	n	P	city	Elec. Procedure: 18-month residency requirement to become a candidate
Town of Hempstead	180 F.3d 476	2d Cir.	1999	NY	n	L	city	At-large
Town of North Johns	717 F. Supp. 1471	M.D. Ala.	1989	AL	y	L	city	Elec. Procedure: Plaintiff alleged that town intentionally withheld candidacy requirement information and forms from 2 African American candidates
Trevino	573 F. Supp. 806	N.D. Ind.	1983	IN	n	P	city	Elec. Procedure: realignment of precinct locations & registration barriers
Turner	784 F. Supp. 553	E.D. Ark..	1991	AR	n	L	state	Reapp
U.S. v. Jones	57 F.3d 1020	11th Cir	1995	AL	y	L	county	Elec. Procedure: Counting ballots from voters ineligible in jurisdiction
Upper San Gabriel	2000 WL 33254228	C.D. Cal.	2000	CA	n	P	county	Reapp
Val Verde County	967 F.Supp. 917	W.D.Tex.	1997	TX	y	P	county	Elec. Procedure: counting of improper mail-in ballots
Vander Linden v. Hodges	193 F.3d 268	4th Cir.	1999	SC	y	P	county	Other: county legislative delegation system
Varner v. Smitherman	1993 WL 663327 / 1993 U.S. Dist. LEXIS 17721	S.D. Ala.	1993	AL	y	L	city	At-large

TABLE A, CONTINUED

Litigation Title	Citation	Court	Year	State	Jurisd.	Type	Gov. Body	Practice
Walthall County	157 F.R.D. 388	S.D. Miss.	1994	MS	y	F	county	Reapp
Wamser	883 F.2d 617	8th Cir.	1989	MO	n	P	state	Elec. Procedure: punch card ballots
Warren County	802 F.2d 461	4th Cir.	1986	KY	n	P	city	At-large
Warrensville Heights	16 F. Supp. 2d 837	N.D. Ohio	1998	OH	n	P	city	Other: mayor's & police chief's use of police data against mayor's opponents
Washington County	653 F. Supp. 121	N.D. Fla.	1986	FL	n	R	county	At-large
Watsonville	863 F.2d 1407	9th Cir.	1988	CA	n	L	city	At-large
Welch v. McKenzie	765 F.2d 1311	5th Cir.	1985	MS	y	L	county	Elec. Procedure: Absentee Ballot Procedural Errors in a Primary Elec.
Wesch	785 F. Supp. 1491	S.D. Ala.	1992	AL	y	S	state	Reapp
Wesley	791 F.2d 1255	6th Cir.	1986	TN	n	L	state	Other: felon disfranchisement
West	786 F. Supp. 803	W.D. Ark.	1992	AR	n	L	county	At-large
Westwego	946 F.2d 1109	5th Cir.	1991	LA	y	L	city	At-large, MV
White	909 F.2d 99	4th Cir.	1990	VA	y	L	county	Reapp
White v. Alabama	74 F.3d 1058	11th Cir.	1996	AL	y	S	state	At-large, Reapp
Williams v. McKeithen	2005 WL 2037545	E.D. La.	2005	LA	y	P	state	At-large
Williams v. State Bd. of Elections	718 F.Supp. 1324	N.D. Ill.	1989	IL	n	L	county	Elec. Procedure: Slating Process
Winston-Salem/Forsyth County Board	1992 U.S. App. LEXIS 6221	4th Cir.	1992	NC	n	F	school	At-large
Worcester County	35 F.3d 921	4th Cir.	1994	MD	n	L	county	At-large

GUIDE TO TABLE B

Field Name	Explanation of Contents
Consid.	y = At least one court within this lawsuit considered Senate Factors under the totality of circumstances and/or *Gingles* test. For all findings, a blank field means that it was unclear from published opinions whether or not factors were considered or found.
1	y = At least one court within this lawsuit found Senate Factor 1 to be met (history of official discrimination), and this finding was not overturned.
2	y = At least one court within this lawsuit found Senate Factor 2 (racially polarized voting), and this finding was not overturned.
3	y = At least one court within this lawsuit found Senate Factor 3 (enhancing practices), and this finding was not overturned.
4	y = At least one court within this lawsuit found Senate Factor 4 (candidate slating), and this finding was not overturned.
5	y = At least one court within this lawsuit found Senate Factor 5 (socioeconomic effects of discrimination), and this finding was not overturned.
6	y = At least one court within this lawsuit found Senate Factor 6 (racial campaign appeals), and this finding was not overturned.
7	y = At least one court within this lawsuit found Senate Factor 7 (lack of candidate success), and this finding was not overturned.
8	y = At least one court within this lawsuit found Senate Factor 8 (lack of responsiveness), and this finding was not overturned.
9	y = At least one court within this lawsuit found Senate Factor 9 (tenuous policy), and this finding was not overturned.
G-I	y = At least one court within this lawsuit found *Gingles* I, and this finding was not overturned.
G-II	y = At least one court within this lawsuit found *Gingles* II, and this finding was not overturned.
G-III	y = At least one court within this lawsuit found *Gingles* III, and this finding was not overturned.
G-all	y = At least one court within this lawsuit found the *Gingles* test satisfied and this finding was not overturned.
Intent	y = A court in this lawsuit found the defendant had engaged in intentional voting discrimination. f = A court in this lawsuit made a finding of intentional discrimination, not necessarily connected to the lawsuit at hand.
Success	y = The ultimate outcome of this lawsuit was plaintiff success on the merits by proving a violation, or (if no published opinion stating a violation) in winning an injunction, attorney's fees, remedy or settlement.
Viol.	y = The court found or the defendant stipulated a violation of Section 2.

TABLE B: FACTOR AND LEGAL FINDINGS IN SECTION 2 LAWSUITS, 1982–2005, BY LITIGATION TITLE

Litigation Title	Consid.	1	2	3	4	5	6	7	8	9	G-I	G-II	G-III	G-all	Intent	Success	Viol.
Abilene	y	y	n	y	n	n			n	n						n	n
African American Citizens for Change																n	n
African American Legal Defense Fund	y		n	n	n	n			n	n		n	n	n		n	n
African-American Voting Rights LDF	y	y	n	n	n	n		n	n	n	n	n	n	n		n	n
Ahoskie	y		y		n	n			n	n						y	y
Alamance County	y		n	n	n	n			n	n	y	y	n	n		n	n
Alamo Heights Indep. School District																n	n
Alamosa County	y	n		n	n	n	y	n	n	n	y	y	n	n		n	n
Albany County	y	y	y	n	y	y	n	y	n	y	y	y	y	y		y	y
Aldasoro v. Kennerson	y	n	n	n	n	n	n	n	n	n	n	n	n	n		n	n
Al-Hakim	y		n	n	n	n			n	n	n	n	n	n		n	n
Anson County	y		n		n	n			n	n	n	n	n	n		n	n
Anthony	y			n	n	n			n	n	y	y	n	n		n	n
Arakaki															y	y	y
Armour	y	y	y	n	n	y	y	y	y	y	y	y	y	y	y	y	y
Armstrong v. Allain	y	n	n	n	n	n	y	n	n	n		n	n	n		n	n
Ashe v. NYC																n	n
Attala County	y	y	y	n	n	y		y	n	n	y	y	y	y		y	y
Austin	y	y	n	n	n	n			n	n	n	n	n			n	n
Autauga County Board of Education																y	n
Baines	y		n	n	n	n			n	n						n	n
Baker	y		n	n	n	n			n	n						n	n
Balderas	y		n	n	n	n			n	n	n	n	n	n		n	n

TABLE B, CONTINUED

Litigation Title	Consid.	1	2	3	4	5	6	7	8	9	G-I	G-II	G-III	G-all	Intent	Success	Viol.
Baldwin Board of Education	y	y	y	y	n	y		y	y	y	y	y	y	y	y	y	y
Baldwin County Commission	y	y	n	n	n	y		y	n	n	n					n	n
Bandemer	y		n	n	n	n			n	n						n	n
Baytown	y	y	y	n	n	y		y	n	n	y	y	y	y		y	y
Beaufort County																y	y
Belle Glade	y	n	n	n	n	n	n		n	n	n	n	n	n		n	n
Ben Hill County																n	n
Benavidez																n	n
Berks County	y	y	n	n	n	y			n	n	n	n	n		f	y	y
Bexar County	y			n	n	n	n		n	n	y	y	n	n		n	n
Black Political Task Force	y	n	y	n	n	n	n	y	n	n	y	y	y	y	f	y	y
Black v. McGuffage																n	n
Bladen County																y	n
Blaine County	y	y	y	y	n	y		y	n	y	y	y	y	y		y	y
Blytheville School District	y	y	y	y	n	y		y	n	n	y	y	y	y		y	y
Bond	y			n	n	n	n	y	n	n	y	n	n	n		n	n
Bone Shirt	y	y	y	y	y	y	y	y	y	y	y	y	y	y	f	y	y
Bradley v. Work	y		n	n	n	n			n	n			n	n		n	n
Brewer	y	y	n	y	n	n			n	n	n	y	n	n		n	n
Bridgeport	y	y	y		n	y		y	y	n						n	n
Brooks	y	y	n	y	n	n			n	n	n	n	n	n		n	n
Brunswick County, NC																n	n
Brunswick County, VA	y	y	y		n	y	y		n	n	n	n	n	n		n	n
Buskey v. Oliver	y	y	y	n	n	y	n		n	n					y	y	y

TABLE B, CONTINUED

Litigation Title	Consid.	1	2	3	4	5	6	7	8	9	G-I	G-II	G-III	G-all	Intent	Success	Viol.
Butts v. NYC	y	y	y	n	n	n	y	n	n	n						n	n
Calhoun County	y	n	y	y	n	y		y	n	n	y	y	y	y		y	y
Cambridge																n	n
Campaign for a Progressive Bronx																y	n
Campos v. Houston	y			n	n	n			n	n	n	y	n	n		n	n
Campuzano	y		n	n	n	n			n	n	y	y	n	n		n	n
Cano	y		n	n	n	n			n	n	n	n	n	n		n	n
Carr																n	n
Carrollton NAACP	y	n	y	n	n	n		y	n	n	n	y	y	n		n	n
Chapman v. Nicholson	y	n	y	y	n	n	n	n	n	n						n	n
Charles Mix County																n	n
Charleston County	y	y	y	y	n	y	y	y	n	n	y	y	y	y	f	y	y
Chatman																y	n
Chattanooga	y	y	y	n	n	n	n	y	n	n	y	y	y	y		y	y
Chickasaw County I	y	n	y	n	n	n		y	n	n	y	y	y	y		y	y
Chickasaw County II	y	y	y	y	n	y		y	n	n	y	y	y	y		y	y
Chilton County Board of Education	y		y		n	n			n	n				y		y	y
Chisom	y	y	n	y	n	y	n	n	n	n		n	n	n		y	n
Chula Vista	y		n	n	n	n			n	n	n	n	n	n		n	n
Cincinnati	y	n		n	n	n	n	n	n	n	y	y	n	n		n	n
Citizen Action	y		n		n	n			y	n						y	n
City of Arcadia	y										y	y				n	n
City of Austin	y	y		n	n	n	n	n	n	n	y	n	n	n		n	n
City of Boston	y	n	y	n	n	n	n	n	n	n						n	n

TABLE B, CONTINUED

Litigation Title	Consid.	1	2	3	4	5	6	7	8	9	G-I	G-II	G-III	G-all	Intent	Success	Viol.
City of Chicago Heights	y	n	y	y	y	n			n	n	y	y	y	y		y	y
City of Chicago-Barnett	y	y	y	n	n	y		n	n	n	y	y	y	y		y	y
City of Chicago-Bonilla	y	n	y	n	n	y	n	n	n	n	y	y	y	y		n	n
City of Cleveland	y	n	n	y	n	n		n	n	n	y	y	n	n		n	n
City of Cocoa																n	n
City of Columbia	y	y	n	n	n	n	n	n	n	n	y	n	n	n		n	n
City of Crystal Springs																y	n
City of Dallas	y	y	y	y	n	y	y	y	y	n	y	y	y	y	f	y	y
City of Dover																y	n
City of Fort Lauderdale	y	n	n	n	n	n	n	n	n	n						n	n
City of Greenville																y	n
City of Greenwood	y	y	y	y	n	y	y	y	n	y						y	y
City of Hampton	y		n		n	n			n	n	y	y	n	n		n	n
City of Holyoke	y	n	n	n	n	y	y	n	n	n	y	y	n	n		n	n
City of Houston																y	y
City of Indianapolis	y		n	n	n	n			n	n						n	n
City of Jackson, MS																n	n
City of Jackson, TN	y	y	y	y	n	y	n	y	n	n	y	y	y	y		y	y
City of LaGrange	y	y	y	y	y	y	y	y	n	n	y	y	y	y		y	y
City of Miami Beach	y		n	n	n	n			n	n	n	n	n	n		n	n
City of Minneapolis	y	y		n	n	n			n	n	n	y	n	n		n	n
City of New Rochelle	y	y	y	n	y	y			n	n	y	y	y	y	y	y	y
City of Norfolk	y	y	y	n	n	n	n	y	n	n	y	y	y	y		y	y
City of Pearland																n	n

TABLE B, CONTINUED

Litigation Title	Consid.	1	2	3	4	5	6	7	8	9	G-I	G-II	G-III	G-all	Intent	Success	Viol.
City of Peoria																n	n
City of Philadelphia	y	n	n	y	n	y	y	n	y	n	n	n	n			n	n
City of Pine Bluff	y		n													n	n
City of Pittsburgh																y	n
City of Quitman																y	y
City of Roanoke																n	n
City of Rome	y	y		y	n	y		n	n	n	y	n	n	n		n	n
City of San Antonio																n	n
City of Santa Maria	y		n		n	n	n	y	n	n	n	n	n	n		n	n
City of Sarasota	y		y		n	n			n	n						y	y
City of Springfield	y	y	y	y	y	y	n	y	n	y	y	y	y	y		y	y
City of St. Louis	y		y								y	y	y	y		n	n
City of Starke	y	y	y	y	n	n	n	y	y	n	y	y	y	y		y	y
City of Statesville	y		y		n	n			n	n						y	y
City of Tampa	y		n		n	n			n	n	n	y	n	n		y	n
City of Thomasville	y		n	n	n	y	n	n			y	y	n	n		y	y
City of Woodville	y	y	y	n	n	y	n	y	n	n	y	n	n	n		n	n
Clark	y	y	y	n	n	y	y	y	n	n	y	y	y	y		y	y
Cleveland County																n	n
Cleveland School District (OH)																n	n
Coleman	y		n			y	y	n								n	n
Columbus County	y	y	y	y	n	y	y	y	y	n	y	y	y	y		y	y
Common Cause/California																y	n
Common Cause/Georgia																n	n

TABLE B, CONTINUED

Litigation Title	Consid.	1	2	3	4	5	6	7	8	9	G-I	G-II	G-III	G-all	Intent	Success	Viol.
Concerned Citizens																n	n
Corbett	y		y	n	n	n			n	n	y	y	y	y		y	y
County of Big Horn (Windy Boy)	y	y	y	y	n	y	y	y	n	n	n	n	n		f	y	y
County of Thurston	y	y	y			y		y		n	y	y	y	y	f	y	y
Cousin	y	y	y	n	n	y	n	n	n	n	n	n	n	n		n	n
Cross	y	y	y		n	n			n	n						n	n
Cumberland County																y	n
Dallas County Board of Education	y	y	y	y	n	y	n	y	n	n						n	n
Dallas County Commission	y	y	y	y	n	y	n	y	n	n						y	y
Dallas Independent school District																n	n
Davis v. Chiles	y	y	y	n	n	y		y	n	n	n	y	y	n		n	n
De Grandy	y	y	y	n	n	y		y	n	n	y	y	y	y		n	n
Dean	y	y	n		n	n			n	n					y	y	n
Democratic Party of Arkansas	y	y	y	n	n	y	n	y	n	n	n	n	n	n		n	n
Democratic Party of Virginia																n	n
Denis																n	n
DeSoto County	y	y	n	n	n	n		y	n	n	n	n	n	n		n	n
Detroit School Reform Board																n	n
Dickinson	y		n		n	n			n	n	n	n	n	n		y	n
Dillard v. Crenshaw	y	y	y		n	y	y	y	n	n	y	y	y	y	y	y	y
Dilworth v. Clark	y		n		n	n			n	n	n	n	n	n		n	n
Dorsey v. Barber																n	n
Durham County	y		n													n	n
Edgefield County	y	y	y	y	n	y		y	n	n	y	y	y	y		y	y

TABLE B, CONTINUED

Litigation Title	Consid.	1	2	3	4	5	6	7	8	9	G-I	G-II	G-III	G-all	Intent	Success	Viol.
El Paso Independent School District	y	y	y	y	n	n	n	y	n	y						y	y
Elections Board																y	y
Emison	y	y	n	n	n	y		y	n	n	n	n	n	n		n	n
Escambia County	y	y	y	y	n	y		y	n	y						y	y
Farrakhan	y	y	n	n	n	n			n	n	n	n	n			n	n
Forest County	y		n	n	n	n			n	n	y	n	n	n		n	n
Forrest County																n	n
Fort Bend Independent School District	y	y	n	n	n	n		y	n	n	y	n	n	n		n	n
France	y	n	n	n	n	n	n		n	n	n	y	n	n		n	n
Fund for Accurate and Informed Representation	y			n	n	n			n	n	y	n	n	n		n	n
Gadsden County	y		y					y	n						y	y	y
Gaona																n	n
Garza v. Los Angeles	y		y	n	n	y	y	y	n	n	n	y	y	n	y	y	y
Gingles	y	y	y	y	n	y	y	y	n	y	y	y	y	y		y	y
Granville County																y	y
Green	y	n	n		n	n			n	n	n	n	n	n		n	n
Grenada County																y	n
Gretna	y	y	y	y	y	y	n	y	n	n	y	y	y	y		y	y
Guy	y	n	n		n	n		n	n	n	n	n	n	n		n	n
Halifax County	y	y	y		n	y		y	n	n						y	n
Hall v. Virginia	y		n		n	n			n	n	n	n	n	n		n	n
Hamrick	y	y		n	n	y		n	n	n	n	y	n	n		n	n
Hardee County	y			n	n	n		y	n	n	y	n	n	n		n	n
Harris	y	y	n	y	n	n			n	n					y	y	y

TABLE B, CONTINUED

Litigation Title	Consid.	1	2	3	4	5	6	7	8	9	G-I	G-II	G-III	G-all	Intent	Success	Viol.
Harris v. Houston	y		n		n	n	n		n	n	y	n	n	n		n	n
Harrison	y			n	n	n			n	n	y	y	n	n		n	n
Hastert Reapportionment	y	y	y			y		y			y	y	y	y		y	n
Hayden																n	n
Haywood County	y	y	y		n	n		y	n	n	n	n	n		y	y	y
Hernandez																n	n
Hispanics v. NAACP																n	n
Holbrook Unified School District	y	y	n		n	n			n	n	n	n	n	n		n	n
Holder v. Hall	y	y	y	n	n	y		y	y	n	y	y	y	y	f	n	n
Houston v. Haley	y	y	n	n	n	y	n	y	n	n	y	n	n	n		n	n
Howard	y			n	n	n			n	n	y	n	n	n		n	n
Howard v. Gilmore																n	n
Hudson County Board	y	y	n		n	n			n	n	n	n	n			y	n
Irby	y		n	n	n	n		n	n	n						n	n
Jacksonville Coalition																n	n
Jeffers	y	y	y	y	n	y	y	y	n	n	y	y	y	y	y	y	y
Jefferson Citizens - Parish II																n	n
Jefferson County																y	n
Jefferson Parish I	y		y	y	n	n		y	n	n	y	y	y	y		y	y
Jefferson Parish School Board																y	n
Jenkins v. Red Clay School District	y	y	y	y	n	y	n	n	y	n	y	y	y	y		n	n
Johnson v. Bush	y		n	n	n	n			n	n						n	n
Jones v. Alabama																n	n
Jones v. Edgar	y	n	n		n	n			n	n						n	n

TABLE B, CONTINUED

Litigation Title	Consid.	1	2	3	4	5	6	7	8	9	G-I	G-II	G-III	G-all	Intent	Success	Viol.
Jordan	y	y	y	n	n	y	y	y	n	n						y	y
Joseph v. LaCoste																n	n
Kansas City	y		n		n	n	n		n	n	n	n	n			n	n
Kent County	y	n	n	n	n	n	y	n	n	n	n	n	n	n		n	n
Kershaw County																y	y
Ketchum	y	y	n	n	n	n			n	n						y	y
Kingman Park	y			n	n	n			n	n	y	n	n	n		n	n
Kirksey v. Allain	y	y	y	y	n	y	n	y	n	y	y	y	y	y		y	y
Knight v. Alabama																n	n
Knox-Milwaukee County																n	n
Kuhn v. Tompson																n	n
Lafayette County	y	n	y	n	n	n	n	y	n	n	y	y	y	y		y	y
LaPaille	y		n	n	n	n			n	n						n	n
Lawrence County	y		y	n	n	n			n	n	n	y	y	n		y	y
Lawrimore County																n	n
Liberty County Commissioners	y	n	y	n	n	n	n	n	n	n	y	y	y	y		n	n
Little Rock	y	y	y	n	n	y	n	n	n	n	n	n	n	n	f	n	n
Local Unions 20																n	n
Love																y	n
Lubbock	y	y	y	y	n	y		y	n	n						y	y
Lucas	y	y	n	n	n	n		n	n	n						n	n
LULAC - Midland	y	y	y	y	n	y	n	y	n	n	y	y	y	y	y	y	y
LULAC - North East I.S.D.	y	n	y	n	n	y		y	n	n	y	y	y	y		y	y
Lulac v. Clements: All 9 Counties	y	n	n	n	n	n	y	n	n	n	y	y	n	n		n	n

Table B, Continued

Litigation Title	Consid.	1	2	3	4	5	6	7	8	9	G-I	G-II	G-III	G-all	Intent	Success	Viol.
Lulac v. Roscoe I.S.D.	y		n	n	n	n		n	n	n	n	n	n	n		n	n
Madison County																y	y
Magnolia Bar Association	y		n	n	n	y	y	n	n	n	y	y	n	n		n	n
Major	y	y	y	y	n	y		y	n	y						y	y
Maldonado v. Pataki																n	n
Mallory-Hamilton County																y	y
Mallory-Ohio	y	y	n	n	n	n	n	n	n	n	n	n	n	n		n	n
Marengo County	y	y	y	y	n	y	n	y	y	y						y	y
Marion County																n	n
Marks-Philadelphia															y	y	y
Martinez v. Bush	y		y	n	n	n			n	n	y	y	y	y		n	n
Marylanders	y	y	y	n	y	y		y	n	y	y	y	y	y	f	y	y
Maxey	y		n	n	n	n		n	n	n						n	n
McCarty	y	n	n	n	n	n		n	n	n						n	n
Mehfoud	y	y	y	n	n	y	y	y	y	n	y	y	y	y		y	y
Merced																n	n
Metro Dade County	y	n	y	n	n	y	y	y	y	n	y	y	y	y		y	y
Metts	y	n	n		n	y			n	n	n			n		n	n
Mexican American Bar Association																n	n
Meza	y	n	n	n	n	n		n	n	n	n	y	n	n		n	n
Milwaukee NAACP	y	n	n	n	n	n	n	n	n	n	y	y	n	n		n	n
Mobile School Board	y	y	y	y	n	y	n	y	y	y					y	y	y
Monroe County	y	n	y	y	n	n	n	y	n	y	y	y	y	y		y	y
Montero																n	n

TABLE B, CONTINUED

Litigation Title	Consid.	1	2	3	4	5	6	7	8	9	G-I	G-II	G-III	G-all	Intent	Success	Viol.
Montezuma-Cortez School District	y	y	y	n	n	y	n	y	n	n	y	y	y	y	f	y	y
Montiel v. Davis																n	n
Muntaqim	y		n	n	n	n			n	n						n	n
NAACP v. Fordice	y	n	y	y	n	n	n	n	n	n	y	y	y	y		n	n
Nash	y		n	n	n	n		n	n	n	y	y	n	n		n	n
National City	y			n	n	n		n	n	n	y	n	n	n		n	n
Neal	y	y	y	n	n	y	y	y	n	n	y	y	y	y		y	y
Newman v. Hunt																n	n
Niagara County	y		n		n	n	n		n	n						y	n
Niagara Falls	y	n	y	y	n	n		n	n	n	y	y	y	y		n	n
Nipper	y	n	y	n	n	y	n	y	n	n	n	y	n	n		n	n
Old Person	y	y	y	n	n	y	y	n	n	n	y	y	y	y		n	n
O'Lear	y		n		n	n			n	n	n	n	n	n		n	n
Opelika	y	y	n	n	n	n		y	n	n						n	n
Operation Push	y	y	n	n	n	y	n	y	n	y						y	y
Orange County	y		n	n	n	n		y	n	n	n	n	n	n		n	n
Osburn	y		n	n	n	n		n	n	n						n	n
Page	y			n	n	n			n	n	y	y	n	n		n	n
Parker v. Ohio	y		n								n	n	n	n		n	n
Pasadena Independent School District	y			n	y	n		y	n	n	n	y	n	n		n	n
Perez																n	n
Perry	y	y	y	n	n	y		n	y	y	y	y	y	y		y	y
Phillips County																n	n
Pomona	y	n		n	n	n	n	n	n	n	y	n	n	n		n	n

TABLE B, CONTINUED

Litigation Title	Consid.	1	2	3	4	5	6	7	8	9	G-I	G-II	G-III	G-all	Intent	Success	Viol.
Prejean																n	n
Prewitt v. Moore																n	n
Quilter	y	y	n	n	n	n			n	n	n	n	n	n		n	n
Ramos																n	n
Rangel	y			n	n	n		n	n	n	y	y	n	n		n	n
Reyes v. Stefaniak																y	n
Richmond County Board	y	y	n					y		n						y	y
Rocha	y		n	n	n	n		y	y	n						n	n
Rockford Board of Education	y	y	y		n	y			n	n	y	y	y	y		y	n
Rodriguez	y	n	y	n	n	n		n	n	n	n	y	y	n		n	n
Rural West I	y	y	y	n	n	y		y	n	n	y	y	y	y	f	n	n
Rural West II	y	y	y	n	n	y	n	y	n	y	y	y	y	y	f	y	y
Rybicki	y	n	n	n	n	n			y	n					f	y	y
Salt River Project	y		n	n	n	n	n		n	n	n	n	n	n		n	n
San Diego County	y			n	n	n			n	n	y	n	n	n		n	n
Sanchez-Colorado	y	y	y	n	n	y	n	y	n	n	y	y	y	y		y	y
Save Our Aquifer v. San Antonio																n	n
Schweitzer																n	n
Seastrunk	y	y	n	n	n	n	n	y	n	n						n	n
Sensley	y		y	n	n	n			n	n	n	y	y	n		n	n
Shelley	y		n		n	n			n	n	n	n	n			n	n
Sisseton Independent School District	y	y	n	y	n	n	n	n	n	n	y	y	n	n		n	n
Slagle																n	n
Smith-Crittenden County	y	y	y	n	n	y		y	n	n	y	y	y	y		y	y

TABLE B, CONTINUED

Litigation Title	Consid.	1	2	3	4	5	6	7	8	9	G-I	G-II	G-III	G-all	Intent	Success	Viol.
South Carolina Democratic Party	y		n	n	n	n		n	n	n	n	n	n	n		n	n
Southern Christian Leadership	y	y	n	y	n	y	y	n	n	n	n	y	n	n		n	n
Springfield Park District	y		n	n	n	n			n	n	n	n	n	n		n	n
St. Bernard Parish School Board	y	y	y	n	n	y	y	y	n	n	y	y	y	y		y	y
St. Francisville																y	n
St. Louis Board of Education	y	n	n	n	n	n			n	n	y	y	n	n		n	n
Stewart v. Blackwell																n	n
Stockton	y		n	y	n	n		n	n	n	n	n	n	n		n	n
Suffolk County	y	n	n		n	n	n	n	n	n	n	y	n	n		n	n
Sumter County																n	n
SW Texas Junior College Dist.	y	n		y	n	n		n	n	n	y	y	n	n		n	n
Tangipahoa																y	n
Tensas Parish School Board	y	y	y	n	n	n			n	n						n	n
Terrazas	y	y	n	n	n	y		y	n	n						n	n
Terrell	y	y	y	y	n	y	n	y	y	y					y	y	n
Texarkana	y	y	y	n	n	n	n	y	n	n	y	y	y	y		y	y
Town of Babylon	y	n	n	y	n	n	n	n	n	n	n	y	n	n		n	n
Town of Cicero	y	y	n		n	n			n	n					y	y	n
Town of Hempstead	y	y	y	y	y	n	y	y	y	y	y	y	y	y		y	y
Town of North Johns	y	y	n	n	n	n			n	n					y	y	y
Trevino																n	n
Turner	y		n	n	n	n			n	n	n	n	n	n		n	n
U.S. v. Jones	y	y	n	n	n	n			n	n						n	n
Upper San Gabriel																n	n

TABLE B, CONTINUED

Litigation Title	Consid.	1	2	3	4	5	6	7	8	9	G-I	G-II	G-III	G-all	Intent	Success	Viol.
Val Verde County	y		n		n	n			n	n	y	y	n	n		n	n
Vander Linden v. Hodges																n	n
Varner v. Smitherman																n	n
Walthall County																y	n
Wamser	y		n		n	y	y		n	y	n	n	n			n	n
Warren County																n	n
Warrensville Heights																n	n
Washington County																y	y
Watsonville	y	n	y	n	n	n	n	y	n	n	y	y	y	y		y	y
Welch v. McKenzie																n	n
Wesch																y	n
Wesley	y	n	n	n	n	y			n	n	n	n	n			n	n
West	y		n	n	n	n			n	n	n	n	n	n		n	n
Westwego	y	y	y	n	n	y	n	y	n	y	y	y	y	y		y	y
White	y		n	n	n	y			n	n	n	n	n	n		n	n
White v. Alabama	y	y	y		n	n	y	y	n	n	y	y	y	y		y	y
Williams v. McKeithen	y		n		n	n			n	n	n	n	n	n		n	n
Williams v. State Bd. of Elections	y		n	n	n	n			n	n			n	n		n	n
Winston-Salem/Forsyth County Board																n	n
Worcester County	y	y	y	y	n	n			n	n	y	y	y	y		y	y

TABLE C
RACIAL APPEALS CITED IN SECTION 2 LITIGATION: TIMELINE AND CITATIONS

Seventy-three distinct racial appeals are identified in post-1982 opinions under Section 2 of the Voting Rights Act. Forty-two of these appeals occurred in covered jurisdictions while 31 occurred in non-covered ones. Of the 47 racial appeals identified in campaigns since 1982, 30 are from covered jurisdictions with the remaining 17 from non-covered jurisdictions.[548]

Year	Covered Jurisictions	Non-Covered Jurisdictions
1950		Gingles v. Edmisten, 590 F. Supp. 345, 364 (E.D.N.C 1984)
1954		*Gingles*, 590 F. Supp. at 364.
1960		*Gingles*, 590 F. Supp. 345 at 364.
1968		*Gingles*, 590 F. Supp. at 364 (2 campaigns).
1970	Williams v. Dallas, 734 F. Supp. 1317, 1339 (N.D. Tex. 1990) (3 campaigns).	
1971		Garza v. County of Los Angeles, 756 F. Supp. 1298, 1341 (C.D. Cal. 1990).
1972	*Dallas*, 734 F. Supp. at 1339.	*Gingles*, 590 F. Supp. at 364.
1973	U.S. v. Charleston County, 316 F. Supp. 2d 268, 295 (D.S.C. 2003); Butts v. New York, 614 F. Supp. 1527, 1531 (S.D.N.Y. 1985).	
1975	*Dallas*, 734 F. Supp. at 1347.	Jeffers v. Clinton, 730 F. Supp. 196, 212 (E.D. Ark. 1989).
1976	*Dallas*, 734 F. Supp. at 1348 (2 campaigns).	*Jeffers*, 730 F. Supp. at 212.
1977	Jordan v. Greenwood 599 F. Supp. 397, 403 (N.D. Miss. 1984); *Dallas*, 734 F. Supp. at 1349.	
1978		U.S. v. Alamosa County, 306 F. Supp. 2d 1016, 1026 (D. Colo. 2004).
1979		Reed v. Town of Babylon, 914 F. Supp. 843, 859 (E.D.N.Y. 1996).
1982	Southern Christian Leadership Conference v. Sessions, 56 F.3d 1281, 1290 (11th Cir. 1995); Jordan v. Winter, 604 F. Supp. 807, 813 (N.D. Miss 1984); White v. Alabama: 867 F.Supp. 1519, 1556 (M.D.Ala. 1994) *Dallas*, 734 F. Supp. at 1360.	Garza v. County of Los Angeles, 756 F. Supp. 1298, 1341 (C.D. Cal. 1990).

548. Years for otherwise specifically cited campaigns were not identified in the following four instances: Town of Hempstead Litig., 956 F. Supp. 326, 342 (E.D.N.Y. 1997); City of Phila. Litig., 824 F. Supp. 514, 537 (E.D. Pa. 1993) (2 campaigns); Magnolia Bar Ass'n Litig., 793 F. Supp. 1386, 1410 (S.D. Miss. 1992).

Year	Covered Jurisictions	Non-Covered Jurisdictions
1983	Clark v. Roemer, 777 F. Supp. 471 (M.D. La. 2001); Neal v. Coleburn, 689 F.Supp. 1426, 1431-32 (E.D. Va. 1998) (2 campaigns); McDaniels v. Mehfoud, 702 F. Supp. 588, 595 (E.D. Va. 1988).	*County of Los Angeles*, 756 F. Supp at 1341; Ortiz v. City of Philadelphia, 824 F.Supp. 514, 537 (E.D. Pa. 1993).
1984		*Gingles*, 590 F. Supp. at 364; *Town of Babylon*, 914 F. Supp. at 860. Windy Boy v. County of Big Horn, 647 F. Supp. 1002, 1018 (D. Mont. 1986).
1985	Magnolia Bar Association v. Lee, 793 F. Supp. 1386, 1410 (S.D. Miss 1990); *Dallas*, 734 F. Supp at 1363.	Armour v. Ohio, 775 F.Supp. 1044, 1056 (N.D. Ohio 1991); *City of Philadelphia*, 824 F.Supp. 514 at 537.
1987	*Clark*, 777 F. Supp. at Appendix A; *Mehfoud*, 702 F. Supp. at 595.	*City of Philadelphia*, 824 F. Supp. at 537; Goosby v. Town of Hempstead, 956 F. Supp. 326, 342-43 (E.D.N.Y. 1997); Vecinos de Barrio Uno v. City of Holyoke, 880 F. Supp. 911, 927 (D. Mass. 1995); Roberts v. Wamser, 679 F. Supp. 1513, 1515 (E.D. Mo. 1987).
1988	U.S. v. Charleston County, 316 F. Supp. 2d 268, 295 (D.S.C. 2003); *Dallas*, 734 F. Supp. at 1365.	U.S. v. Alamosa County, 306 F. Supp. 2d 1016, 1026 (D. Colo. 2004).
1989	*Magnolia Bar Ass'n*, 793 F. Supp. at 1409-10; *Dallas*, 734 F. Supp at 1368.	
1990	*Southern Christian Leadership Conf.*, 56 F.3d at 1290; *Magnolia Bar Ass'n*, 793 F. Supp. at 1409-10; *Charleston County*, 316 F. Supp.2d at 295 (2 campaigns).	Meek v. Metro Dade County, 805 F. Supp 967, 982 (S.D. Fla. 1992).
1991	Smith v. Board of Sup'rs of Brunswick County, 801 F. Supp. 1513, 1518 (E.D. Va. 1992); *Magnolia Bar Ass'n*, 793 F. Supp. at 1410.	*City of Philadelphia*, 824 F. Supp. at 537.
1992	*Charleston County*, 316 F. Supp.2d at 295 (2 campaigns).	*Alamosa County*, 306 F. Supp. 2d at 1025.
1994	*White*, 867 F.Supp. at 1556.	
1995	Cofield v. City of LaGrange, 969 F. Supp. 749, 777 (N.D. Ga. 1997).	
1996		Coleman v. Board of Educ., 990 F. Supp. 221, 231-32 (S.D.N.Y. 1997).
1998	Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1041 (D.S.D. 2004).	
2000	Charleston County, 316 F. Supp. 2d at 295.	
2002	St. Bernard Parish School Board, 2002 U.S. Dist. LEXIS 16540, at *33 (E.D. La. 2002).	

GOP redistricting maps make dramatic changes

Critic calls redrawing of districts 'shameful gerrymandering'; backers say they're just doing jobs

By Jason Stein and Patrick Marley of the Journal Sentinel
July 8, 2011

Madison - Republicans unveiled a plan Friday to redraw the state's 132 legislative seats just before a wave of recall elections this summer - a proposal that would push at least 11 pairs of lawmakers into the same districts.

A quick vote would allow GOP lawmakers to approve the maps and lock down advantages for themselves at the ballot box for the next 10 years by drawing district lines in their favor. Republicans' schedule would allow them to sign off on maps to their liking even if they lose control of the Senate in the coming weeks.

Republicans have been working on the maps for months, but Democrats and the general public saw them for the first time Friday, a week and a half before lawmakers are expected to approve them.

Democrats are in the minority in both houses and will have little to no say in what the maps look like. But a lawsuit has already been filed over redistricting, meaning a federal court could still weigh in on the process.

A legislative hearing on the new maps is scheduled for 10 a.m. Wednesday, and the Legislature could act on it as early as July 19 in extraordinary session.

"(Republicans) are now going to convene an extraordinary legislative session to rush a vote on their plan out of fear they will lose their majority when voters render their verdict in the upcoming recall elections," said a statement from Senate Minority Leader Mark Miller (D-Monona).

"Instead of creating any jobs for the people of Wisconsin, the only jobs they're protecting are their own."

But GOP leaders said they were simply doing their jobs.

Once a decade, every state must draw new lines for congressional and legislative districts based on new U.S. census data, which show that Wisconsin gained more than 300,000 residents since 2000. The new lines are needed to ensure the districts are of equal population.

"Republicans have been keeping our promises and getting the job done since day one. We started with jobs bills to improve the economy; we balanced the budget on time and turned a deficit into a surplus; and now we're fulfilling our constitutional requirement to properly reapportion the state's legislative and congressional districts," Assembly Speaker Jeff Fitzgerald (R-Horicon) and Senate Majority Leader Scott Fitzgerald (R-Juneau) said in a joint statement.

Republican leaders said there were 11 states where some redistricting measures had already been approved by the Legislature and signed by the governor or been passed through an alternate system of redistricting used in those states.

Scott Fitzgerald spokesman Andrew Welhouse said Republicans would seek to pass separate legislation allowing the legislative and congressional maps to be redrawn before local municipalities finish drawing ward lines. Currently, state law requires the ward lines to be drawn first, which would mean that lawmakers would have to wait until long after the recall elections to pass a redistricting plan.

Welhouse said lawmakers were moving more quickly this year because of new technology, such as computerized mapping. He declined to comment on whether local communities could use that same technology to move more quickly as well.

Some communities have drawn their ward lines, but many have not. Those that have approved them may have to redraw them once the Legislature approves its maps.

Dramatic changes

Sen. Alberta Darling (R-River Hills) would see her 8th Senate District change significantly, likely becoming far more Republican. As now, the district would include parts of Milwaukee, Ozaukee, Washington and Waukesha counties. But it wouldn't include Shorewood, where the recall movement against her was launched last winter, and which has voted Democratic in recent state and national elections. Also gone: sections of the east side of Milwaukee.

What it lost on the east and south, Darling's district would pick up on the west and north, taking in more of Germantown and Menomonee Falls than it does now, along with Lannon and part of the Town of Lisbon.

Now, the 21st Senate District consists of most of Racine County, and the 22nd Senate District consists of most of Kenosha County.

Under the proposal, the 21st District would hold the western, Republican-leaning portions of both counties, while the 22nd District would include the city of Kenosha and much of the City of Racine, which have larger Democratic and minority populations.

With those changes, Sen. Bob Wirch (D-Pleasant Prairie), who is facing a recall election, would be drawn out of the 22nd District he has long represented. He called the changes "shameful political gerrymandering."

Democrats said two Democrats challenging Republican senators in recall elections - Rep. Fred Clark of Baraboo and former Brown County Executive Nancy Nusbaum - were drawn out of the districts they are seeking. That would mean if they won this summer's recall elections, they could serve briefly but would then have to move or run in a different district in November 2012.

In the Assembly, 11 pairs of sitting lawmakers are drawn into the same districts, and 11 other districts are left without incumbents. In three districts, Republicans would have to run against each other; in two districts, Democrats would have to run against each other; and in six, a Republican would have to run against a Democrat - in districts that Democrats said leaned Republican.

Cullen Werwie, a spokesman for Republican Gov. Scott Walker, said the governor would examine the bill when it reaches his desk and declined to comment on whether it was appropriate to vote on it before

the recall elections.

"It's up to the Legislature right now," Werwie said.

Sen. Randy Hopper (R-Fond du Lac), who is facing a recall election, said he didn't know if voters would have a problem with lawmakers approving new maps just before the recall elections. Asked if he thought the timing was fair, he said, "That's leadership's call."

Republicans currently run all of state government, but run the risk of losing the Senate this summer because of unprecedented recall elections against six Republicans and three Democrats. Republicans have a 19-14 majority, and Democrats would need to net three seats to gain control of the chamber.

Courts have drawn Wisconsin's maps for the past three redistricting cycles, but that's because control of the Legislature was split between the two parties, which were unable to agree on a plan.

Under the federal Voting Rights Act, districts must be drawn in ways that ensure minorities have an opportunity to elect candidates of their choice.

This month, former Senate Democratic leader Judy Robson of Beloit and 14 other citizens asked for a three-judge panel to develop a redistricting plan if lawmakers do not put a constitutional plan in place in a timely fashion.

GOP legislative leaders have retained Michael Best & Friedrich and the Troupis Law Office to draw the maps. So far they have reported spending $300,000 in taxpayer money for those maps, but lawmakers have not said how much they expect the legal work to cost in total.

At Wednesday's hearings, Senate and Assembly committees will consider a bill that would dictate how challenges to the maps in state court can be conducted. Under the bill, the Supreme Court would have to assign a panel of judges from three circuit courts to hear the challenges.

Those suing would be barred from substituting any of the judges. Appeals of the panel's rulings would be heard directly by the Supreme Court, without going through the appeals court. Those changes would not affect the lawsuit that has already been filed because that case is in federal court.

Tom Tolan and Emma Roller of the Journal Sentinel staff contributed to this report.

GERRYMANDERING AND POLITICAL CARTELS

Samuel Issacharoff

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GERRYMANDERING AND POLITICAL CARTELS

*Samuel Issacharoff**

*As redistricting reaches its decennial peak, and as courts anticipate the next round of redistricting litigation, it is worthwhile to revisit some of the fundamental tenets of the law governing gerrymandering. This Article explores three interrelated issues. First, the Article inquires as to the different treatment given to two analogous scenarios: although there has been an apparent collapse of any effort to control geographic carve-ups of territory between competing political parties, condemnation would inevitably ensue if market rivals were to attempt analogously to divide their respective zones of influence so as to preserve market share. The second part of the Article shows that this differential treatment results from the Supreme Court's having fastened on limited doctrines of individual rights and nondiscrimination in the political arena, while allowing notions of consumer welfare and the preservation of competition to govern product markets. The Article then concludes with a proposal to remove the power to redistrict from insider political operatives to promote a more competitive political process. This approach would render suspect all purposeful districting, thereby taking the pressure off of the vulnerable category of race. The aim is both to restore competition to the political process and to show a possible way out of the post-*Shaw v. Reno *morass.*

I. INTRODUCTION: THE SEARCH FOR A CONSTITUTIONAL THEORY OF THE POLITICAL PROCESS

Nearly forty years ago, the U.S. Supreme Court ushered in the rights era in the law governing the political process. Beginning with its intuition that redistricting may impermissibly alter the outcomes of elections, the Court created a regime of justiciable rights that redrew the contours of politics, from eligibility for the franchise, to the effect of electoral schemes on minority electoral prospects, to the funding of candidates and the political process. Although few countries are comfortable with an American level of judicial intervention in the political arena, there is little question that a rights regime is asserting itself across much of Europe, and that even countries resistant to judicial

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review, such as Britain,[1] are finding the traditional divide between law and politics considerably more porous than they once did.

The passage of time, and the extensive case law that has developed, permits a revisitation of the core principles animating American jurisprudence on the political process. This is a more difficult undertaking than may appear, for American courts are more secure in their oversight of the political arena than in identifying the underlying principles that govern their intervention. The lack of a secure footing can be traced back to the Court's initial concern, as set out in the reapportionment cases of the 1960s, that districting (or the refusal to redistrict) may be an invitation to mischief.[2] While the Court's willingness to enter the "political thicket"[3] was of tremendous jurisprudential significance, the underlying insight was hardly a great conceptual breakthrough. There is a core understanding in American politics, going back to the evocative imagery of the gerrymander, that geographically districted elections are subject to ends-oriented manipulation. Even when the distribution of votes remains constant, the actual partitioning of voters along district lines can determine the outcomes of elections and thereby tempt those who control the redistricting process to manipulate the lines for their own ends. Indeed, the history of the practice of ends-oriented manipulation of district lines traces back to the founding strokes of the American republic and the attempt to rig electoral boundaries in Virginia so as to keep James Madison out of the state legislature.[4]

Further, the Court's intuition of the harm in the malapportionment cases also comports with a well-trodden insight in political theory. Such luminous figures as the Marquis de Condorcet and Kenneth Arrow have explained that all election mechanisms are vulnerable to manipulation by a variety of means, including what is termed "agenda setting" — the attempt by those who structure the rules concerning presentation of questions to voters to create pathways that favor one or another outcome.[5] For political theorists, a focus on districting is only a subset of a concern over the ability of insiders to gain unfair advantage over the disorganized mass of the electorate who must, of

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[1] *See, e.g.*, Bowman v. United Kingdom, 63 Eur. Ct. H.R. 175, 191 (1998) (striking down a £5 independent expenditure limitation in electoral campaigns as infringing rights of expression).

[2] *See* Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

[3] This is Justice Frankfurter's evocative caution against engaging in constitutional oversight of the political process. *See* Colegrove v. Green, 328 U.S. 549, 556 (1946) (opinion of Frankfurter, J.) ("Courts ought not to enter this political thicket.").

[4] *See* Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, *in* MINORITY VOTE DILUTION 85, 85 (Chandler Davidson ed., 1984).

[5] *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963); DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS 159–80 (1963) (discussing Condorcet's theory of elections).

necessity, await the manner in which issues are presented to them on election day before trying to exercise their will.[6]

In the early cases of the reapportionment revolution, the Court turned its attention primarily to numerical disparities among the districts.[7] Not only did such disparities violate rudimentary conceptions of equality, they also prevented the citizenry from enjoying a somewhat abstract right to "full and effective participation" in the electoral process.[8] Lurking in these cases was a deeper concern that the manipulation of the districting agenda could cause systemic harms to the political process.[9] The difficulty, as I show in this Article, is in the development of a benchmark against which to measure the distortive effects of improper manipulation of the political process. To the extent that the problem in the early malapportionment cases could be limited to numerical disparities among districts, the one-person, one-vote principle provided a preliminary fix. However, as a conceptual matter and as a solution to the problems that would later confront the Court, the simple rule of equipopulational apportionment was at best a stand-in for a difficult constitutional confrontation with the world of politics.

Over the past decade, the focus of constitutional attention in the redistricting arena has been on the imprecise boundaries the courts have drawn against the use of racial considerations in apportioning representation. Following the pathbreaking opinion in *Shaw v. Reno* (*Shaw I*),[10] the battle lines in the courts and in the scholarship have been drawn over the application of familiar equal protection categories in the struggles over race and representation. Often overlooked in the

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[6] Hence Robert Dixon's well-known aphorism that "[a]ll [d]istricting [i]s '[g]errymandering.'" ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 462 (1968); *see also* Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2292 (1998) ("If '[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals,' then redistricting stabs at the heart of the Fourteenth Amendment every time." (footnote omitted)).

[7] For a review of the case law developing the one-person, one-vote rule of apportionment, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 141–216 (2d ed. 2001).

[8] Reynolds v. Sims, 377 U.S. 533, 565 (1964).

[9] Justice Clark made this problem clear in his concurring opinion in *Baker v. Carr*, 369 U.S. 186, 258–59 (1962) (Clark, J., concurring), in which he noted that the Tennessee electorate had "no practical opportunities for exerting their political weight at the polls" (internal quotation marks omitted). In a somewhat similar vein, Justice Warren warned in *Reynolds* that "[i]ndiscriminate districting . . . may be little more than an open invitation to partisan gerrymandering." 377 U.S. at 578–79. The need for judicial intervention to disrupt non-self-correcting distortions of the political process in turn derives from Justice Stone's observation in the famous *Carolene Products* footnote that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny." United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[10] 509 U.S. 630 (1993).

profusion of scholarship following *Shaw I*, however, has been whether the battles over racial representation reveal a more systemic institutional failure in the redistricting process. Indeed, as I develop in this Article, it is possible to see in the *Shaw* line of cases a manifestation of a more deeply rooted problem in the redistricting context, one stemming from the acceptance to date of insider manipulation of the process for partisan gain. To gain traction on institutional factors that may exacerbate the already explosive issues of race in the redistricting battles, this Article examines the *Shaw* issues as a subset of the failure of constitutional law to ensure the competitive vitality of the political process. This approach contrasts most directly with the customary examination of the *Shaw* issues as simply another manifestation of the question of the level of equal protection scrutiny that should be afforded to race-conscious redistricting — a question presumably no different in the political arena than in schools, the workplace, or any other setting where public services are provided.

Examined from this perspective, the *Shaw* line of cases reveals not only ongoing doctrinal battles over the application of the antidiscrimination norm to state action deemed beneficial to racial minorities, but also something deeper about the relation between constitutional law and politics. To date, the Court has not developed any theoretical foundation deeper than its early insight that redistricting may be subject to systematic manipulation. Instead, the Court has articulated only a rudimentary concern that the susceptibility of redistricting to ends-oriented manipulation might result in impermissible discrimination or some other form of unfair partisan advantage. This limitation emerges most clearly not in the area of racial representation, but in the less normatively explosive context of partisan gerrymandering. Just as one may best observe a solar eclipse by focusing away from its brightest point, so too it may be that insights into the failings of current jurisprudence may be gained by diverting attention from the searing question of race. Accordingly, the opening sections of this Article avoid the problem of racial motivations in districting and turn instead to the core difficulty in the lack of clear purpose behind the current approach to judicial oversight of politics.

The place to start, therefore, is the breakthrough case of *Davis v. Bandemer*,[11] in which the Court first recognized a claim of unconstitutional discrimination in the redistricting context based on partisanship rather than the familiar equal protection category of racial classifications. In *Davis*, the Court grounded its constitutional concerns in the ability of political insiders to manipulate electoral boundaries to magnify their political power and frustrate the legitimate aspirations of

[11] 478 U.S. 109 (1986).

their political rival, defined for all practical purposes as one or another of the two major parties. The conceptual underpinning of the Court's analysis in *Davis* is undeveloped but appears to rest on an unelaborated intuition of unfairness to the political party not enjoying the bounties of incumbent power. *Davis* introduces the actionable claim of political vote dilution, an uncomfortable analogue of the concept of minority vote dilution, which in turn is an extension of antidiscrimination law.[12] But the analogy breaks down across many dimensions, and the unfortunate result is a new equal protection doctrine with an impossibly high burden of proof for actually making out a claim.[13] As described below, the end result is a legal standard of potentially sweeping breadth but of virtually no meaningful application.

The conceptual weakness in how the Court has treated the potential for mischievous manipulation of redistricting is evident in a less criticized earlier case, *Gaffney v. Cummings*.[14] There, the Court found unobjectionable a political compromise between the Democrats and Republicans of Connecticut to partition the state so as to lock in the political status quo ante. The Court reasoned that there could be no partisan harm, regardless of the geographic contortions of the district lines, when the two parties had negotiated a redistricting plan without either of them seeking to exploit the other for legislative gain.[15] The Connecticut experiment in a negotiated division of power, which political scientist Bruce Cain terms a "bipartisan gerrymander,"[16] does not present the problem of discrimination against one of the parties and thereby avoids the equal protection framework the Court has employed thus far. Put another way, if a legislative plan were to provide the two major political parties with reasonable prospects of achieving what they believed to be their appropriate shares of representation, what could be objectionable in such a coalition effort? From the vantage point of equal protection law, neither party should be considered a victim of discrimination under such a sharing of electoral opportunity.

The label "bipartisan gerrymander" suggests that there may be grounds for concern but does not elucidate the exact source of that concern. The invocation of the gerrymandering label may express an aesthetic objection to the contours of the districting lines, or it may hint at the stench of backroom politics improperly shielded from pub-

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[12] *See id.* at 125.

[13] *See id.* at 126 (stating that a claim of partisan gerrymandering will require "a showing of discriminatory intent," but requiring proof of consistent degradation to demonstrate actual impact).

[14] 412 U.S. 735 (1973).

[15] *Id.* at 752 ("We are quite unconvinced that the reapportionment plan . . . violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts.").

[16] BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE 159–66 (1984).

lic scrutiny, but it does not capture any substantive conception of what is wrong with the outcome when the two incumbent parties carve up the state into mutually acceptable bailiwicks.

A simple analogy might cast the putative benefits of a partisan nonaggression pact in a different light. Imagine that instead of two political parties agreeing to territorially defined zones of influence, we found that two dominant rival firms producing interchangeable products — as with Coke and Pepsi, to take but the most obvious example — had made such an agreement. To pose the question is virtually to answer it since such a pact would be a first-order violation of the antitrust laws. Such a market division agreement with the understood result of no real competition would constitute a per se violation of the Sherman Act.[17] Moreover, the well-developed antitrust case law and commentary would have no trouble identifying the nature of the harm that such an arrangement would cause. The standard legal and economic analysis posits that consumer welfare would be adversely affected by the absence of competition between the dominant market players. Cartelization would produce monopoly rents in the market, and consumers would end up with fewer choices at higher prices.[18] A more complete story would add concerns about long-term stagnation, incentives for product development, and so forth. Nonetheless, the story would boil down to the harms caused by the loss of competitive product markets.

As redistricting returns to its decennial full bloom, it is worth pondering why the two stories elicit such different legal reactions. Why is it that geographical divisions into clearly identified zones of influence trigger condemnation under the antitrust laws but approval under constitutional scrutiny? Pushed further, is there anything specific in the political arena that insulates a standstill agreement between the two dominant parties from being defined as anything less than a serious threat to consumer (defined here as voter) welfare? If politics were just a matter of product markets, there would be little to commend a market division agreement between competitors. Quite simply, the idea that competitors may agree to carve up the world is as violative of the premises of free markets as is imaginable.

At some level, the comparison to product markets may remain rhetorical. It is difficult to conjure up a "natural duopoly" in the product sphere that approaches the well-established propensity of districted election systems to yield two stable and relatively centrist parties.[19] Yet the interesting question remains why the basic move to protect

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[17] *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 607–08 (1972).

[18] *See* 12 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2031 (1999).

[19] *See* sources cited *infra* note 103.

avenues of competition does not appear at all in the political arena. The first part of this Article suggests that the reason is that the Court's conceptual framework to date remains limited to the doctrinal categories of individual rights protection and antidiscrimination. Since the bilateral cartelization of political markets neither tramples individual rights to participate in the political process nor disadvantages one political party relative to another, the practice stays safely off the constitutional radar screen.

Viewed differently, however, this form of political market manipulation threatens a core tenet of democratic legitimacy: accountability to shifting voter preferences. The basic move here is to argue that the risk in gerrymandering is not so much that of discrimination or lack of a formal ability to participate individually, but that of constriction of the competitive processes by which voters can express choice.[20] Here an analogy to the evidentiary factors used in antitrust law suggests that market division agreements should be inherently suspect, if not per se prohibited. This, however, is only the first step. I want to push the argument further by suggesting that *Davis* and *Gaffney* got it exactly backwards: there should be greater constitutional concern and, correspondingly, greater warrant for judicial intervention when political parties have joined together to squeeze the competitive juices out of the process. In the case of an inequitable gerrymander, dissatisfied voters are forced to seek recourse in a distorted political process. The expression of their political will may be hampered, but they will at least have an ally and a willing institutional voice through the minority political party. No such mechanism is easily available in the context of the bipartisan gerrymander. In such cases, the only relevant market actors are fully complicit in the cartelized political market.

This analysis suggests several additional moves. First, the harm in gerrymandering is not really the discrimination that the Court identifies in *Davis*, nor is it the lack of transparency that the term "bipartisan gerrymander" suggests. Rather, the harm is the insult to the competitiveness of the process resulting from the ability of insiders to lessen competitive pressures. This consideration then points to the second and more contentious claim: the harm to be avoided may not be limited to *wrongful districting* but rather must encompass *purposeful districting*, much as the antitrust laws reach not only the actual

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[20] For earlier versions of the argument about the need to preserve the competitive vitality of the political process, see Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 HARV. J.L. & PUB. POL'Y 91 (2000); Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274 (2001) [hereinafter Issacharoff, *Private Parties*]; Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 702 (1998); and Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611 (1999).

cartelization of markets but also conspiracies that set out to frustrate competition.[21]

The final piece of the argument rests on the observation that the gerrymandering case law has failed to police effectively the risk of gerrymandering. After several rounds of post-*Baker/Reynolds* redistricting, and despite sensitivity to the risk of insider self-dealing in the process, courts have been unable to apply a legal standard that turns on difficult assessments of "political fairness." From this come several conclusions. First, I argue that the Court's decade-long struggle with the *Shaw* line of cases ended up addressing the wrong problem. To the extent that political insiders should be given latitude to engage in any ends-oriented redistricting, it should be only to promote political access for those on the outs politically, not to reward incumbent powers. Thus, the holding in *Easley v. Cromartie*[22] that the latest incarnation of Mel Watt's congressional district survives challenge as a system of partisan reward was ill-conceived. But the point here is not to substitute an alternative test for racial or partisan gerrymandering, but to suggest a way to jettison the elusive search for improper motives altogether.

After several decades of trying to police the redistricting process with a series of unpredictable and combustible doctrines, it may well be time to call a halt to this failed experiment. Instead of monitoring redistricting ex post to tease out the necessarily complex and conflicting motivations of sophisticated partisan actors, the Court has available to it an alternative path. This Article ends with a proposal to establish a prophylactic per se rule that redistricting conducted by incumbent powers is constitutionally intolerable.[23]

II. GERRYMANDERING AS A HARM

A useful starting point in examining the relation between constitutional law and politics is the question of political gerrymandering as

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[21] *See* 6 PHILLIP E. AREEDA, ANTITRUST LAW § 1400a, at 3–4 (1986) (explaining the Sherman Act statutory requirements regarding conspiracy).

[22] 121 S. Ct. 1452 (2001), *decided sub nom.* Hunt v. Cromartie.

[23] *See* Melissa L. Saunders, *Reconsidering* Shaw*: The* Miranda *of Race-Conscious Districting*, 109 YALE L.J. 1603, 1606 (2000) (suggesting that "the limitations on race-conscious districting set forth in *Shaw* and its progeny . . . are a 'prophylactic' measure that overprotects individual constitutional rights in some cases in order to ensure adequate protection of those rights across a range of cases"); *cf.* Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 73–75 (considering the "prophylactic approach" to interpreting the Supreme Court's holdings in *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Dickerson v. United States*, 530 U.S. 428 (2000)); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 21 (1975) ("A prophylactic rule might be constitutionally compelled when it is necessary to overprotect a constitutional right because a narrow, theoretically more discriminating rule may not work in practice.").

defined through *Davis v. Bandemer*.[24] Of all the Supreme Court's forays into the political process after the reapportionment cases of the 1960s, the political gerrymandering cause of action enunciated in *Davis* leaves the smallest trail in the actual political life of the country. Certainly when compared to the compelled decennial redistricting occasioned by *Baker* and *Reynolds*, or the limitation on campaign finance reform after *Buckley v. Valeo*,[25] or the representation of minorities in the wake of the vote dilution cases and then the *Shaw* line of cases, the constitutional concern over partisan distortions enunciated in *Davis* fades into quick oblivion. Most evidently, unlike in any other area of legal oversight of the political process, the definition of the constitutional harm involved in partisan gerrymandering has remained frustratingly imprecise. While other areas of the law settled on judicially recognizable concepts, such as one person, one vote, the evidentiary standard for partisan gerrymandering never moved beyond a concern over an ill-defined "consistent degradation" of a partisan group's electoral influence.[26]

A number of reasons have been offered for why partisan gerrymandering survived constitutional scrutiny unaffected. There are by now two fairly well-established lines of criticism of the Court's approach. The first actually predates the Supreme Court's entry into the field in *Davis*, and arises from the social science debates over how to determine whether a particular districting configuration is a gerrymander. The difficulty largely mirrored the Court's own core problem in the political arena: to measure the extent to which a claimed gerrymander distorted the will of the electorate, there had to be some baseline for calculating what would be the proper distribution of electoral outcomes in the absence of the gerrymander. Here, social scientists were replaying a variant of the social science debates over the measure of minority vote dilution, which in turn was deeply influential in the evolution of legal doctrine.[27] In examining the extent to which a particular voting system frustrated the ability of minorities to elect the candidates of their choice, the dominant approach compared the voting preferences of the minority community to that of the majority. Re-

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[24] 478 U.S. 109 (1986).

[25] 424 U.S. 1, 143 (1976) (per curiam) (striking down limitations on candidate expenditures but affirming the constitutionality of statutory limitations on individual contributions to political candidates, as well as disclosure and reporting provisions).

[26] *See Davis*, 478 U.S. at 132 ("[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.").

[27] *See* MINORITY VOTE DILUTION (Chandler Davidson ed., paperback ed. 1989) (discussing various themes of this social science debate); Thornburg v. Gingles, 478 U.S. 30, 46 n.11 (1986) (relying on Davidson and other social scientists for an operational definition of minority vote dilution).

lying on the tools of bivariate regression analysis, social scientists were then able to determine whether the candidates of choice of the minority were routinely defeated as a result of the bloc-voting practices of the majority.[28] The key to comparing the voting preferences of distinct racial groups was the use of relatively straightforward statistical tests based on regression models that allowed a comparison of the racial composition of all electoral precincts in a jurisdiction and of the extent to which they voted for a particular candidate. When there was a black-white contest, to take the clearest case, polarized voting could be demonstrated by showing that the number of votes the black candidate received could be accurately predicted by the black composition of the precinct. As regression techniques became more widespread in the social sciences and more accepted in law, social scientists turned to these same models in an attempt to operationalize the concept of partisan vote dilution. Indeed, in retrospect, it is possible to see in the social science efforts at fashioning a statistical test for partisan vote dilution an attempt to replicate some variant of the ecological regression techniques used for minority vote dilution. Unfortunately, this effort ran into significant methodological difficulties for a host of reasons, including the instability of the definition of "Democrat" and "Republican," the high level of split-ticket voting, and the inability to derive stable census-block-level data analogous to the racial composition of the voting age population.[29] Because American political parties have no meaningful membership criteria,[30] the parties' actual levels of support are best measured in an "as revealed" state in terms of electoral results. There is accordingly no independent variable, analogous to the racial composition data of a district used in the analysis of racially polarized voting practices, that would permit relatively straightforward comparisons of the political opportunities of rival parties. At best, it would be possible to measure the expected statewide distribution of support for each party by examining a non-candidate-focused statewide election, as with voting for Secretary of State. Unfortunately, such a broad-level measure of statewide support provides little

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[28] *See Thornburg*, 478 U.S. at 48–49.

[29] For a review and critical discussion of the social science literature, see Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of the Political Process*, 71 TEX. L. REV. 1643 (1993).

[30] *See* Elizabeth Garrett, Is the Party Over? The Court and the Political Process 14 (Aug. 2, 2002) (unpublished manuscript, on file with the Harvard Law School Library) ("Political parties are unusual organizations because, although they are often referred to as membership groups, determining who their members actually are may not be possible." (citation omitted)); *see also* PAUL ALLEN BECK, PARTY POLITICS IN AMERICA 7–12 (8th ed. 1997); V.O. KEY, JR., POLITICS, PARTIES, & PRESSURE GROUPS 163–65 (5th ed. 1964); Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 778 (2000).

specific information about whether any particular district was gerrymandered.

The second criticism comes into existence with *Davis* itself. The difficulty in devising a direct empirical test for partisan vote dilution was reflected doctrinally in the requirement in *Davis* that a claim of partisan vote dilution be predicated on proof that the electoral system "will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[31] This highly peculiar burden of proof had no antecedents in the law, and the need to prove consistency of degradation seemed to require a period of observation that could consume the entirety of the decennial lifespan of any particular redistricting.[32] The effect of an unclear social science metric for measuring diluted partisan voting strength and an impossibly high burden of proof was a potentially invasive body of doctrine of no particular utility.[33] This problem was compounded by the embarrassment of the judiciary's one venture into actually finding an election system unconstitutional for diluting partisan voting strength: the North Carolina judicial elections struck down in a post-1990 Republican challenge to the statewide election of local superior court judges.[34] In that case, the lack of a clear measure of dilution and the poorly defined basis for constitutional intervention left the courts looking as foolish amateurs in the complex game of politics. No sooner had the Fourth Circuit deemed the electoral prospects of North Carolina Republicans sufficiently degraded as to offend the Constitution than did the partisan edge in the state tilt slightly, but significantly. While the remand lay pending, the Republicans not only overcame their doctrinally required degraded state, but also swept state elections in 1994, including the judicial elections.[35]

These two forms of criticism resonate loudly as we begin the process of judicial review of the second round of post-*Davis* redistricting. Clearly, the intervening case law has not provided any further clarifying signposts. The leading cases attempting to apply *Davis* have either proven embarrassing to the judiciary, as in North Carolina, or have

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[31] 478 U.S. at 132.

[32] This point is also further developed in Issacharoff, *supra* note 29, at 1670–88.

[33] For a review of the case law under *Davis*, see ISSACHAROFF, KARLAN & PILDES, *supra* note 7, at 882–89.

[34] Republican Party of N.C. v. Martin, 980 F.2d 943 (4th Cir. 1992).

[35] *See* Betty Mitchell, *Democrats Failed to Get Out the Vote, Blue Said; But Republicans Mobilized Their Supporters and Attracted New Voters, the Speaker Says*, VIRGINIAN-PILOT, Nov. 13, 1994, at B1 ("In Tuesday's election, the Republicans added 36 seats to their numbers in the North Carolina House, winning 57 of 120 seats and taking control of the chamber for the first time this century."); Edward Walsh, *North Carolina Reflects Voting Shift in South: GOP Takeover Nov. 8 Both Wide and Deep*, WASH. POST, Nov. 26, 1994, at A1 (reporting on the Republican sweep of the 1994 elections).

shown that even the most systematic of gerrymanders can evade the lofty evidentiary standards of *Davis*, as with the abortive challenge to the 1980s Democratic gerrymander of the California congressional delegation.[36] In this regard, as I have argued before,[37] *Davis* is striking for its failure to produce an operational standard, much as would have been the case had *Baker v. Carr*[38] not been followed immediately by *Reynolds v. Sims*.[39] Indeed, *Davis* might well be thought of as *Baker* without the one-person, one-vote rule.

The operational criticisms of *Davis* are nonetheless incomplete. Looking beyond the difficulties in applying the *Davis* test reveals great uncertainty about what the exact harm from a gerrymander is. If we look to the Court's understanding of the harm that an improper manipulation of the electoral system might occasion, we find that there are three alternative claims.

A. Democratic Accountability

In the first instance, there is the classic rendition of an improper electoral system as hampering the necessary accountability of representative government to the electorate.[40] Here the animating principle, per the Supreme Court, is the belief that elections in a democratic order should permit the selection of "the free and uncorrupted choice of those who have the right to take part in that choice."[41] On this view, democratic accountability turns on a principle of "popular choice of representatives,"[42] which the Court has subsequently termed "the foundation of our representative society."[43] Ultimately, the popular choice can be deemed to have not been realized when electoral outcomes represent, in the formulation of *Davis*, a "frustration of the will of a majority of the voters."[44]

When we examine this unsteady line of cases retrospectively, the Court appears to be attempting to identify a core value that is at stake in proper electoral practices. These cases ground the legitimacy of the

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[36] *See* Badham v. Eu, 694 F. Supp. 664, 665–66 (N.D. Cal. 1988) (three-judge court) (dismissing the plaintiffs' challenge to the redistricting on the grounds that the plaintiffs failed to state a claim), *aff'd*, 488 U.S. 1024 (1989).

[37] *See* Issacharoff, *supra* note 29, at 1670 (considering the "failure of [*Davis*] to provide . . . a standard for the effective control of partisan gerrymandering").

[38] 369 U.S. 186 (1962).

[39] 377 U.S. 533 (1964).

[40] *See* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531 (1998) (arguing for the centrality of accountability in theories of democratic legitimacy and attempting to ground the need for judicial review in guaranteeing the accountability of governing bodies).

[41] *Ex parte* Yarbrough, 110 U.S. 651, 662 (1884).

[42] United States v. Classic, 313 U.S. 299, 319 (1941).

[43] Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969).

[44] Davis v. Bandemer, 478 U.S. 109, 133 (1986).

exercise of governmental power in the fairness and propriety of the electoral process itself. The key to this approach is to tie the proper operation of elections to the expression of majority will and the ensuing legitimacy of government. Unfortunately, each of these cases also rests on formulations that are conspicuously vague about both the nature of the harm from improper electoral practices and the actual transmission mechanism between the electoral process and the representative legitimacy of government. The cases that best develop this intuition involve electoral arrangements that manifestly allowed a minority of the electorate to control a majority of the legislature. The intuition, however, goes to something deeper about democratic politics, something that transcends the simple case of a numerical minority capturing a majority of legislative representation. The inability of a majority to prevail electorally does not simply compromise the integrity of any particular election result. It also skews the incentive structures operating to ensure the accountability of elected representatives to shifts in the preferences of the electorate. Although this intuition about the proper functioning of the political process is evident right from the earliest cases in this area,[45] it is an intuition that is more invoked in passing than grounded in actual doctrinal holdings. Nonetheless, it remains the core insight about the role of constitutional scrutiny of the political process. I return to this core concept in the next section to provide a firmer grounding for the idea of preserving the competitive vitality of the electoral process.

B. Individual Rights

A second approach is to root the harm from gerrymandering in a conception of the individual right to participate. The intellectual foundation of this approach harkens back to Justice Holmes's unfortunate, century-old opinion in *Giles v. Harris*.[46] In a case involving the categorical denial of registration to all black voters in Alabama, Justice Holmes limited the power of judicial intervention to a narrow conception of individual make-whole relief, writing that "[a]part from the damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States."[47] For Justice Holmes, courts were necessarily limited to hearing claims that individual rights were being frustrated. Consequently, the claim in *Giles* that structural relief was

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[45] *See, e.g.*, *Yarbrough*, 110 U.S. at 662.

[46] 189 U.S. 475 (1903). For the historical background of the first systematic attempt to challenge racial exclusion from the ballot, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000).

[47] *Giles*, 189 U.S. at 488.

needed to provide a disenfranchised minority access to the political process was beyond the competence of the judiciary.

Justice Holmes then filled in the capacity of courts to provide individual relief in the earliest of the *White Primary Cases*,[48] in which the Court struck down, under the guise of individual suits for damages, repeated attempts to disenfranchise blacks in Texas Democratic primaries.[49] So long as black plaintiffs presented narrowly drawn individual claims that required no injunctive relief, the exclusion of black voters lay within the realm of remediable harms. Justice Frankfurter carried the limitation on judicial intervention to secure only individual rights into the modern era in *Colegrove v. Green*,[50] with his famous caution against judicial entry into the "political thicket."[51] For Justice Frankfurter, reapportionment was an area that the political question doctrine immunized from judicial review because the harm suffered through the failure of Illinois to reapportion itself on a population basis was "not a private wrong, but a wrong suffered by Illinois as a polity."[52] Whereas claims of individual wrongs could be redressed through customary doctrines of legal remedies, the equitable powers of the courts could not reach claims of systemic distortions of the political process. Even Justice Frankfurter's most venturesome opinion in the political arena — the decision in *Gomillion v. Lightfoot*[53] to strike down the surgical reconfiguration of Tuskegee, Alabama that had removed virtually all black voters — was carefully constructed as a deprivation of individual voting rights in contravention of the Fifteenth Amendment. In distinguishing the claim of malapportionment that the Court rejected in *Colegrove*, Justice Frankfurter found recourse in a narrow and unpersuasive reliance on "the Fifteenth Amendment to the Constitution of the United States, which forbids a State from passing any law which deprives *a citizen* of his vote because of his race."[54]

The approach inherited from Justices Holmes and Frankfurter became enshrined in the breakthrough cases of the reapportionment revolution, *Baker v. Carr*[55] and its direct progeny. Here the Warren Court, and Justice Brennan in particular, chose to elide the constricting form of the political question doctrine by framing federal constitutional oversight of the political process in the same language of indi-

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[48] *See* Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

[49] *Condon*, 286 U.S. at 89; *Herndon*, 273 U.S. at 541.

[50] 328 U.S. 549 (1946).

[51] *Id.* at 556 (opinion of Frankfurter, J.).

[52] *Id.* at 552. Justice Frankfurter expressly relied on the distinction Justice Holmes had drawn in *Giles* and the *Nixon* cases to frame the political question doctrine. *See id.*

[53] 364 U.S. 339 (1960).

[54] *Id.* at 345 (emphasis added).

[55] 369 U.S. 186 (1962).

vidual rights that prior case law left open.[56] By framing the obligation to reapportion on an equipopulational basis as an individual right to an equally weighted franchise, the Court could claim that it was merely giving force to a longstanding commitment to equal protection, rather than propounding a more robust claim about the proper operation of the political process.[57] This was, of course, a sensible evasion of the deeper problem given that in the early one-person, one-vote cases, the claim of debasement of each individual voter's stake actually made some sense.[58] But that narrow approach could not explain the Court's elliptical promise in these early cases to guarantee a "full and effective" right of participation,[59] nor could it explain the use of one person, one vote to address the problem of gerrymanders that had mutated so as to survive in the new one-person, one-vote era.

Karcher v. Daggett[60] exposed the limitation of this approach. At issue was a Democratic party gerrymander of congressional districts aptly termed "a flight of cartographic fancy" by outsiders struck by the swooping contortions of district lines.[61] Although Justices Powell and Stevens were prepared to take on the partisan gerrymandering claim directly, Justice Brennan held fast to the individual rights approach inherited from *Baker*. The difficulty was that the population disparities at issue were less than the margin of error of the underlying census data, and even if there were disparities present, the average deviation from perfect equipopulational apportionment was entirely trivial.[62] The core failing in Justice Brennan's approach came from his inability to extricate himself from the trap that Justices Holmes and Frankfurter had laid. Except perhaps at the extreme levels of the early

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[56] *See, e.g.*, Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736–37 (1964) (casting the one-person, one-vote rule of apportionment as an individual right akin to the right against compelled speech upheld in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)).

[57] The precise formulation was that "[j]udicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Baker*, 369 U.S. at 226.

[58] In *Baker*, the divergences (the ratio of the number of citizens that yield one representative in the most populated district to the number of citizens that yield one representative in the least populated district) reached twenty-three to one, while in *Reynolds* they were as high as forty-one to one. *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 7, at 175.

[59] Reynolds v. Sims, 377 U.S. 533, 565 (1964).

[60] 462 U.S. 725, 744 (1983) (striking down a New Jersey partisan gerrymander on one-person, one-vote grounds, even though the disparities in district population were so negligible that they were less than the margin of error of the underlying census enumeration).

[61] *Id.* at 762 (Stevens, J., concurring) (quoting Larry Light, *New Jersey Map Imaginative Gerrymander*, 40 CONG. Q. 1190, 1193 (1982)).

[62] The details of *Karcher* and the misapplication of the one-person, one-vote rule are discussed in Issacharoff, *supra* note 29, at 1655–58. For an argument that the approach of the one-person, one-vote cases had lasting deleterious effects, see Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and Its Progeny*, 80 N.C. L. REV. 1411 (2002).

malapportionment cases, no credible individual rights claim could be made where districts numbering in the many thousands deviated from the ideal size by less than one percent. As a result, the individual-rights-based, equal protection approach could not capture the nature of the constitutional insult. Instead, the harm is suffered at the level of core democratic values, perhaps, as Professor McConnell argues, with their constitutional embodiment in the Republican Form of Government Clause: "a government is not 'republican' if a minority faction maintains control, and the majority has no means of overturning it."[63] If the gravamen of the harm of gerrymandering lies in the inability of a majority of the whole body to govern, the continued attempt to restrict the voting rights inquiry to simply an individual claim must be doomed.[64] Such a group-based claim cannot be reduced to a right of individual access.[65]

C. Group-Based Discrimination

The doctrinal significance of *Davis* lies in its substitution of partisan discrimination for the approach based upon claimed violations of individual rights. The use of the discrimination model to reach such claims of group harm outside the category of race originated with Justice Stevens in *Karcher*, in which he argued for a holistic approach to equal protection challenges to districting plans similar to the approach used to evaluate "attacks on other forms of discriminatory action."[66] For Justice Stevens, lack of compliance with one person, one vote was

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[63] Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 106 (2000). As McConnell elaborates:

> A districting scheme so malapportioned that a minority faction is in complete control, without regard to democratic sentiment, violates the basic norms of republican government.
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> . . . Had the litigation [in *Baker*] proceeded under the Republican Form of Government Clause, it would have been quite different. The gravamen of a Republican Form of Government challenge is not that individual voters are treated unequally, but that the districting scheme systematically prevents effective majority rule. There are many systems of representation that would satisfy the Republicanism requirement. But at a minimum, the Clause must mean that a majority of the whole body of the people ultimately governs.

Id. at 105, 114 (footnote omitted).

[64] This basic insight prompted Justice Powell to promote a more expansive defense of recognizing group-based harms in the partisan gerrymandering context: "The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not." Davis v. Bandemer, 478 U.S. 109, 167 (1986) (Powell, J., dissenting in part).

[65] This is by now a fairly widespread criticism of the individual rights approach to voting claims reaching beyond simple access to the franchise. For earlier renditions of this argument see Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1675–76 (2001); Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 882–84 (1995).

[66] Karcher v. Daggett, 462 U.S. 725, 751 (1983) (Stevens, J., concurring).

an evidentiary shortcut used to answer the ultimate question whether the districting plan harbored a discriminatory intent against an identifiable group, defined as a "politically salient class, one whose geographical distribution is sufficiently ascertainable that it could have been taken into account in drawing district boundaries."[67] As adapted by Justice White in *Davis*, a claim of unconstitutional partisan gerrymandering must be predicated on proof that there was "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[68] In effect, the Court applied minority voting rights theory to the claims of the major political parties.

Unfortunately, the intentional discrimination model is of little use in the context of partisan gerrymandering. To begin with, as the Court acknowledged in *Davis*,[69] all districting is purposeful, such that meeting the intentionality requirement is a given. Moreover, the evidentiary hurdles of *Davis* have thus far proved insurmountable, as previously discussed. But of far greater significance is the absence of a core conception of the harm at stake in gerrymandering. Consider the key passage from *Davis* identifying the harm against which the Constitution protects:

> [U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.
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> . . . .
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> . . . In both contexts, the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process. In a challenge to an individual district, this inquiry focuses on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate. Statewide, however, the inquiry centers on the voters' direct or indirect influence on the elections of the state legislature as a whole. . . . In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.[70]

Even leaving aside the curious evidentiary standard of consistent degradation, the opinion is remarkably evasive about its core concerns.

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[67] *Id.* at 754 (citation omitted). For an overall assessment of Justice Stevens's methodology in this area, see Pamela S. Karlan, Cousins' *Kin: Justice Stevens and Voting Rights*, 27 RUTGERS L.J. 521 (1996).

[68] *Davis*, 478 U.S. at 127.

[69] *Id.* at 128–29.

[70] *Id.* at 132–33.

What is the meaning of a "chance to effectively influence the political process"? Or to "directly influence" election returns? Or of having "direct or indirect influence on" elections? The key problem is that there is ultimately no real conception of what a properly functioning electoral system looks like and, not surprisingly, no real conception of what is the precise harm to be remedied. The problem of the absence of a core definition of constitutional harm is then compounded by the Court's definition in *Davis* of what is constitutionally tolerable — a definition that is so broad as to encompass virtually any system in which voters can cast ballots:

> [T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters.[71]

Neither *Davis* nor any subsequent case has shown what such "actual proof to the contrary" might entail. Thus this constitutional doctrine that purports to oversee partisan distortions of the political process, but presumes overwhelmingly that all electors are fairly represented by whomever might emerge as the victorious candidate, is of little practical value.

In sum, as I develop below, the Court was closer to the mark in its initial intuition that the harm to be avoided in the political process cases was the loss of the democratic legitimacy that presumably follows from free and fair elections. Lacking a developed theory of how to operationalize that intuition, the Court turned to the accessible categories of individual rights and antidiscrimination commands. These categories may have sufficed to address either extreme malapportionment or the fencing out of a racial minority, but they provided little explanatory power in the more difficult cases that followed. Indeed, the recourse to the domain of rights and discrimination actually moved the Court away from its initial insights in this area of law.

III. THE MARKET FOR PARTISAN CONTROL

Let us now return to the original premise of the Court's intervention into the political process as securing "the free and uncorrupted

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[71] *Id.* at 131–32.

choice of those who have the right to take part in that choice."[72] It should be possible to rescue the evident early systemic concern of the Court from its subsequent derailment into the constricting language of individual rights and discrimination. If the concept of the integrity of voter choice is to again become the primary constitutional objective, then the task must be to identify the circumstances that best ensure that integrity.

A. Political Noncompetition Agreements

Stepping back from the case law of the past forty years, there is no evident reason why the concern over the integrity of the political process should be limited to questions of individual rights and group discrimination. These may have been the terms most conducive to the Court's overcoming the justiciability hurdles of the brooding political question doctrine, but the legitimizing function of the democratic accountability of elected officials depends on more than simply the ability of individuals and groups to participate in the electoral process. To introduce the idea of political competition as an independent value in the political process, it is worth returning to the scenario underlying *Gaffney v. Cummings*.[73] As Justice White set out:

> The record abounds with evidence, and it is frankly admitted by those who prepared the plan, that virtually every Senate and House district line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties, the only two parties in the State large enough to elect legislators from discernible geographic areas. Appellant insists that the spirit of "political fairness" underlying this plan is not only permissible, but a desirable consideration in laying out districts that otherwise satisfy the population standard of the reapportionment cases.[74]

The Court found this assurance of "political fairness" between the parties to be far superior to "a politically mindless approach" of ignoring the likely electoral consequences of redistricting, a practice that in turn could produce "the most grossly gerrymandered results."[75]

The Court's invocation of an unintentional or "mindless" gerrymander is curious. The idea that the harm of gerrymandering may result without design runs against the conventional supposition that, at

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[72] *Ex parte* Yarbrough, 110 U.S. 651, 662 (1884).

[73] 412 U.S. 735 (1973).

[74] *Id.* at 752. To achieve this proportionate result, the Connecticut redistricters created various odd configurations of districts. It is ironic in light of the later *Shaw* cases to note that the *Gaffney* Court found this of no moment: "compactness or attractiveness [of district shapes] has never been held to constitute an independent federal constitutional requirement for state legislative districts." *Id.* at 752 n.18.

[75] *Id.* at 752, 753 (internal quotation marks omitted).

bottom, the gerrymander is a willful attempt to advance one's own interests and harm one's rivals. Instead, the idea of a gerrymander occasioned by something other than wrongful intent suggests that the Court's conception of the harm to the political process is limited to the claims of the major parties to a proportionate stake of representation. Indeed, the Court candidly held that judicial scrutiny should "be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so."[76] In this sense, *Gaffney* is consistent with *Davis* in limiting the ultimate reach of the constitutional prohibition on partisan gerrymandering to some notion of unfair conduct directed at one or the other of the major parties. Put another way, *Gaffney* must rest on the lack of any alternative systemic harm that gerrymandered districts might cause to any other participants in the political process. Thus, *Gaffney* is a more extreme version of *Davis* in assuming that there is no other interest in the gerrymandering context than the risk of discrimination by one party against another. It is here that I want to part company from this approach.

A simple extreme hypothetical can frame my initial inquiry. What if the parties in Connecticut agreed upon a proper division of legislative representation that preserved their respective shares of the legislature, and decided to forego elections altogether? If we leave aside the obvious constitutional and statutory requirements of some periodicity to elections, the question becomes quite difficult to answer within the narrow discrimination model of *Davis* and *Gaffney*. The gerrymandering cases have little to say about the positive role that elections and the electoral process play in a system of democratic governance. These cases are instead limited to identifying circumstances in which individuals or, on occasion, groups can raise rather confined rights-based claims. *Gaffney* illustrates the problem of the use of a discrimination model unmoored to any positive account of the electoral process. The lack of a theory of the aims of judicial intervention in the political process manifests itself more seriously in the *Shaw* line of cases, to which I turn in the next section.

So what is the conceptual harm in jettisoning elections and substituting a "fair" distribution of political power? Professor McConnell attempts to address this question by reinvigorating the Republican Form of Government Clause of the Constitution, a move that has much to commend it doctrinally.[77] On this view, the Republican Form of Gov-

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[76] *Id.* at 754.

[77] *See* McConnell, *supra* note 63, at 106 ("Constitutional standards under the Republican Form of Government Clause are ill-developed, but surely a government is not 'republican' if a minority faction maintains control, and the majority has no means of overturning it."). To a large extent, I focus on McConnell's observations because he comes to the need for the separate treat-

ernment Clause must, at the very least, preserve some assurance that political majorities can ultimately assert their electoral will. The problem is that this move is of necessity incomplete and focuses on conditions in which a minority is able to embed itself in power, immune to the will of the numerical majority. Shifting the doctrinal categories may better capture the constitutional interest in the context of the extreme malapportionment evident in *Baker* or *Reynolds*. In such cases, numerical majorities in urban and suburban areas were unable to dislodge the stranglehold on legislative representation enjoyed by overrepresented rural areas. Thus, the remedy may be self-revealing in the context of the grotesque minority lockups of power seen in the massive malapportionments in Tennessee and Alabama, the settings for *Baker* and *Reynolds*. But the answer is more elusive in the context of the manipulation of district lines consistent with one person, one vote, as *Karcher* and the post-*Davis* partisan gerrymandering cases reflect. At some level, the same problems that challenge the Court's equal protection jurisprudence will reassert themselves in trying to give content to the equally open-textured Republican Form of Government Clause. Outside the context of actual malapportionment, the challenge remains how to establish that a "districting scheme systematically prevents effective majority rule," to use McConnell's formulation.[78]

A more textured understanding of the preconditions necessary for legitimate electoral choice is needed to give meaning to the concept of effective majority rule. Constitutional concern cannot be limited to the issue whether the majority does or does not hold its appropriate share of power, lest the hypothetical distribution of legislative seats without elections fall below constitutional scrutiny. Rather, the very concept of proper political outcomes requires attention to the electoral preconditions through which the majority expresses its will. If the absence of elections would compromise democratic integrity, then there must be some positive account of the role played by elections. Accordingly, the richer concept of republicanism must turn not simply on majoritarian triumph, but on the idea of selecting elected representatives through robust competition before the electorate. The essence of republicanism then becomes not the lack of direct participation in government by the *demos* but, critically, the fact that the elected representatives were forced to compete in the arena of public accountability. The fact that the public has selected its representatives in turn allows us to impute some legitimacy to the representation, even though public

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ment of constitutive questions of politics from the perspective of constitutional law proper. Most of the work in this area to date has come from a group of scholars who have revisited these questions from the vantage point of developing what some of us have termed "the law of democracy."

[78] *Id.* at 114.

choice and other modern theories of collective action tell us that such selection processes are necessarily imperfect.[79]

The conceptual harm in simply jettisoning elections is that the concept of "fair" representation has no meaning outside an appropriately competitive electoral process. The electorate can only express a "free and uncorrupted choice" if it has the ability to select among competing political prospects. At the heart of what has been termed the "political markets" approach[80] is a commitment to the competitive integrity of the political process as an indispensable guarantor of democratic constitutionalism. This concept may be expressed as

> a market [for political office] whose vitality depends on both clear rules of engagement and on the ritual cleansing born of competition. Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interest and views of citizens.[81]

The key to this approach is to view competition as critical to the ability of voters to ensure the responsiveness of elected officials to the voters' interests through the after-the-fact capacity to vote those officials out of office. In turn, the accountability to the electorate emerges as the prime guarantor of democratic legitimacy.[82]

Representatives remain faithful to the preferences of the electorate and responsive to shifts in preferences so long as they remain account-

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[79] Public choice theory posits that collective preferences are inevitably the product of the manner in which choice may be expressed. Because of the impact of voting procedures on how preferences emerge, this theory questions whether any electoral outcome may be accepted "as uniquely representing the popular will." JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 298 (1988) (emphasis omitted). As a result, public choice theorists would argue either "that the notion of a popular will is incoherent, or that the popular will is itself incoherent, whichever you prefer." JON ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES 155 (1989). The canonical text of this approach is KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1973). The application of Arrow's insights to political behavior is represented by WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM (1982). For leading critical works on the application of public choice theory in law, see DANIEL A. FARBER & PHILLIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991), and Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990).

[80] *See* Persily & Cain, *supra* note 30, at 788–91 (providing an overview and critique of this approach).

[81] Issacharoff & Pildes, *supra* note 20, at 646.

[82] Numerous political theorists discuss responsiveness and the electoral process. *See* DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 205–07 (1989) (identifying responsiveness "as the core of a theory of legitimacy"); HANNAH PITKIN, THE CONCEPT OF REPRESENTATION 232 (1972) (arguing that a "representative government must not merely be in control, not merely promote the public interest, but must also be responsive to the people"); Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of* Baker v. Carr, 80 N.C. L. REV. 1103, 1149 (2002) (arguing that responsiveness is the measure of "how well democratic institutions track the substantive preferences of the electorate"); Pildes, *supra* note 20, at 1611 (identifying responsiveness as a "central democratic value").

able electorally. Thus, while we do not enforce campaign promises within the normal bounds of contract law, the same function is performed — if imperfectly — by the accountability of individual representatives for their success or failure in accurately representing their constituents' preferences. To the extent that elections are structured to limit accountability, whether it be by inordinately high filing fees, by restrictive petitioning requirements to get on the ballot, or by gerrymandered districts, the key role of accountability is compromised. In other words, accountability is a central feature of democratic legitimacy, regardless who wins or loses a particular election.

The political markets analysis therefore tries to define a risk to the electoral process that is independent of an individual rights claim and of a claim of discrimination. The focus is instead on an alternative risk that emerges from the vulnerability that the political marketplace shares with all other markets: the possibility that anticompetitive behavior will compromise the ability of selection to reveal true consumer preferences. At some basic level, we have no confidence in our knowledge of the true will of the majority or of a fair distribution of political power except through the revealed preferences of voters who are given competitive alternatives. Stripped of the market gloss, this is simply a restatement of Madison's early insight in *The Federalist No. 51* expressing the importance of true electoral choice: "A dependence on the people is no doubt the primary controul on the government . . . ."[83]

To pursue the analogy to a competitive market, the problem in *Gaffney* is the Court's confidence that a proper electoral balance had been struck in Connecticut without any clear competitive demonstration of actual voter preferences. The contrast between a properly competitive market and a proper allocation of legislative seats is oddly analogous to the contrast between the concept of revealed market valuations of goods and the medieval idea of the intrinsic just price of goods and services.[84] Not only is the *Gaffney* conception of proper political outcomes unmoored from the checking function of electoral competition, but it also assumes a fixed quality to political preferences that is immune to change or refinement over the course of contested partisan debate. The Court's conception draws from a dated proposition that, as framed by Joseph Schumpeter in his classic work on democracy, there is some entity called "the people," and that they "hold a

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83 THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

84 An unrelated but parallel debate is playing itself out in the courts over the assignment of attorneys' fees in noncontractual cases. The strongest advocates of trying to replicate the market in court-awarded attorneys' fees, led by Judge Richard Posner of the Seventh Circuit, derisively characterize non-market-based approaches as a modern attempt to recreate a "medieval just price." *See* Steinlauf v. Cont'l Ill. Corp. (*In re* Cont'l Ill. Sec. Litig.), 962 F.2d 566, 568 (7th Cir. 1992).

definite and rational opinion about every individual question and that they give effect to this opinion — in a democracy — by choosing 'representatives' who will see to it that that opinion is carried out."[85] For Schumpeter, this proposition inverts the importance of the selection of representatives. Rather than the selection process being merely a transmission mechanism for expressing the existing preferences of the voters, the power to decide meaningfully among representatives becomes the core of the electorate's democratic rights: "the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."[86]

Applying this concept, we can now answer the question of the harm that would follow if Connecticut were simply to abolish elections and allow for a "proper" allocation of political power. Under a static view of democracy that focuses exclusively on the satisfaction of the preexisting political preferences of the electorate, the question whether there is any intrinsic value to elections persists. A focus on the legitimizing role of competition before the electorate, by contrast, not only condemns the wholesale abolition of elections, but also lays the foundation for contesting any idea that there can be "just" political outcomes independent of the competitive integrity of the electoral process. It also provides theoretical ballast for what the Court itself has recognized about the vitality of the political process: "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."[87] Further, the focus on competitive processes ties back to the undeveloped original Madisonian understanding of republican government as one that "derives all its powers . . . from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour."[88]

B. Restraints on Competition

According to the Supreme Court, the primary appeal of the redistricting plan in *Gaffney* lay in the fact that no party suffered discrimination in the redistricting process.[89] However, if one were to examine

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[85] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269 (6th ed. 1987). Pamela Karlan, Richard Pildes, and I begin our casebook on the law of democracy by describing the most conventional understanding of democracy as existing "prior to and independent of the specific institutional forms in which it happens to be embodied at any particular time and place." ISSACHAROFF, KARLAN & PILDES, *supra* note 7, at 1. We then go on to criticize this view, on grounds similar to Schumpeter's, as "misconceived and perhaps even unintelligible." *Id.*

[86] SCHUMPETER, *supra* note 85, at 269.

[87] Williams v. Rhodes, 393 U.S. 23, 32 (1968).

[88] THE FEDERALIST NO. 39, at 251 (James Madison) (Jacob E. Cooke ed., 1961).

[89] *See supra* pp. 612–13.

Gaffney as part of a systematic assessment of the importance of competition, rather than simply from the vantage point of discrimination against the parties, the result would be quite disturbing. In any other market, courts would determine an arrangement like the one in *Gaffney* to be a horizontal noncompetition agreement. Whereas the Court in *Gaffney* upheld and even praised collusion between the only two market players, such horizontal agreements among competitors in a product market are "antitrust's most 'suspect' classification, and as a class provoke harder looks than any other arrangement."[90] In antitrust law, courts have found such horizontal restraints so completely lacking in redeeming virtue that they are presumed to be illegal.[91] Horizontal restraints that apply to territory, in particular, are per se invalid. Speaking to a *Gaffney*-style horizontal market division in the commercial context, the Court in *United States v. Topco Associates, Inc.*[92] clearly stated the antitrust rule:

> One of the classic examples of a *per se* violation of § 1 [of the Sherman Act] is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition . . . . This Court has reiterated time and time again that "horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition." Such limitations are *per se* violations of the Sherman Act.[93]

This per se rule precludes the Court from having to make any individualized inquiry into the economic justifications for the market division in a particular case.[94] Thus, regardless of the beneficial qualities the *Gaffney* court found in redistricting to maintain the proportional representation of the major political parties, such a scheme would be illegal per se under the antitrust laws regulating consumer markets. Even if there were no per se rule against horizontal territorial limitations, an application of the more lenient "rule of reason" balancing test,

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[90] 11 HOVENKAMP, *supra* note 18, ¶ 1902a, at 190.

[91] Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899), *aff'g* 85 F. 271 (6th Cir. 1898); *see also* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

[92] 405 U.S. 596 (1972) (Marshall, J.).

[93] *Id.* at 608 (citation omitted) (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)); *see also* Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49–50 (1990) (holding that agreements to split a market are illegal "regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other"); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 597–98 (1951) (holding that agreements between corporations to allocate trade territories are illegal).

[94] *See Topco Assocs.*, 405 U.S. at 607–08; *see also* United States v. Sealy, Inc., 388 U.S. 350, 357–58 (1967) (holding that horizontal territorial market divisions are "unlawful under § 1 of the Sherman Act without the necessity for an inquiry in each particular case as to their business or economic justification, their impact in the marketplace, or their reasonableness").

which courts apply to more ambiguous antitrust situations,[95] would easily invalidate the anticompetitive behavior the Court upheld in *Gaffney* as well. The Supreme Court has explained that under the rule of reason analysis "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[96] Courts applying this analysis have been especially wary of agreements between competitors when the surrounding circumstances include certain market conditions that are favorable to the establishment of cartels and the suppression of competition. Such market conditions include concentrated market power, high barriers to entry, and the ability of parties to police an agreement once it has been made. The first factor, market power, is determined in part by the market shares of the parties involved in the agreement[97] and is an essential element in proving an antitrust violation,[98] except in the more unusual cases in which there is direct proof of the actual anticompetitive effects of an agreement.[99] Market power alone, however, may not be dispositive in establishing an antitrust violation; courts will often inquire into the barriers to entry as well.[100] Thus, courts are especially skeptical of agreements between organizations when the barriers to entry are high enough to effectively eliminate the chance for outside competition.[101] Finally, courts will often look for policing procedures because, to support an anticompetitive cartel, the colluding parties must have a way

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[95] *See* 7 AREEDA, *supra* note 21, § 1500, at 361–64 (describing general issues surrounding the "rule of reason" and "per se rule").

[96] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

[97] *See* Flegel v. Christian Hosp., 4 F.3d 682, 689 (8th Cir. 1993) ("To establish that the defendants have market power, [plaintiffs] must show that the defendants have 'a dominant market share in a well-defined relevant market.'" (quoting *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 318 (8th Cir. 1986))); Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 899 F.2d 951, 969 (10th Cir. 1990) (holding that a market share between forty-five percent and sixty-two percent could permit a finding of market power); Wilk v. Am. Med. Ass'n, 895 F.2d 352, 360 (7th Cir. 1990) (holding that a market share of greater than fifty percent may contribute to a finding of market power).

[98] *See* Chicago Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 600 (7th Cir. 1996) ("Substantial market power is an indispensable ingredient of every claim under the full Rule of Reason.").

[99] *See* K.M.B. Warehouse Distribs. v. Walker Mfg. Co., 61 F.3d 123, 129 (2d Cir. 1995) (holding that plaintiffs must prove market power unless there is evidence of actual adverse effects).

[100] *See Reazin*, 899 F.2d at 971 (inquiring into barriers to entry after considering market share); *cf.* 12 HOVENKAMP, *supra* note 18, ¶ 2002f6, at 27–28 (noting that low barriers to entry will destroy cartelization); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 288 (4th ed. 1992) ("If entry can be effected rapidly and entrants have no higher long-run costs than the members of the cartel, the profits of cartelization will be small, and so also the incentive to cartelize.").

[101] *See Wilk*, 895 F.2d at 360 (noting that market share is especially predictive of market power when there are substantial barriers to entry); New York v. Anheuser-Busch, Inc., 811 F. Supp. 848, 873 (E.D.N.Y. 1993) (noting that "[h]igh barriers to entry can effect [sic] the ability of new participants to enter the market and result in giving the established participants more power in the market").

to prevent one another from cheating and thereby ruining the cartel arrangement.[102]

Any application of antitrust law under either a per se or rule of reason approach would condemn the arrangement found constitutional in *Gaffney*. Whatever arguments might be made to justify a horizontal restraint like the one in *Gaffney*, such arguments could never survive a court's antitrust scrutiny of noncompetition between two dominant firms when substantial barriers to entry exist. It is well established that single-member territorial districting with first-past-the-post winners almost invariably leads to two and only two serious political parties.[103] In antitrust terms, this market-compelled pressure toward two and only two major firms is a duopoly.[104] Moreover, policing a redistricting agreement in the political market is easy because the market division is enforced through government legislation. Cheating among the cartel members is a non-factor. Therefore, under a simple antitrust analysis, whether using the per se or rule of reason approaches, courts would be particularly skeptical of agreements in the political market because it is in fact the ideal market for cartelization and suppression of competition.

C. The Effects of Noncompetition

Whatever the allure of the antitrust analogy, it would be folly to claim that politics and economic markets are identical. One clear difference between product markets and the political arena turns on the measure of the harm that anticompetitive behavior causes. In product markets, anticompetitive behavior results in higher prices and diminished consumer welfare as a result of the ability of monopolists and cartels to extract prices untempered by competition.[105] Since the bene-

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[102] *See* 12 HOVENKAMP, *supra* note 18, ¶ 2002d2, at 19–20 (noting that despite being hard to maintain, cartels are still a major antitrust concern because they often have numerous tools available to punish cheaters).

[103] *See* MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE 216–28 (Barbara & Robert North trans., Methuen 1964) (1951) (proposing that a simple majority electoral system strongly favors a two-party system); *see also* GARY W. COX, MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS 13–33 (1997) (further discussing Duverger's Law); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 116 (1957) (noting that "a two party system would cause each party to move toward its opponent ideologically").

[104] *See* Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States To Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 332 (employing the term "duopoly" to describe the hegemony of the Democratic and Republican parties).

[105] *See* ROBERT H. BORK, THE ANTITRUST PARADOX 17 (2d ed. 1993) (describing the consensus that "competition could be injured to the detriment of consumers by the agreed elimination of rivalry . . . or by a powerful firm's attack upon rivals with the purpose of driving them out of the market").

fits of political competition cannot be measured by so simple a metric as price, finding the definition of the harm that anticompetitive behavior causes in the political arena requires further elaboration. Indeed, even for commentators not taken with the analogy to market models, defining the harm in the gerrymandering context has remained a bit of a puzzle.

To address this puzzle, the political science literature has tried to assess the impact of gerrymanders on the partisan composition of a state legislature or a state's congressional delegation. From this perspective, the critical question is whether the manipulation of district lines will result in a stable realignment of partisan control over the course of the decennial redistricting cycle.[106] The general conclusion is that evidence of a stable partisan effect over the entire ten-year period is inconclusive at best.[107]

In arguing against the creation of a partisan gerrymandering cause of action in *Davis*, Justice O'Connor also took the approach of defining harm as realignment of partisan control. According to Justice O'Connor, one reason for courts not to engage claims of partisan misbehavior in redistricting is that, in effect, the parties will be naturally restrained from pushing the limits of gerrymandering by fear of placing some of their safe seats at risk.[108] As a result, this argument con-

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[106] For an early version of this argument, see Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1345 (1987) ("[A] party's motive to gerrymander is considerably stronger than its ability to execute and sustain one."). Professor Schuck goes on to question the ability of courts to redress as elusive a concept as a successful partisan gerrymander. *See id.* at 1345–48. As an empirical matter, Schuck's prognostication is difficult to dispute.

[107] *See, e.g.*, Daniel Hays Lowenstein, Bandemer's *Gap: Gerrymandering and Equal Protection*, *in* POLITICAL GERRYMANDERING AND THE COURTS 64, 95 (Bernard Grofman ed., 1990) ("Gerrymandering is not a potent enough instrument to permit a minority to dominate state government and perpetuate itself from decade to decade — especially not in a state in which an extraordinary legislative majority is required to overcome a governor's veto."); Richard G. Niemi & Laura R. Winsky, *The Persistence of Partisan Redistricting Effects in Congressional Elections in the 1970s and 1980s*, 54 J. POL. 565, 571 (1992) (summarizing studies from the 1970s and 1980s to show that, though control over redistricting had an immediate partisan impact, that impact dissipated over the ten-year cycle).

[108] Justice O'Connor adds:

> Indeed, there is good reason to think that political gerrymandering is a self-limiting enterprise. In order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat — risks they may refuse to accept past a certain point. Similarly, an overambitious gerrymander can lead to disaster for the legislative majority: because it has created more seats in which it hopes to win relatively narrow victories, the same swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious. More generally, each major party presumably has ample weapons at its disposal to conduct the partisan struggle that often leads to a partisan apportionment, but also often leads to a bipartisan one. There is no proof before us that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves.

Davis v. Bandemer, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring) (citations omitted).

tinues, there is unlikely to be any systematic distortion of the relative partisan strength in legislative bodies. A political equilibrium serves as a more effective and less intrusive check on partisan overreaching than would an uncertain measure of constitutional oversight.

From both the political science perspective and the constitutional approach Justice O'Connor promoted, even blatant partisan gerrymanders result in little lasting harm to the political partisan balance. The political scientists and Justice O'Connor focus on potential harm to political rivals rather than on the meaningfulness of the choices presented to voters. Thus, each of these approaches mistakenly examines the gerrymander from the perspective of the motivation of the gerrymanderer. Each then asks what the relative effectiveness of the gerrymander is likely to be in terms of gaining an overall partisan advantage in the legislature for the party enjoying the fruits of political power. This approach, in effect, reproduces the doctrinal methodology of *Gaffney* by reducing the scope of potential harm to the ability to discriminate against one's rival or hamper that party's future electoral prospects. Strikingly, neither the political science approach nor Justice O'Connor's intuition about the self-policing quality of excessive gerrymandering contemplates the potential for harm in terms other than the impact on the partisan composition of the resulting legislative body.

What if, instead of measuring harm exclusively in terms of the effect upon the partisan composition of the legislature, one were to examine the impact on the political equivalent of consumer welfare? Such an examination would shift the focus from whether the legislature is in balance to whether the parties are forced to compete for the votes of the electorate, are forced to attempt to educate and influence the voting public, and are in a deep sense accountable to changes in the preferences of the electorate. In other words, what if the competitiveness of elections were considered an independent democratic good? Democratic legitimacy, on this account, turns on the ability of the citizenry to "participate primarily by choosing policymakers in competitive elections,"[109] a more recent formulation of Schumpeter's insistence that the hallmark of democracy is "individuals acquir[ing] the power to decide by means of a competitive struggle for the people's vote."[110] On this view, the competitiveness of elections emerges as a central guarantee of the integrity of democratic governance. As political scientist G. Bingham Powell, Jr. elucidates in his empirical assessment of

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109 G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY 3 (2000).

110 SCHUMPETER, *supra* note 85, at 269; *see also* PITKIN, *supra* note 82, at 234 ("Our concern with elections and electoral machinery, and particularly with whether elections are free and genuine, results from our conviction that such machinery is necessary to ensure systematic responsiveness.").

the comparative democratic accountability of governments around the world:

> Few contrasts between dictatorship and democracy are sharper than this one: in a democracy the citizens can vote the leaders out of office. The citizens' ability to throw the rascals out seems fundamental to modern representative democracy because it is the ultimate guarantee of a connection between citizens and policymakers. It enables the citizens to hold the policymakers accountable for their performance. Such accountability is a keystone of majoritarian democratic theory.[111]

From this perspective of democratic legitimacy, democracy is defined primarily by the accountability of the elected to the electors, an accountability that is in turn shaped through competitive elections. Allowing partisan actors to control redistricting so as to *diminish* competition runs solidly counter to the core concern of democratic accountability. Even a cursory examination of American elections shows how tenuous is the ability of even a sizeable number of aroused and dissatisfied electors to hold incumbents accountable.

One can start this examination with congressional elections, the most visible battleground over redistricting. For all the battles over incumbent protection that have dominated news accounts in states such as New York,[112] one might assume that incumbents actually lost elections in meaningful numbers. Far from it. In the 2000 congressional elections, incumbents won 98.5% of the challenges, with 82.6% of those elections won by a margin of greater than twenty percent.[113] Examined more closely, the numbers are even more astonishing. For example, in Massachusetts in the 2000 congressional elections, the *average* margin of victory — that is, the spread between the percentage achieved by the victor and that of his or her nearest rival — was *72.9%*.[114] Given that the political science literature defines a landslide as an election in which the winner receives more than sixty percent of the vote,[115] the likelihood of serious challenge to an incumbent member of Congress is fleeting at best. Indeed, there is more likelihood of

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[111] POWELL, *supra* note 109, at 47. Powell's ultimate conclusion that proportional design systems carry out this mandate better than majoritarian systems, such as first-past-the-post electoral systems, is beyond the scope of this Article.

[112] *See* Richard Pérez-Peña, *Albany Draws New Lines To Keep the House Safe for (Most) Incumbents*, N.Y. TIMES, June 6, 2002, at B6 (chronicling the intervention of the national political parties to secure increased levels of incumbent protection through redistricting after the state lost two congressional seats).

[113] Center for Voting and Democracy, *Dubious Democracy*, *at* http://www.fairvote.org/2001/us1954_1998.htm (last visited Nov. 6, 2002) (on file with the Harvard Law School Library).

[114] Center for Voting and Democracy, *Margin of Victory, 2000*, *at* http://www.fairvote.org/2001/margins.htm (last visited Nov. 6, 2002) (on file with the Harvard Law School Library).

[115] *See* Allan J. Lichtman & J. Gerald Herbert, *A General Theory of Vote Dilution*, 6 LA RAZA L.J. 1, 5 (1993) (describing the sixty-percent "landslide standard" for single-member office elections).

self-implosion of a congressional career, as with Gary Condit,[116] than defeat of an incumbent through the normal workings of electoral politics.

If anything, this pattern of incumbent entrenchment has gotten worse as the computer technology for more exquisite gerrymandering has improved and political parties have ever more brazenly pursued incumbent protection.[117] For example, it was estimated that after the 2001–2002 redistricting there could be as few as thirty competitive House races in the entire United States,[118] with competitive being defined as a district that is likely to be won by a margin of less than ten percent. Meanwhile, forty-five candidates for the House were expected to run unopposed. Following the eminently incumbent-satisfying redistricting of Massachusetts, to take a particularly extreme example, the first elections in the new districts were expected to feature six of ten congressional candidates running unopposed, including four who were unopposed in the primary as well.[119]

Massachusetts may be extreme, but it is not aberrant. In California, political insiders expected redistricting to produce *no* competitively contested elections[120] among the state's fifty-three-member congres-

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116 *See* Evelyn Nieves, *Fall of Condit, Still Caught in the Shadow of Scandal, Comes as No Surprise*, N.Y. TIMES, Mar. 7, 2002, at A21.

117 *See*, Pérez-Peña, *supra* note 112 (describing the exclusive focus on incumbent protection in the high-profile New York State redistricting).

118 *See* Michael Barone, *Sizing Up the 2002 Races*, U.S. NEWS & WORLD REP., May 13, 2002, at 35; *see also Democracy Denied*, RICHMOND TIMES-DISPATCH, Mar. 17, 2002, at E2, *available at* 2002 WL 7194862 ("Precision redistricting — *i.e.*, gerrymandering — has made 380 districts safe for one party or the other. Citizens will cast ballots in November, but their votes effectively were counted when the pols drew the lines."); Juliet Eilperin, *House Democrats' Climb Gets Steeper: Party Lacks Rallying Cry as Redistricting, Incumbency Cut Competitive Races*, WASH. POST, Apr. 2, 2002, at A1 ("A decade ago, there were roughly 100 competitive races following redistricting; this year there will be 30 to 40, perhaps even fewer."); Ryan Lizza, *White House Watch: Future Tense*, THE NEW REPUBLIC, Sept. 2, 2002, at 10, 11 (reporting the estimate of Charlie Cook, a leading analyst for the *National Journal*, that there will be thirty-nine competitive elections for the House of Representatives this year); Alison Mitchell, *Redistricting 2002 Produces No Great Shake-Ups*, N.Y. TIMES, Mar. 13, 2002, at A20 ("With Congressional redistricting almost complete, the once-a-decade redrawing of the nation's political map is turning out to favor incumbents to an unusual degree, making many of the House's swing seats into safer territory for one party or the other.").

The *Wall Street Journal* noted on election day that only fifteen of 435 House races were "toss-ups." *The Gerrymandered Democrats*, WALL ST. J., Nov. 5, 2002, at A22. The *Journal* lamented that the House, which was "designed to be the body of government most responsive to the public," is now "far more insulated from public opinion than is the Senate, because no one has yet found a way to gerrymander a state." *Id.*

119 David Espo, *Miss. Dem to Back Party Candidate*, ASSOCIATED PRESS ONLINE, June 7, 2002, *available at* 2002 WL 21844498.

120 Political scientists refer to the competitiveness of elections by the "marginals" separating the two leading candidates. The conventional definitions generally focus on a ten-percent vote spread (55% to 45% in a two-candidate election) as a competitive election and a twenty-percent spread (60% to 40% in a two-candidate election) as a landslide. *See* David R. Mayhew, *Congressional*

sional delegation.[121] Nor were competitive congressional elections expected in other large states, such as Ohio, Illinois, Michigan, Texas, New Jersey, and New York.[122] Not even Florida, the ultimate battleground of the 2000 presidential election, expected a race in which Democrats and Republicans had equal chances of victory.[123] Aided by new technologies,[124] incumbent preservation has become, in the words of the chief redistricting official of the Republican National Committee, a "sweetheart gerrymander."[125]

The same pattern appears at the state legislative level. In the 2000 state legislative elections, 40.6% of the legislative seats in the forty-three states that hold partisan elections found a Democratic or Republican candidate for office *uncontested* by the other major party — in other words, a seat so safe as not to generate any serious challenge.[126] Equally striking is the decrease in intradistrict competition in the years following the post-1990 redistricting: the 1992 state legislative elections saw 32.8% of the seats essentially uncontested in the same forty-three states.[127] Over the course of the ten-year cycle, as incumbents became entrenched in their districts, the figure rose to 41.1% uncontested elections in 1998.[128]

There is little dispute in the political science literature that there is a powerful incumbency advantage at all levels of federal and state elections, and that the observed incumbency advantage has climbed steadily since the 1940s.[129] Although there are strong proponents of the view that the manipulation of district lines is a significant causal

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Elections: The Case of the Vanishing Marginals, 6 POLITY 295, 304 (1974) (defining marginality "narrowly," as 45 to 54.9 percent of the vote, and "broadly," as 40 to 59.9 percent of the vote); *see also* GARY C. JACOBSON, THE ELECTORAL ORIGINS OF DIVIDED GOVERNMENT: COMPETITION IN U.S. HOUSE ELECTIONS, 1946–1988, at 26 (1990) ("The two thresholds of marginality commonly found in the literature are 55% and 60% of the vote. Winning candidates who fall short of the threshold are considered to hold marginal seats; those who exceed it are considered safe from electoral threats.").

121 *See* John Harwood, *No Contests: House Incumbents Tap Census, Software to Get a Lock on Seats*, WALL ST. J., June 19, 2002, at A1.

122 *Id.*

123 *Id.*

124 *See The Gerrymandered Democrats*, *supra* note 118 (discussing "computer databases that can account for voter tendencies down to the city block").

125 Harwood, *supra* note 121 (quoting Thomas Hofeller).

126 These data are drawn from state legislative files and compiled by Richard Winger, the editor of Ballot Access News. *See Dems, Reps Failed To Nominate in 2000 (Table)*, BALLOT ACCESS NEWS, Dec. 5, 2000, *available at* http://www.ballot-access.org/2000/1205.html (on file with the Harvard Law School Library).

127 *Id.*

128 *Id.*

129 *See* Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942–2000*, 1 ELECTION L.J. 315, 328 (2002).

factor in explaining the incumbency advantage,[130] the picture cannot be quite that simple. For example, Professors Ansolabehere and Snyder find that the incumbency edge is present not only in legislative elections, where district lines are subject to manipulation, but also in races for executive offices, where there are no district lines to redraw every ten years.[131] The large number of causal explanations offered for the rising premium of incumbency[132] suggests that there may be a variety of factors contributing to this effect, and that different factors may be at issue for elections to legislative as opposed to executive offices.

The empirical evidence cannot support so strong a claim as assigning to the gerrymander exclusive or even primary responsibility for the electoral prowess of incumbents. No doubt other factors, such as campaign finance regulations, contribute as well. Ultimately, however, this Article does not rise or fall on the narrow empirical question whether gerrymandering is the predominant cause of the increase in uncontested or uncompetitive elections. There is no question that district lines are manipulated for the purpose of protecting incumbents from effective challenge, that incumbents assiduously police the redistricting process to protect themselves from challenge, and that a diminishing number of legislative seats are electorally competitive. Certainly correlation cannot prove causation, and it may be that all political insiders are operating under the mistaken belief that gerrymanders benefit incumbents. My suspicion, however, is that incumbents have a keen understanding of the system in which they operate. It is probably not a matter of coincidence that in Iowa, where congressional boundaries are drawn by nonpartisan officials who are instructed to disregard incumbent and other political preferences, four out of five House districts were considered highly competitive in 2002.[133] Even if the extent of the effect that redistricting has on incumbent advantage remains a matter of debate, the question is whether the deliberate use of powers over redistricting to attempt to insulate incumbent officeholders from meaningful challenge is normatively proper and constitutionally tolerable.

It is of course possible to argue that these lopsided majorities, or even the absence of challengers, is simply a reflection of the true and

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[130] *See* GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION 127–205 (2002).

[131] Ansolabehere & Snyder, *supra* note 129, at 328–29.

[132] *See, e.g.*, Richard D. McKelvey & Raymond Riezman, *Seniority in Legislatures*, 86 AM. POL. SCI. REV. 951 (1992) (highlighting the connection between seniority systems and the incumbency advantage).

[133] *See Rigged Voting Districts Rob Public of Choice*, USA TODAY, Aug. 28, 2002, at 13A (reporting the competitiveness of Iowa congressional districts and the resulting intense campaigning by both national parties).

uncorrupted will of the voters. So framed, engaging this argument seems as productive as debating whether Elvis is really alive and will shortly return to Graceland. A more serious version of this challenge would rely on the inherent imprecision of the term "competitive." Thus, one might argue that structural barriers that substantially diminish the prospect of contested elections are easy targets, but that every rule governing the electoral process limits some forms of challenge — with the prime example being the pronounced tendency of first-past-the-post electoral districts to reward two and only two political parties.[134] This objection must also fail. Undoubtedly, all rules limit choices. Yet no competitive endeavor, from elections to baseball, would be possible without predefined rules of engagement. It is possible to distinguish between enabling rules that define the engagement and restraining rules that are designed to frustrate challenge.[135] To return to the analogy of markets, although the question of the optimal number of firms in a competitive market is one that is unlikely to yield any answer in the abstract, it is still possible to identify anticompetitive behavior that artificially restricts the ability of new entrants to emerge or improperly entrenches the privileged position of the dominant actors.

The complacent lack of concern about noncompetitive districts also involves overlooking the cost of noncompetitiveness to the political process and to the ability to realize actual voter preferences. While each of the major American political parties is a big tent, there are nonetheless key divisions in their constituencies — particularly in their activist cores.[136] As a general matter, internal party selection of candidates, either by primary or direct party nomination, rewards the more

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[134] *See supra* note 103. For leading examples of this critique directed against earlier formulations of the competitive markets approach to the law of the political process, see Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589 (1999).

> Every electoral system introduces arbitrary advantages and disadvantages. Given a particular configuration of preferences, different electoral rules can lead to different outcomes. Groups that would win under one set of rules might lose under another. It is quixotic to look for the absolutely fair system. The danger of the Issacharoff-Pildes structural approach is that it might send the judiciary on just such a fruitless quest.

Id. at 1603; *see also* Richard L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719 (1998).

[135] This approach follows the work of Stephen Holmes, who describes the limitations on precommitment inherent in a constitutional order as enabling rather than restricting democratic politics. *See* Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195, 227 (Jon Elster & Rune Slagstad eds., 1988) ("In general, constitutional rules are enabling, not disabling; and it is therefore unsatisfactory to identify constitutionalism exclusively with limitations on power.").

[136] A more elaborate version of this argument may be found in Issacharoff, *Private Parties*, *supra* note 20.

polarized activist wing of the party.[137] The process of having to run in the general election tempers that polarization as the parties compete for the median voters who may tip the election. A bipartisan gerrymander may keep intact the overall Republican-Democratic balance in the legislature, but it offers no guarantee that the same Democrats or Republicans would emerge from competitive elections.[138] Left behind in the "sweetheart gerrymander" are the droves of median voters increasingly estranged from the polarized parties. Left behind as well are the incentives to provide representation to the community as a whole.[139] As California Democratic Congressman Adam Schiff remarked, "[t]he best representation . . . comes out of the most marginal districts."[140]

No districting scheme could (or should) aspire to recreate the exact partisan balance of the state or jurisdiction as a whole. The resulting legislature would replicate the winner-take-all feature of at-large elections, a feature that has been at the heart of the concern over minority vote dilution.[141] If district lines were to be purposefully manipulated to make every district represent the actual political configuration of

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[137] *See* ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY 71–73 (1970) (identifying the tendency of party activists to push their parties toward polar positions); Issacharoff, *Private Parties*, *supra* note 20, at 302–04 (identifying the polarizing role of activists, which is offset by electoral accountability).

[138] Hence the repeated observation that the parties today are more polarized and less likely to engage in bipartisan efforts than they once were. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2311 (2001); David C. King, *The Polarization of American Parties and Mistrust of Government*, *in* WHY PEOPLE DON'T TRUST GOVERNMENT 155, 156 (Joseph S. Nye et al. eds., 1997).

[139] In an early article, Professor Ortiz ties the redistricting process to an effort by incumbents to insulate themselves from electoral accountability for their policy decisions:

> By redrawing district lines in such a way as to favor their own reelection, incumbents can partially protect themselves from challenge. They can then pursue their self-interests at the expense of their constituents' interests with less fear of being unseated. The smaller their fear, moreover, the more room they have to indulge their own preferences and ignore the voters — even the majority who elected them.

Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature To Police Itself*, 4 J.L. & POL. 653, 675 (1988); *see also* CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS 72 (1993) (arguing that representatives with "electoral security" tend to "become complacent, not consulting their constituents as frequently as representatives from other kinds of districts do"). Subsequently, Professor Ortiz and I placed the problem of incumbent self-interest within the broader framework of the agency costs associated with political intermediaries. *See* Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999) (exploring the agency costs imposed by superagents monitoring our directly elected agents to prevent them from disregarding voter interests).

[140] Harwood, *supra* note 121 (internal quotation marks omitted).

[141] *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY (1994) (detailing the problem of majority overrepresentation); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1838–45 (1992) (describing the development of the voting rights assault on minority vote dilution).

the general population, the result would be to skew representation toward the median voters — with the predictable effect that nonmajoritarian views would be shut out of the legislature. While this problem is well identified in the case law and literature addressing the problems with at-large or multimember election districts,[142] there is insufficient attention to the fact that gerrymandered single-member districts have distributional consequences that push in the opposite direction. If each district can potentially be gerrymandered to render it uncompetitive, the result is to create strong incentives toward polarization as the parties become more susceptible to partisan homogeneity — as is common with the cumulative effect of the tyranny of small decisions.[143] Gerrymandering and the diminution of competition have a predictable effect that is completely independent of the overall partisan composition of a legislative body. As one member of Congress put it, "[b]ecause the districts in Congress are more and more one-party dominated, the American Congress is more extreme."[144] The result is not only less electoral accountability but also more fractiousness in government and more difficulty in forming legislative coalitions across party lines.

Finally, a focus on the competitive implications of rules governing the political process allows for confined yet effective court oversight to guard against conduct that frustrates democratic accountability.[145]

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[142] *See* Thornburg v. Gingles, 478 U.S. 30, 47 (1986) ("This Court has long recognized that multimember districts and at-large voting schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'" (quoting *Burns v. Richardson*, 384 U.S. 73, 88 (1966) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965))) (alteration in original) (internal quotation marks omitted)); *see generally* ISSACHAROFF, KARLAN & PILDES, *supra* note 7, at 746–866 (reviewing case law and scholarship on minority vote dilution).

[143] *See* Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 46 (1999).

[144] *Id.* (quoting Rep. John Tanner (D-Tenn.)) (internal quotation marks omitted).

[145] Although it is beyond the scope of this Article, it is worth noting that other constitutional courts have taken the idea of policing the political arena to protect competitiveness as the core function of constitutional oversight. For example, the German Constitutional Court has written: "In the field of elections and voting, formal equality includes the principle of formal equal opportunity, namely, the opportunity of political parties and voter organizations to compete for electoral support." DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 188 (2d ed. 1997) (translated from the National Unity Election Case, 82 BVerfGE 322 (1990)). In similar fashion, the Constitutional Court of the Czech Republic recently upheld a statute requiring a political party to obtain at least five percent of the vote before it could be represented in Parliament, but noted that "it is always necessary to gauge whether such limitation of the equality of the voting right is the minimum measure necessary to ensure such a degree of integration of political representation as is necessary for the legislative body to form a majority (or majorities) required for the adoption of decisions and formation of a government which enjoys the confidence of parliament." 5 EAST EUROPEAN CASE REPORTER OF CONSTITUTIONAL LAW 159, 170 (1998) (translated from Pl ÚS 25/96-37). For further discussion of these courts' use of a competition-enhancing principle of constitutional oversight, see

The concern over incumbent manipulation of redistricting to thwart electoral accountability becomes a subset of a broader strategy for ensuring the democratic accountability of elected representatives.[146] It is not surprising that redistricting authority is a prime target for reform in those states where voters are able to bypass legislative obstacles through the initiative process.[147] But where that is not possible, the focus must be on the constitutional guarantees of the preconditions for democratic elections. This approach necessarily moves away from the notion of individual rights as the prime protector of the integrity of the political process, and looks instead to the structural vitality of politics. My collaborator Professor Pildes has expressed this point:

> [C]ourts should become more aware of the need for external oversight of potentially anticompetitive practices that masquerade under the hoary labels of good order, stability, and similar homilies. When claims of rights are asserted, courts should attempt to recognize the structural and organizational implications of the resulting decisions. The way to sustain the constitutional values of American democracy is often through the more indirect strategy of ensuring appropriately competitive interorganizational conditions. It is in this way that central democratic values, such as responsiveness of policy to citizen values and effective citizen voice and participation, are best realized in mass democracies.[148]

IV. *SHAW* AND PROPHYLAXIS

If we turn to the major redistricting battlefront of the 1990s, the racial gerrymandering cases, a second and perhaps even more significant benefit of reassessing the law of gerrymandering under a competition-reinforcing approach will hopefully become apparent. One of the perverse consequences of the absence of any real constitutional vigilance over partisan gerrymandering is that litigants must squeeze all claims of improper manipulation of redistricting into the suffocating

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Issacharoff & Pildes, *supra* note 20, at 690–99, discussing the German Constitutional Court, and Pildes, *supra* note 20, at 1613–15, discussing the Constitutional Court of the Czech Republic.

146 Professor Ortiz pushes a variant of this argument further to claim that the degree of competition, even absent gerrymandering, is generally insufficient in political markets consisting of only two actors — the major political parties. *See* Daniel R. Ortiz, *Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 COLUM. L. REV. 753, 765 (2000) ("Weak markets do discipline — just too weakly. . . . For this reason, the antitrust laws do not stop with ensuring just a single competitor.").

147 The creation in 2000 of the Arizona Independent Redistricting Commission is an example. Proposition 106, the voter-approved measure that enabled the Commission, directed it to work largely without regard to partisan information and incumbent political biases, and to include among its overall objectives the maximization of competitive elections. *See* ARIZ. CONST. art. 4, pt. 2, § 1 (codifying Proposition 106, *available at* http://www.azredistricting.org/default.asp?page=prop106).

148 Pildes, *supra* note 20, at 1611.

category of race.[149] The reasons for this are somewhat convoluted, but nonetheless critical. Immediately after the Court announced the rule of equipopulational districting in *Reynolds* and its progeny, mathematical disparities in district size became a convenient target of parties seeking to challenge the partisan impact of a proposed redistricting plan. As Justice White observed in 1983 in *Karcher*, "[m]ore than a decade's experience . . . demonstrates that insistence on precise numerical equality only invites those who lost in the political arena to refight their battles in federal court."[150] As redistricters adapted to tight equipopulational constraints on district configurations, the numerical challenge to the first rounds of post-*Baker* redistricting diminished in value as a vehicle to "refight" political battles through the courts. What emerged in its place were claims over the racial implications of redistricting decisions. In hindsight, this path of development appears to have been almost inevitable. The concern over minority vote dilution had already paved the way for expanded federal oversight of local election practices[151] — well before *Bush v. Gore*[152] — and *Shaw v. Reno* (*Shaw I*)[153] began the process of constitutionalizing federal oversight along the dimensions of race.

A. Race and Politics

Beginning with *Shaw I* in 1993, the Supreme Court ushered in a new era of constitutional entanglement with the redistricting process, one whose intensity and intrusiveness into state political arrangements are unmatched since the early days of *Baker* and *Reynolds*. At one level, Justice O'Connor's recognition of a new "analytically distinct"[154] cause of action in *Shaw I* is consistent with the broad themes of this Article. By recognizing a systemic harm from excessive reliance on racial considerations in redistricting, *Shaw I* in effect repudiated decades of case law that had found equal protection harm only in the denial of individual rights to vote or in group-based discrimination through dilution of voting strength.[155] But *Shaw I*'s new structural equal protec-

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[149] This mismatch is analogous to the problem of protecting employees from discharge only through the antidiscrimination laws and not through any just-cause criterion. The predictable consequence is to reward claims of discharge that can be cast in terms of discrimination, even where other more palpable, but legally permissible, factors may have been at play. *See* Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1679–82 (1996).

[150] Karcher v. Daggett, 462 U.S. 725, 778 (1983) (White, J., dissenting).

[151] *See* Issacharoff, *supra* note 141, at 1836 (arguing that cases interpreting the Voting Rights Act "dramatically enhanced federal power to regulate electoral processes").

[152] 531 U.S. 98 (2000).

[153] 509 U.S. 630 (1993).

[154] *Id.* at 652.

[155] In this sense, *Shaw I* decisively rejected the Court's earlier ruling in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), which found that a claim challenging redistricting was only

tion, to use Professor Karlan's terminology,[156] admitted of only one lens through which to focus this new constitutional scrutiny, and the predictable effect was to magnify the distinct role of race in the redistricting battles. As a result, the structural difficulties in policing the political process were reduced to the single issue of race, and the necessarily murky partisan battles involved in redistricting were presented for judicial review only along that dimension.

Many have observed the difficulty of disentangling questions of race and politics,[157] and some have noted a paradox in the differential constitutional scrutiny between claims of racial gerrymandering and partisan gerrymandering. In the Texas redistricting saga presented as *Bush v. Vera*,[158] for example, the Court scrutinized the overlap of the categories of race and party to warn that simply offering partisanship as a justification for aggressive districting practices would not distract the Court's watchful eye from the constitutional infirmities involved in an excessive reliance on race in redistricting.[159] But the Court's admonition stayed at just that level: a warning that racial considerations could not be obscured behind claims of partisanship. However, the Court and the surrounding commentary failed to explore the perverse set of incentives that the decision created. Following *Shaw I*, there was every reason for disappointed players in the cruel game of partisan redistricting to recast themselves as aggrieved parties in equal protection dramas defined by race. Indeed, this became the defining legal pattern in the 1990 round of redistricting: the courts provided a second forum for redistricting battles if, *and only if*, the redistricting losers could recast themselves as victims of excessive consideration of race.

Thus, the question concerns the incentives established by combining exacting scrutiny for racial claims with no meaningful scrutiny for claims of partisan manipulation. One need only turn to the current round of redistricting to see how savvy political actors are responding to the Court's invitation. Only recently, for example, Georgia Republi-

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actionable if individuals had been denied the right to vote or if a racial group had had its voting strength unfairly minimized or canceled out. *Id.* at 165 (plurality opinion).

156 *See* Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 672–73 (2002) (assessing the Court's intuitive but unsystematic use of equal protection doctrine to intervene in highly charged political cases, from *Shaw I* to *Bush v. Gore*).

157 For an earlier account of the difficulty of disentangling racial and political motivations, see Richard Briffault, *Race and Representation After* Miller v. Johnson, 1995 U. CHI. LEGAL F. 23. Professor Briffault argues, based on social science evidence, that "in rejecting the essentialist assumption that all people of the same race necessarily vote alike, the Court's color-blindness doctrine risks going too far in the other direction — of ignoring the proven evidence that in some jurisdictions and at some times, race is a crucial basis in interest-group formation, with racial differences forming significant lines of political division." *Id.* at 69.

158 517 U.S. 952 (1996).

159 *See id.* at 959.

cans, frustrated by the state Democratic success in building a coalition to restore Democratic-controlled districts to the state, immediately invoked the concept of minority vote dilution and the authority of the Voting Rights Act to undo what they perceived of as a Democratic gerrymander.[160] In effect, these Republicans were attempting to recapture the successes of the 1990s round of redistricting in which the creation of heavily black districts in Georgia laid the foundation for Republican control of that state's congressional delegation.[161]

If we examine the totality of the law governing redistricting, it is possible to identify a rather perverse incentive structure that the Court has inadvertently created for partisan warriors. Through a combination of *Shaw I* and the most recent contribution to the racial redistricting cases, *Easley v. Cromartie*,[162] the Supreme Court has exacerbated the incentive to racialize partisan disputes by creating a two-track approach to redistricting that can best be summarized as "politics, but not race." Under this approach, racial considerations are extraordinarily suspect, raising the evocative concerns of "balkaniz[ation]" and "political apartheid" that Justice O'Connor articulated in *Shaw I*.[163] But the Court has apparently opened up a safe harbor for bizarre redistricting lines whose inspiration is political as opposed to racial, even if in many states, "racial identification is highly correlated with political affiliation."[164]

The litigation history, at first glance, would seem to defeat attempts to draw the battle lines over the race/partisanship divide. In *Vera*, the Court rejected the defendants' claim that the Texas congressional redistricting plan was constitutional because it was inspired by partisan rather than racial considerations. Although it did so largely on the basis of the evidentiary proof in the case,[165] the Court noted quite forcefully that the overlap of racial and partisan considerations would not

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[160] *See* Michael Finn, *Barnes Signs Senate Remap*, CHATTANOOGA TIMES, Aug. 25, 2001, at B2, *available at* LEXIS, News Library, Allnws File (reporting Republican opposition to the redistricting plan); Michael Finn, *Georgia Remap in Legal Quagmire*, CHATTANOOGA TIMES, Oct. 22, 2001, at A1, *available at* LEXIS, News Library, Allnws File (noting the Republican Party Chairman's opinion that the new redistricting maps "violate the integrity of local communities, and they deny minorities their legal rights under the Voting Rights Act").

[161] For an overview of the debates and social science evidence on the creation of heavily minority-dominated districts in the 1990s, see ISSACHAROFF, KARLAN & PILDES, *supra* note 7, at 907–24.

[162] 121 S. Ct. 1452 (2001), *decided sub nom.* Hunt v. Cromartie.

[163] Shaw v. Reno, 509 U.S. 630, 647, 657 (1993) ("A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.").

[164] *Cromartie*, 121 S. Ct. at 1459.

[165] Bush v. Vera, 517 U.S. 952, 970 (1996) (plurality opinion).

assuage the concern evinced in the *Shaw* line of cases for the excessive reliance on race.[166]

But the very argument that failed for evidentiary reasons in *Vera* has now succeeded in *Cromartie*, the fourth and last of the tortuous North Carolina cases to come to the Supreme Court from the 1990 round of redistricting[167] — this one decided in 2001, no less. According to Justice Breyer's majority opinion, a claim under *Shaw* must fail unless there is dispositive evidence that race, and not politics, was the driving motivation for the challenged redistricting plan:

> A legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior. Hence, a legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be political rather than racial.[168]

The distinction between race and politics is made curious in North Carolina, where the incumbent protected by the partisan gerrymander upheld in *Cromartie* was the very same congressman, Mel Watt, whose initial election had been held to be an unconstitutional racial gerrymander in *Shaw v. Hunt* (*Shaw II*).[169] The Court seemed not at all concerned that well-trodden equal protection case law would condemn this apparently neutral preservation of an unconstitutional objective, for it is the equal protection equivalent of the fruit of the poisonous tree.[170]

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166 *See id.* at 967–69.

167 The previous three cases were *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Shaw v. Hunt*, 517 U.S. 899 (1996); and *Shaw I*.

168 *Cromartie*, 121 S. Ct. at 1460.

169 517 U.S. 899, 918 (1996). In *Cromartie*, the Court found that North Carolina "drew its plan to protect incumbents — a legitimate political goal." 121 S. Ct. at 1461. Among these incumbents was Rep. Watt, who was originally elected by the subsequently invalidated majority-black Twelfth Congressional District. *Cf. id.* at 1473 n.3 (Thomas, J., dissenting) (assuming, without deciding, "that the goal of protecting incumbents is legitimate, even where, as here, individuals are incumbents by virtue of their election in an unconstitutional racially gerrymandered district").

170 *See, e.g.*, Green v. County Sch. Bd., 391 U.S. 430, 441 (1968) (striking down a school district's "freedom of choice" plan because, even if not unconstitutional in itself, the plan failed to remedy the district's unconstitutional racial segregation). Throughout the late 1960s and early 1970s, federal courts routinely struck down "freedom of choice" and other similar race-neutral moves intended to perpetuate unconstitutional racial segregation, even when the schools crafted new attendance policies to avoid any overt reference to race, as was the case in *Green*.

This is part of what was termed the "*Keyes* presumption," in which courts allowed the finding of unconstitutional conduct to create a presumption that related conduct, both contemporaneous and prospective, was infected by the same unconstitutionality, even if facially neutral. As set out in *Keyes v. School District No. 1*, 413 U.S. 189 (1973), the presumption states "that a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious." *Id.* at 208. For applications, see, for example, *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979), which held:

What most distinguishes *Cromartie* is its curious factual acceptance of the claim that the preservation of a district drawn to ensure black representation could exist independent of racial considerations. By contrast, at the doctrinal level, the test set out in *Cromartie* is nothing more than a recapitulation of the doctrinally puzzling standard of *Miller v. Johnson*,[171] the Georgia case that was the most significant of the post-*Shaw I* cases. Under the standard formulated in *Miller*, racial considerations become constitutionally injurious when they are the "predominant" factor behind a redistricting plan.[172] Since Justice Breyer could not conceivably have believed that the legislature was unaware of the racial composition of the North Carolina districts, particularly after the Supreme Court had considered the issue on three earlier occasions, his alternative standard in *Cromartie* must have turned on the notion that the amount of racial consideration in North Carolina was not dispositive: "The evidence taken together . . . does not show that racial considerations predominated in the drawing of District 12's boundaries."[173] Whatever the conceptual limitations of the predominance standard before *Cromartie*,[174] the result after this district's fourth review by the Court is aptly characterized as "indeterminate to the point of incoherence."[175]

> Even though a freedom-of-choice plan had been adopted, the school system remained essentially a segregated system, with many all-black and many all-white schools. The board's continuing obligation, which had not been satisfied, was "'to come forward with a plan that promises realistically to work . . . *now* . . . until it is clear that state-imposed segregation has been completely removed.'"

Id. at 459 (quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 13 (1971) (alterations in original) (quoting *Green*, 391 U.S. at 439)); *see also* Brown v. Bd. of Educ., 892 F.2d 851, 904 (10th Cir. 1989) (summarizing Supreme Court cases as using "the *Keyes* presumption . . . to decree a current system-wide remedy on the basis of recent and remote purposefully segregative action, including the failure to satisfy the affirmative duty to eliminate a dual system").

171 515 U.S. 900 (1995).

172 *Id.* at 916. The tortuous line of these cases confirms the absence of any clear content to this standard. *See, e.g., id.* ("Redistricting legislatures will . . . almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. . . . The plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove the legislature subordinated traditional race-neutral districting principles . . . to racial considerations."); *Shaw II*, 517 U.S. at 905 ("The constitutional wrong occurs when race becomes the 'dominant and controlling' consideration." (citing *Miller*, 515 U.S. at 911, 915–16)).

173 *Cromartie*, 121 S. Ct. at 1466.

174 The doctrinal limitations of the "predominant factor" test are set out in Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 SUP. CT. REV. 45.

175 John Hart Ely, *Confounded by* Cromartie*: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489, 496–98 (2002) (arguing that "even if Justice Breyer had a magic x-ray machine that could tell him that here the desire to create a substantially African-American district was almost entirely parasitic on a desire to create a safely Democratic district, it would still be hard to understand why that makes the latter purpose 'predominant' for constitutional purposes" (footnote omitted)); *see*

The paradoxical combined effect of *Miller* and *Cromartie* is to turn the process of judicial review of redistricting into a robust evidentiary hunt for any trace of controlling racial considerations in the drawing of legislative boundaries. Thus, the *Cromartie* Court split over the proper evidentiary treatment of an isolated statement in the legislative record acknowledging the need for "racial and partisan balance" as one factor among the many that should be considered in an equitable assignment of electoral opportunity,[176] and of a single incriminatory e-mail that dared to utter the forbidden term "Black community" in describing how the districts were redrawn.[177] In finding that, thankfully as it appears, these stray comments did not infect the redistricting process, the Court blessed what is the most normatively troubling aspect of *Shaw I*: the conception of electoral opportunity that would allow any constituency save racial minorities to demand electoral opportunity. The bizarre extremes of this approach had already surfaced in lower court opinions that sanctified the divergent legislative needs of rice farmers and soybean farmers — all the while condemning the racial considerations that unconstitutionally infected the process.[178]

Under *Cromartie*, then, a legislature is now free to seek any objective in redistricting, so long as it eschews any express commitment to providing representation to racial minorities. The result is an equal protection variant of the "seven dirty words" approach to the First Amendment protection of speech:[179] so long as the drafters never mention race, a plan will likely survive equal protection scrutiny. One may titillate with veiled intimations of partisanship that are widely understood to correlate heavily with race. But the explicit recognition of race as a critical divide in our society becomes the new equal protection obscenity — something just too hard-core for the frail ears of the body politic. The *Shaw* line of cases may now be said to have come full circle.[180] In keeping with Justice O'Connor's admonition from *Shaw I* that this is an area in which "appearances do matter,"[181] the

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also Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-*Shaw *Era*, 26 CUMB. L. REV. 287, 302–03 (1996) (noting that the *Miller* predominance test could not explain the interconnected redistricting objectives of equipopulation, partisan advantage, and incumbent protection that exist even in majority-minority districts).

176 *Cromartie*, 122 S. Ct. at 1464 (quoting state Senator Cooper's prior statement to the legislature).

177 *Id.* at 1474–75 (Thomas, J., dissenting).

178 *See* Hays v. Louisiana, 862 F. Supp. 119, 127 (W.D. La. 1994) (finding, among the defects of a challenged district, that "[t]he agricultural regions of District 4 include cotton, soybean, rice, sugar cane, and timber. Such diverse agricultural constituency [sic] have few common interests. We continue to question how one Congressional representative could adequately represent the varying interests of residents in such far-flung areas of the State.").

179 FCC v. Pacifica Found., 438 U.S. 726, 777 (1978).

180 *See* Karlan, *supra* note 156.

181 Shaw v. Reno, 509 U.S. 630, 647 (1993).

Court has now come to believe that the appearances that matter are no longer the district lines but the formalities of the legislative record.

The upshot of *Cromartie* is that so long as the white majority Democratic legislature was gerrymandering a congressional district to reward *its* own interests, the Constitution would remain silent. But should the same legislators consider the political aspirations of historical outsiders, the courts must intercede. John Hart Ely well captures this point:

> A central theme of our Constitution is the preclusion of self-dealing maneuvers on the part of incumbents (other than by the pursuit of constituent preferences) to perpetuate their incumbency or otherwise promote the fortunes of their political party. . . . [P]artisan gerrymandering is more clearly unconstitutional than pro-minority racial gerrymandering: whether or not the former should form the basis of a cause of action, it certainly should not be invocable as a defense to, or "innocent" explanation of, what appears to be the latter.[182]

The contrast between insider manipulation and the claims of those without incumbent power becomes critical. Indeed, the Court's constitutional priorities in the *Shaw* cases appear to be backwards. The *Shaw* cases placed the Court in the awkward position of putting the Constitution on the side of protecting vested incumbent power, while prohibiting the redistribution of electoral opportunity to those out of power.[183]

B. Perverse Incentives

Much has already been written on the troubling legacy of the *Shaw* line of cases for subsequent rounds of redistricting,[184] including careful assessments of the facts and issues in the North Carolina redistricting

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[182] Ely, *supra* note 175, at 503 (footnotes omitted).

[183] Professor McConnell elaborates upon this point in an attempt to moor the redistricting concerns textually within the Constitution:

> Partisan gerrymandering is designed to entrench a particular political faction against effective political challenge — sometimes even to give a political minority effective control. That is in obvious tension with the values of Republicanism. Racial gerrymanders of the sort we have seen in recent years, by contrast, do not threaten ultimate majority rule. To be sure, they have other consequences that may well be deemed undesirable — such as the exacerbation of racial polarization in elections — but they are not unrepublican. As long as the majority retains effective control, it is consistent with Republicanism for the majority to give greater influence to minority voices that would otherwise be submerged.
>
> Adopting the Republican Form of Government Clause and abandoning the Equal Protection Clause as the basis for evaluating electoral districting would thus be a practical and judicially manageable means of curbing gerrymandering abuses of all kinds, and it would put an end to the embarrassingly standardless line of cases that began with *Shaw v. Reno*.

McConnell, *supra* note 63, at 116 (footnotes omitted).

[184] For an overview of the scholarship, see ISSACHAROFF, KARLAN & PILDES, *supra* note 7, at 906–07.

fiasco.[185] My goal here is not so much to criticize this line of case law, although one might observe that the set of commands it issues is almost as contorted as the original North Carolina districting plan struck down in *Shaw I*. Rather, my aim is to use the doctrinal morass over race and redistricting to highlight the Court's inability to develop a workable approach to policing constitutionally improper behavior in the redistricting arena. In particular, I want to direct attention to the perverse incentives the Court has created — incentives that encourage the racialization of all claims of improper manipulation of the redistricting process.

First, now that the post-1990 round of redistricting litigation has concluded, there is every reason to suspect that future redistricting fights will be framed in the inflammatory language of race to increase the possibility of subsequent judicial revision. In retrospect, it is fairly clear that partisan battles for the spoils of redistricting were successfully recast as racial gerrymandering claims once *Shaw I* established this "analytically distinct"[186] cause of action. Whether in North Carolina, Georgia, or Alabama, the story of racially motivated redistricting could be told compellingly — perhaps more compellingly than a story of a battle for partisan control.[187] Evidence of political influence

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[185] For work on this score, see Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium:* Hunt v. Cromartie *as a Case Study*, 58 WASH. & LEE L. REV. 227 (2001).

[186] *Shaw I*, 509 U.S. at 652. Only recently has the strategic use of claims of racial rewards been recognized in the scholarship as one of the deleterious consequences of the *Shaw* line of cases. For recent contributions to this discussion, see Charles & Fuentes-Rohwer, *supra* note 185, at 309, noting that "courts should handle the 'racial' gerrymandering cases just like the political gerrymandering cases because the race cases are not really about race after all. They are about politics," and Megan Creek Frient, Note, *Similar Harm Means Similar Claims: Doing Away with* Davis v. Bandemer*'s Discriminatory Effect Requirement in Political Gerrymandering Cases*, 48 CASE W. RES. L. REV. 617, 655 (1998), observing that "[b]ecause what is really a political gerrymander cannot be invalidated unless plaintiffs allege the scheme is a racial gerrymander, parties both bringing and defending these claims have incentives to attempt to emphasize or downplay the degree to which considerations of race and political affiliation played a role in [redistricting]."

[187] The partisan effects of the Republican-proposed 1990 Alabama redistricting scheme have been described as follows:

> Now consider the partisan distribution of Alabama's congressional delegation before and after the post-1990 redistricting, and a comparison of the black percentage of each congressional district. . . . [T]he immediate result of the redistricting is the replacement of two white Democratic congressmen from Districts 6 and 7 with a black Democratic congressman from District 7 and a white Republican congressman from District 6. Notice as well, the near even distribution of black voters prior to 1990 and the concentration of black voters after 1990.

ISSACHAROFF, KARLAN & PILDES, *supra* note 7, at 923. As political scientist David Lublin notes, "[r]edistricting in Alabama worked exactly as the Republicans hoped. . . . Thanks virtually entirely to favorable redistricting, Republicans won one new seat in 1992 and held on to one seat that they otherwise would have lost." David Ian Lublin, *Race, Representation and Redistricting*, *in* CLASSIFYING BY RACE 111, 116–17 (Paul E. Peterson ed., 1995); *see also supra* notes 160–161 and accompanying text.

permeates the racial gerrymandering cases, especially those involving the protection of minority incumbents.[188] Even the contorted district configurations that the Court spoke to in *Shaw I* reflect more than an excessive concern with race.[189] The history of the ill-fated majority-minority districts demonstrates the ubiquity of partisan politics in redistricting battles. Because legislatures and redistricting authorities turned to the problem of minority representation only *after* incumbent powers had been satisfied, the minority districts were patched together from the remnants and leavings of more commanding political players. The result was that minority districts looked tattered and badly stitched together, generally reflecting the fact that they had been "squeezed into a map that had already taken shape."[190] By contrast, in California, where special masters drew minority districts first, it was several of the *non-minority* districts that "had to be constructed around the periphery" and as a consequence "became rather elongated."[191]

The second, and more salient, detrimental incentive the Court established was that opponents of the post-1990 districts had to construct their racial challenges after the fact, once *Shaw I* had given a green light to such claims. Imagine the effect on redistricting debates in the post-2000 round now that any salting of the record with racial issues may enhance the prospects of judicial oversight,[192] and as legis-

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[188] *Cf.* Charles & Fuentes-Rohwer, *supra* note 185, at 280 (citing *Shaw v. Hunt*, 517 U.S. 899, 936 (1996); *Miller v. Johnson*, 515 U.S. 900, 942 (1995) (Ginsburg, J., dissenting) (considering state legislators' influence on districting decisions from which they benefit); and *Shaw I*, 509 U.S. at 673 n.10 (White, J., dissenting) (noting that a majority-minority district was created in the northern part of North Carolina, rather than the southern part of the state, in order to protect a Democratic incumbent)).

[189] *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993) (describing how the much-maligned North Carolina highway district resulted from the efforts of state Democrats to protect white Democratic incumbents); Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 653 (1993) (reporting how North Carolina legislators turned to the creation of minority districts only after ensuring reelection of incumbents).

[190] Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1576 (2002).

[191] Wilson v. Eu, 823 P.2d 545 app. at 579–80 (Cal. 1992) (special masters' report); *see also* Karlan, *supra* note 190, at 1576 (describing the process by which minority districts are "squeezed in[]" after incumbent interests are protected).

[192] This is a particularly precarious situation for those jurisdictions subject to the preclearance provisions of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (2000). Under the nonretrogression doctrine enunciated in *Beer v. United States*, 425 U.S. 130, 141 (1976), these jurisdictions are required to ensure that no alterations of any electoral practices, including the redrawing of district lines, have an adverse effect on minority electoral prospects. Additionally, these jurisdictions must submit all changes to the Justice Department for approval prior to implementation — the "preclearance" requirement — together with documentation that the proposed change was free of any adverse effect or malevolent purpose. *See id.* (establishing the nonretrogression stan-

lators from both parties (and their advisors) recognize both the loopholes and pitfalls of the current *Shaw/Davis* divide.[193] The legislative process of redistricting does not occur within a sterile environment where reasoned deliberation is the norm. Rather, redistricting reveals "the bloodsport of politics," as self-interest overwhelms any claims of "ideology, social purpose, or broad policy goals."[194] Those on the losing side of the redistricting battles may well be tempted to compromise the constitutional viability of the redistricting plans by inserting claims of racial purpose into the legislative record.[195] It is difficult to conjure up a more harmful set of incentives for state actors.

Third, even assuming that racial gerrymandering is an independent constitutional harm, the bizarre post-*Cromartie* inquiry gives no guidance at all for the next round of litigation. The constitutional distinction between the redistricting plan upheld in *Cromartie* and the one rejected in *Vera* turns on an assessment of the state of mind of the legislature. This assessment is inherently problematic, because a racially motivated legislature and one concerned only with politics could easily produce identical results. For example, the Court in *Vera* relied heavily on the fact that the state of Texas drew its district lines using population data that were "uniquely detailed" with regard to race but relatively general with regard to other demographic factors.[196] After *Vera*, it is clear that such express reliance on racial data would trigger withering constitutional scrutiny. But a careful redistricter armed with data showing only partisan predilections of the city of Houston, to take an example, could easily create a virtually identical map. The heavy

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dard); *see also* ISSACHAROFF, KARLAN & PILDES, *supra* note 7, at 599–632 (setting out case law on nonretrogression and scrutiny for discriminatory motive). A covered jurisdiction engaged in redistricting could not possibly create this record without paying attention to the effect on minority electoral constituencies. That condition, of course, would create precisely the record of attention to the racial composition of districts that would presumably run afoul of *Vera* and *Cromartie*.

193 Consider the examples of *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992); and *Hays v. Louisiana*, 839 F. Supp. 1188, 1200–01 (W.D. La. 1993). In *Pope*, the predecessor case to *Shaw I* itself, the challengers claimed political gerrymandering. When they lost, *see* 809 F. Supp. at 399, they challenged the district on racial gerrymandering grounds. Once *Shaw I* had been decided, defenders of the plan in *Hays*, who had previously admitted to racial gerrymandering, unsuccessfully attempted to convince the court that their motivations had really been political all along, *see* 839 F. Supp. at 1199.

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

195 One insight into how savvy redistricters are already planning around *Shaw* considerations is found in J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431 (2000). For example, Hebert advises, "[i]f a state is able to create an explicit record of these race-neutral considerations, it is more likely than not to defeat a *Shaw* claim in the post-2000 redistricting litigation battles. . . . Where a state seeks to engage in constitutional political- or partisan-gerrymandering, the *Shaw* line of cases make it critical that the state use non-racial political data to achieve that goal." *Id.* at 450, 453.

196 *See* Bush v. Vera, 517 U.S. 952, 961–62 (1996) (plurality opinion).

overlap of predominantly Democratic precincts with black population centers and predominantly Republican precincts with white population centers could yield a map whose contours looked surprisingly like the suspect race-derived ones. So long as no redistricting authorities uttered the forbidden words of race, would the plan then survive challenge under *Vera* and *Cromartie*? I suggest, without further elaboration, that the final act in the 1990s North Carolina redistricting saga did little to bring clarity to the standards for redistricting in the next decennial cycle.[197]

C. *Altering the Process of Redistricting*

Redistricting is not the first area that confronts courts with a recognizable pattern of misconduct by official actors that defies easy judicial oversight. Such patterns of official misconduct may prove difficult to detect for evidentiary reasons or may pose obstacles to after-the-fact judicial scrutiny for any number of reasons, including the potential intrusiveness of an inquiry into motive. The Court's response in many such cases has been to use a species of constitutional common law[198] to develop rules of prohibition as a shield against the temptation for state actors to cross the constitutional line. The emergence of these constitutional rules of prophylaxis is by now well established,[199] with leading examples being the one-person, one-vote rule of apportionment[200] and

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[197] The porous quality of the line between race and politics is well summarized by Justice Souter in his dissent in *Vera*:

> The plurality seems to assume that incumbents may always be protected by drawing lines on the basis of data about political parties. But what if the incumbent has drawn support largely for racial reasons? What, indeed, if the incumbent was elected in a majority-minority district created to remedy vote dilution that resulted from racial-bloc voting? It would be sheer fantasy to assume that consideration of race in these circumstances is somehow separable from application of the traditional principle of incumbency protection, and sheer incoherence to think that the consideration of race that is constitutionally required to remedy Fourteenth and Fifteenth Amendment vote dilution somehow becomes unconstitutional when aimed at protecting the incumbent the next time the census requires redistricting.

517 U.S. at 1061 (Souter, J., dissenting) (citation omitted). It would not be an uncharitable reading of the state of the law after *Vera* and *Cromartie* to say that the Court has arrived at just the state of incoherence anticipated by Justice Souter.

[198] *See* Monaghan, *supra* note 23, at 2–3 (defining constitutional common law as "a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions").

[199] For leading discussions of the prevalence of such prophylactic rules, see Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 899–904 (1999), arguing that the "real" constitutional right is indistinguishable from its "remedial" or prophylactic component, and David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988), arguing that prophylactic rules are "a central and necessary feature of constitutional law."

[200] *See* Levinson, *supra* note 199, at 883.

the famous *Miranda* warnings.[201] As Professor Saunders describes, the key to these rules is their clarity in prohibiting the conduct likely to lead to unconstitutional results:

> In retrospect . . . *Miranda*'s specificity has emerged as one of its chief virtues. Because the Court has defined the contours of the per se rule so precisely, state actors have little doubt about what they must do to avoid triggering it, and courts reviewing their conduct after the fact have little doubt about when they should apply it. The result has been a substantial degree of compliance with the Fifth Amendment ex ante and a substantial reduction in the administrative costs incurred to enforce the Fifth Amendment ex post. A less specific rule would not have produced these benefits.[202]

Oddly, Professor Saunders tries to find such a prophylactic rule emerging from within the *Shaw* line of cases. This search is doomed precisely because these cases lack the very rule-specificity that she identifies as the chief virtue of *Miranda*. Instead, a successful prophylactic strategy must set aside the doctrinal tests for impermissible gerrymandering that have failed to give clear guidance to redistricting officials and have failed to deter improper behavior.

What would happen if the Court were to look to *Miranda* and the use of prophylactic rules to extricate itself from *Shaw*'s self-generated morass? The first step would be to focus more clearly on the harm identified in the racial gerrymandering cases. Here the manifestation of the harm is twofold. First, race-based redistricting involves state officials assigning opportunities for representation based on race. Second, racial gerrymandering reinforces the "racialization" of politics, since race is the coin by which redistricting prospects are allocated.[203] The next step requires returning to the initial premise of this Article. The *Shaw* line of cases imposes constitutional scrutiny on only one particular outcome in the process of insider-controlled districting but leaves the structural problems of incumbent entrenchment and the erosion of political competition uncorrected. It is perhaps unsurprising that the majority-minority districts that emerged in the 1990s are among the least competitive in the country and boast margins of in-

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201 *See* Strauss, *supra* note 199, at 190.

202 Saunders, *supra* note 23, at 1632–33 (footnotes omitted).

203 For example, in *Miller v. Johnson*, 515 U.S. 900 (1995), the Court stated that "[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Id.* at 911–12 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). Professor Pildes summarizes the Court's concern that state involvement in creating racially identifiable districts "expresses a view of political identity inconsistent with democratic ideals . . . [and] might have the consequentialist effect of encouraging citizens and representatives increasingly to come to experience and define their political identities and interests in partial terms." Richard H. Pildes, *Diffusion of Political Power and the Voting Rights Act*, 24 HARV. J.L. & PUB. POL'Y 119, 121 (2000).

cumbent victory resembling those of Massachusetts.[204] To the extent that the *Shaw* cases concern the purposeful packing of minority voters, *Miranda*'s logic recommends a better approach: the Court should forbid ex ante the participation of self-interested insiders in the redistricting process, instead of trying to police redistricting outcomes ex post.

The focus on ex ante rules of process has a direct payoff beyond the question whether any particular district is made competitive as a result. It is important to recognize that even if the Court were to accept the competition-enhancing metric for redistricting, there would still be a strong argument for the use of a prophylactic rule of preclusion in the redistricting process. Not every district could have a roughly equal number of registered Democrats and Republicans, and even a purely unmanipulated process would create some safe districts. The distortion comes not from the fact that some districts are safe, but from the fact that some districts are deliberately made noncompetitive to feather the nests of incumbent officials.

The advantages of an ex ante process-focused approach extend beyond the ability to foster competitive elections. The racial gerrymandering cases from the 1990s were, without exception to the best of my knowledge, the product of intense partisan struggles in which contorted minority districts were created either by Democrats seeking to preserve Democratic incumbent districts, or by Republicans seeking to pack likely Democratic voters into some districts and thereby tilt the balance of power in other districts. In other words, the racial considerations that troubled the Court were not independent of "normal" partisan divides, as *Vera* and *Cromartie* suggest, but were the direct consequence of partisan battles that were clinically "normal."[205] If the overracialization of redistricting is not the consequence of an absence of "normal" redistricting practices, but is instead the byproduct of normal practices in the context of partisan and racial strife, then the

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[204] *See generally* Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383 (2001) (providing data on the ability of black voters to have a reasonable chance to elect candidates of their choice in districts with significantly lower black voter concentrations); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002) (analyzing data on the packing of black voters in majority black districts); *see also supra* p. 623.

[205] Courts have recognized this observation even in those cases that have struck down redistricting results because of an excessive reliance on race in the redistricting process. *See, e.g.*, Vera v. Richards, 861 F. Supp. 1304, 1334 (S.D. Tex. 1994) ("The Legislature obligingly carved out districts of apparent supporters of incumbents, as suggested by the incumbents, and then added appendages to connect their residences to those districts. The final result seems not one in which the people select their representatives, but in which the representatives have selected the people." (citation omitted)).

target of *Shaw* should be the process that produces these pressures to racialize rather than the ill-defined end result of that process.[206]

There is already a significant body of experience from across the country of alternatives to redistricting conducted by partisan officials. Various approaches to nonpartisan redistricting, such as blue-ribbon commissions, panels of retired judges, and Iowa's computer-based models, recommend themselves as viable alternatives to the pro-incumbent status quo.[207] Although the track record of such nonpartisan alternatives is uneven, the general trend so far is that plans drawn outside the partisan arena produce less litigation, less contortion, and less opportunity for insider manipulation than do partisan processes. For example, it is striking that, as noted above,[208] political insiders considered four of the five Iowa congressional races to be competitive — compared to the less than ten percent figure that prevails nationwide.[209] Nonpartisan redistricting, at least through the 1990s, also seems to have allowed for adequate levels of minority representation, thereby avoiding vote dilution claims under the Voting Rights Act. Moreover, by upholding every commission-based redistricting plan challenged in the 1990s, the Court has tacitly hinted that commission-based redistricting allays its *Shaw* concerns.[210]

On the flip side, one might ask what possible justification can be offered for permitting insiders to engage in self-dealing districting. Once we accept that the process of redistricting is subject to manipula-

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206 For earlier applications of the theory of partisan capture of constitutional claims in the political arena, see Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1733–35 (1993) [hereinafter Karlan, *The Rights To Vote*], describing partisan strategic uses of one-person, one-vote doctrine and the Voting Rights Act; Karlan, *supra* note 175, at 297 n.60, stating that many racial gerrymandering cases are "simply 'stalking horse' cases in which disappointed aspirants for elective office use whatever statutory handle is available to challenge otherwise unreviewable outcomes of the political process"; and Pildes, *supra* note 20, at 1608–09, discussing the exploitation of one-person, one-vote litigation by partisan organizations. For discussions of the extent to which judges can inflect *Shaw* claims to partisan ends, see, for example, J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 426–39 (1999). *But see* Heather K. Gerken, *Morgan Kousser's Noble Dream*, 99 MICH. L. REV. 1298, 1326–31 (2001) (book review) (criticizing Kousser's analysis of the post-*Shaw I* holdings as an oversimplification of Voting Rights Act jurisprudence).

207 *See, e.g.*, DeWitt v. Wilson, 515 U.S. 1170 (1995), *summarily aff'g* 856 F. Supp. 1409 (E.D. Cal. 1994) (upholding a redistricting plan created by three retired judges). For a consideration of blue-ribbon commissions and computer-based models, see Issacharoff, *supra* note 29, at 1693–1702. The extremes in 2002 even propelled the *Wall Street Journal*, "often suspicious" of nonpartisan commissions, to support them. *See The Gerrymandered Democrats*, *supra* note 118.

208 *See supra* p. 626.

209 *See Rigged Voting Districts Rob Public of Choice*, *supra* note 133.

210 *See* cases cited *infra* note 218. Indeed, Justice Souter has suggested that the logic of *Shaw* may lead to the abolition of traditional districting practices, perhaps through random districting or nondistricted elections (although Souter goes on to oppose such measures). Bush v. Vera, 517 U.S. 952, 1071–72 (1996) (Souter, J., dissenting).

tion, what possible legitimacy can there be for giving control over the process to those who are most likely to abuse it? Or worse, what could possibly justify giving the insiders license to protect themselves at the expense of accountability to the voters?[211] For example, the argument that partisan control of the redistricting process might somehow be central to the stability of political parties[212] provides no convincing rationale for insider control. This line of argument would have had more force in defense of party prerogatives such as patronage that failed to withstand constitutional scrutiny.[213] It provides even feebler support in this context, where the link between redistricting practices and party vitality is so much more attenuated. Even the claim of stability cannot dispel the lingering notion that a deep corruption threatens the core democratic enterprise when elections are formally channeled to yield predetermined outcomes. As the great British parliamentarian Aneurin Bevan once said: "I can think of nothing that could undermine the authority of Parliament more than that people outside should feel that the constitutional mechanism by which the House of Commons is elected has been framed so as to favour one party in the State."[214] The passage of time suggests that the same sentiment could be extended to the manipulation of the rules of the game toward predetermined ends, whether the ends favor only one party or all incumbents in a "sweetheart gerrymander."

V. CONCLUSION: ABANDONING THE PRETENSE OF POLICING REDISTRICTING

Several straightforward conclusions should emerge from the foregoing. First, the current doctrines of individual rights of access and protection against discrimination do not capture the potential risk to the competitive legitimacy of the political process. Second, the combination of the recognition that *something can go wrong* in redistricting with the absence of doctrinal tools to address that recognition leads to great pressure on antidiscrimination doctrine to fill the void. This in turn leads to the overracialization of redistricting law through the

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[211] For a forceful discussion of this point, see Kristin Silverberg, Note, *The Illegitimacy of the Incumbent Gerrymander*, 74 TEX. L. REV. 913 (1996).

[212] Justice O'Connor's opinion in *Davis v. Bandemer*, 478 U.S. 109 (1986), suggests a version of this argument: "The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level." *Id.* at 145 (O'Connor, J., concurring in the judgment).

[213] *See* Elrod v. Burns, 427 U.S. 347 (1976) (granting public employees First Amendment protection from discharge and replacement by patronage-based hires). For an assessment of the impact that the loss of patronage had on American political parties, see LEON D. EPSTEIN, POLITICAL PARTIES IN THE AMERICAN MOLD 134–35, 142–53 (1986).

[214] 535 PARL. DEB., H.C. (5th ser.) (1954) 1871–72.

Shaw line of cases. Third, the *Shaw* line has itself been stuck in a bizarre fact-based inquiry into the extent to which racial factors "predominate" in redistricting decisions,[215] as well as the evidentiary disentanglement of the inevitably intertwined considerations of race and politics. Fourth, there exists an escape move with a considerable constitutional pedigree that would allow the Court to extricate itself from the entire morass of after-the-fact review of the fruits of the redistricting process. Here, the Court could turn to the sorts of prophylactic rules employed in other domains in which there is a considerable risk of unconstitutional behavior but a high level of difficulty in policing it after the fact.

One further consideration should be added in concluding. It may well be that the Court is already stumbling toward the prophylactic solution. As a result of the invasive yet unsettled doctrines on the redistricting process, and as a result of the clear partisan gain to be had by replaying the political process in the litigation arena,[216] a huge amount of the redistricting in the United States already finds its way into the courts.[217] Those who actually try to carry out redistricting in good faith complain frequently about the lack of any safe harbors: the same conduct that seems compelled by the Voting Rights Act invites a *Shaw* challenge, and vice versa, whereas unfair partisan gain is presumptively unconstitutional under *Davis* but is a defense to a *Shaw* claim.

Yet there is some prospect of relief from potential liability so long as redistricting is carried out at some remove from self-interested governmental actors. In addition to *Cromartie*, the Supreme Court has upheld three other plans against *Shaw* claims.[218] Notably, none of these plans involved district lines drawn by overtly political actors. In one case, the Florida state Senate district map was the product of a federal court settlement reviewing the work of the Florida Supreme Court;[219] in another, the California state legislative reapportionments were the work of three retired California judges appointed by the Cali-

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[215] *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 916 (1995).

[216] *See* Karlan, *The Rights To Vote*, *supra* note 206 (documenting the use of Voting Rights Act litigation for partisan gain).

[217] *See* Issacharoff, *supra* note 29, at 1689–90 (pointing out that roughly one-third of all redistricting after the 1980 census was done either directly by federal courts or under federal judicial supervision, but that there were virtually no successful challenges to reapportionments performed by nonpolitical actors, such as districting commissions); Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 861–72 (1997) (suggesting that state and federal courts are more likely to uphold the products of commission-run reapportionments).

[218] *See* King v. Ill. Bd. of Elections, 522 U.S. 1087 (1998), *summarily aff'g* 979 F. Supp. 619 (N.D. Ill. 1997); Lawyer v. Dept. of Justice, 521 U.S. 567 (1997); DeWitt v. Wilson, 515 U.S. 1170 (1995), *summarily aff'g* 856 F. Supp. 1409 (E.D. Cal. 1994).

[219] *Lawyer*, 521 U.S. at 569–72.

fornia Supreme Court as special masters;[220] and in the third, the so-called "earmuff district" was designed by a court to create a Hispanic district in Chicago.[221] A review of the facts in these cases reveals that the district lines were drawn with clear attention to providing some significant measure of racial representation in the legislature. Yet that racially inspired purpose did not rise to the level of "predominance" required by the Supreme Court's *Shaw* jurisprudence.[222] The Court thus suggests that placing the power to redistrict at one remove from active partisan officials provides a safe harbor from the harsh litigation battles that have consumed so many states, with North Carolina as the poster child.

There is a substantial literature in the legal academy on the fine line between safe harbors and prophylactic rules.[223] In general the distinction tends to describe the rule's state of evolution rather than describing any of its fixed characteristics. Over time, safe harbors that become sufficiently accepted by relevant actors serve as prophylactic rules and may even, as in *Dickerson v. United States*,[224] become indistinguishable from the constitutional right at stake.[225] Unfortunately, there is reason to believe that the safe harbor approach will not work in the redistricting context. So long as the process is left in the hands of incumbent political officials whose self-interest runs strongly to what they can get away with, and so long as judicial oversight remains cumbersome and unpredictable, the private interest will likely continue to subsume the public interest.[226] A strategy of reinforcing political competition by taking the process of redistricting out of the hands of partisan officials offers the prospect of realizing our constitu-

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220 *DeWitt*, 856 F. Supp. at 1410.

221 *King*, 979 F. Supp. at 625–26. The challenged district line was originally drawn by the court in *Hastert v. State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991).

222 In *DeWitt* the court noted that the redistricting lines were drawn with race as "one of the many factors" considered. *DeWitt*, 856 F. Supp. at 1413. However, the court upheld the plan because "[t]he Masters did not draw district lines based deliberately and solely on race." *Id.* Justice Souter reported in *Lawyer* that the Florida Supreme Court had "acknowledged that the district was 'more contorted' than other possible plans and that black residents in different parts of the district might have little in common besides their race." *Lawyer*, 521 U.S. at 571. The Supreme Court upheld the plan despite this racial element because "traditional districting principles had not been subordinated to race." *Id.* at 582.

223 *See, e.g.*, Dorf & Friedman, *supra* note 23, at 82 (analyzing *Miranda* as a strong safe harbor that should be read as leaving open an invitation to other constitutional actors to provide alternative and adequate measures of protection).

224 530 U.S. 428, 444 (2000) (affirming the *Miranda* warnings as a constitutional obligation).

225 *See* Levinson, *supra* note 199, at 899–904.

226 *See* Gene R. Nichol, Jr., *The Practice of Redistricting*, 72 COLO. L. REV. 1029, 1033 (2001) ("In my experience, the prospect that the state might be forced to spend hundreds of thousands, or even millions of dollars, to defend redistricting adventurism plays an astonishingly small role in the decision-making process of both legislatures and commissions. There is a certain luxury, no doubt, in spending other peoples' money.").

tional values. Not only does it provide an exit strategy from the Court's entanglement with the bruising world of race and politics, but it also returns the core constitutional value in judicial oversight of the political process to what, at least aspirationally, it has been for over a century: securing the selection of representatives that as fully as possible stand for the "free and uncorrupted choice of those who have the right to take part in that choice."[227]

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[227] *Ex parte* Yarbrough, 110 U.S. 651, 662 (1884).

THE THEORY OF POLITICAL COMPETITION

Richard H. Pildes[*]

Constitutional cases addressing the law of politics currently present a dizzying array of competing claims: of individuals (acting in a variety of roles), of groups (organized for a variety of purposes), and of the State (as both regulator and participant in politics). Voters assert rights as voters, as potential financial contributors and labor participants in campaigns, and as independent speakers. Candidates wield their own purported rights in speech and association, unsurprisingly generating conflicts with the alleged rights of voters, as in the ballot-notation cases Professor Elizabeth Garrett considers (i.e., should voters be able to mandate that candidates take pledges, a modern form of binding instructions,[1] on specific issues).[2] Among groups, political parties offer up allegedly distinct and constitutionally underwritten rights in associational autonomy or rights to participate in politics through particular means, such as public debates or access to the ballot.[3] Other groups, organized along lines of ideology or economic interest rather than partisanship, assert their own rights of participation and expression.[4] Finally, against these various rights and interests, the State counters with the importance of conducting orderly elections, or of ensuring political stability, or of promoting political equality, or other purportedly legitimate justifications for channeling democratic politics along one path or another.[5]

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[1] For some of the history of binding instructions, see Gordon Wood, The Creation of the American Republic, 1776–1787, at 189–92 (1979). For discussion of early state constitutions that contained the right of the people to issue instructions to their representatives, see Willi Paul Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era 248 (1980). For the long historical role of state legislatures issuing instructions to their Senators, see William H. Riker, The Senate and American Federalism, 49 Am. Pol. Sci. Rev. 452, 456–57 (1955).

[2] See Elizabeth Garrett, The Law and Economics of "Informed Voter" Ballot Notations, 85 Va. L. Rev. 1533 (1999).

[3] On associational autonomy, see, for example, Duke v. Massey, 87 F.3d 1226 (11th Cir. 1996), and Republican Party v. Dietz, 940 S.W.2d 86 (Tex. 1997). On party challenges to ballot access see, for example, Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997), and Muuro v. Socialist Workers Party, 479 U.S. 189 (1986).

[4] See, e.g., FEC v. Christian Action Network, 92 F.3d 1178 (4th Cir. 1996); Austin v. Michigan Chamber of Commerce, 497 U.S. 652 (1990).

[5] For a recent example, see *Timmons*, 520 U.S. at 352.

Constitutional doctrine has only grappled with this puzzle of competing rights and interests for a generation or so. From the time of *Giles v. Harris*[6] to that of *Baker v. Carr*,[7] the entire arena of "political rights" was the Banquo's ghost of constitutionalism, haunting the background of decisions, but, given justiciability doctrines, rarely confronted. In the relatively short time since, the United States Supreme Court has not only entered the "political thicket,"[8] but with remarkable speed has found conflicts of democratic politics coming to dominate its docket.

Not surprisingly, these cases have thus far been assimilated into the preexisting structure of conventional constitutional rights adjudication. Courts define the scope of the right being asserted, assess the strength of the competing state interest, and "balance" their way to a result. In doing so, courts tend to conceive of political rights as akin to other intrinsic rights of individuals; and courts tend to reify the State, rather than to see it as a constellation of currently existing political, often partisan, forces potentially legislating in self-interested ways. In recent years, however, scholars of the emerging field of the law of politics have begun to argue that this familiar framework inappropriately atomizes or disaggregates the issues at stake in "political rights" cases.[9] The context differs, these scholars argue, because these cases are best analyzed in terms of more comprehensive structural perspectives on democratic politics—in constitutional decisionmaking, this means the appropriate constitutional conception of democratic politics.[10] At least three ways of putting the force of this point can be offered: First, the content of the rights that ought to be recognized is best understood as derivative of the appropriate structural conception of democratic politics. To be sure, some of the fundamental rights of democracy should be seen as intrinsic to individuals. But for the most part today, the competing claims that arise can best be evaluated only by courts endorsing particular structural or functional aims. Second, when a specific state regulation is assessed, it is a mistake to consider the interests that this particular regulation affects outside the context of the cumu-

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[6] 189 U.S. 475 (1903) (holding that massive black disenfranchisement in the South was not justiciable because it presented claims of "political rights").

[7] 369 U.S. 186 (1962) (holding that claims of malapportioned legislatures were indeed justiciable).

[8] Colegrove v. Green, 328 U.S. 549, 556 (1946).

[9] See Daniel R. Ortiz, The Democratic Paradox of Campaign Finance Reform, 50 Stan. L. Rev. 893 (1998); Richard H. Pildes, Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism, 27 J. Legal Stud. 725, 725–27 (1998) [hereinafter Pildes, Why Rights Are Not Trumps]; Richard H. Pildes, Two Conceptions of Rights in Cases Involving Political "Rights," 34 Hous. L. Rev. 323 (1992); Richard Briffault, Race and Representations after Miller v. Johnson, 1995 U. Chi. Legal F. 23; Pamela S. Karlan, The Rights to Vote: Some Pessimism About Formalism, 71 Tex. L. Rev. 1705 (1993); Samuel Issacharoff, Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence, 90 Mich. L. Rev. 1833 (1992).

[10] See Pildes, Why Rights Are Not Trumps, supra note 9, at 725–27.

lative structure of politics that the state's laws create. Finally, because rights depend upon and are derivative of structures, if courts focus on ensuring that the appropriate structural aims are being realized through the system of democratic politics, they will not have to play as aggressive a role as various rights claimants demand—and the ever expanding logic of such claims in the political realm will always demand an increasingly aggressive judicial role.[11]

In a recent work, Professor Samuel Issacharoff and I attempt to make these ideas concrete by developing one structural aim that the history of American law and democracy suggests should be a particular focal point for courts.[12] This aim is the assurance of an appropriately competitive partisan political environment, or, to put it more accurately, the assurance that "artificial" barriers to robust partisan competition not be permitted.[13] Of course, this requires an understanding of which barriers should be treated as artificial and which considered justifiable. But, based on historical experience as well as theory, it is possible to identify certain characteristic ways that dominant partisan actors seek to leverage their power into more enduring constraints on the political competition that they would otherwise face—perhaps the most visible example being the failure of many state legislatures to reapportion throughout the twentieth century. In her article, Professor Garrett applies this framework to the novel context of voter-initiated state ballot notations; at the end of the day, she considers these undesirable, although she does not address whether courts are right to strike them down as unconstitutional.[14] Commenting on Garrett, Professor Bruce Cain urges that she resist the "temptation" of this apparently alluring, but dangerously seductive, structural approach.[15] These articles thus provide an opportunity to revisit the theory of political competition, to elaborate upon it, and to explain away certain misconceptions about how such a structural approach would work.

I. THE APPROACH

Our[16] approach begins by recognizing that a myth of romantic individualism exercises a dangerous pull over conceptions of politics, both in public discourse and judicial decisions. This is the illusion that the ideal politics is one in which unmediated individuals are the key agents of electoral politics,

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[11] For a critical analysis of the tendency of legal rights to expand as a consequence of the internal logic of legal processes and interpretation, see Robert Nagel, Constitutional Cultures: The Mentality and Consequences of Judicial Review 62–65 (1989).

[12] See Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 Stan. L. Rev. 643 (1998).

[13] See id.

[14] See Garrett, supra note 2, at 1538, 1586–87.

[15] Bruce E. Cain, Garrett's Temptation, 85 Va. L. Rev. 1589 (1999).

[16] Because this approach was jointly developed with Professor Issacharoff, see supra note 12, I will refer to it as "our" approach even though I write separately here.

exercising control, making decisions, and monitoring officials. A revealing article could be written on the extent to which American political reforms since the Jacksonian Era have been demanded and justified in the name of restoring the role of the individual citizen—only to find that those very reforms prompted new organizational structures to arise, or were most easily exploited by large organizational entities.[17] For the central fact of democratic politics in modern societies with universal suffrage and large territories is that individual participation can be meaningful only when mediated through organizational forms, whether they be political parties, watchdog groups, ideological and economic groups, or others.[18] Without considering how organizations will respond to new rules of politics (both existing organizations as well as new ones that the rules will spawn), changes made in the name of the individual voter can be counterproductive, perverse, and disillusioning.

From this fact I draw two initial implications. First, the organizational and structural stakes in certain contexts of rights claims dwarf the individual interests asserted. For example, in *Karcher v. Daggett*,[19] the Court accepted the claim of individual voters that their one-person, one-vote rights of political equality were violated by congressional districts whose average population varied from the ideal by 726 people against a baseline of 526,059 people per district.[20] Moderation in the pursuit of right might not be a virtue, but does anyone believe that the plaintiffs in larger districts were powerfully disturbed by having at most 0.6984% less voting power than those in smaller districts[21]—disturbed enough to defend their liberty and equality all the way to the Supreme Court, costs notwithstanding? The "right" claimed here, as often in political cases, was obviously a stalking horse for other interests: in this case, for one political party that had lost a partisan gerrymandering battle at the midnight hour just before the sitting Governor was to leave office and that stood to do much better after the Court's decision with a new Governor of its own party in place.[22] That organizations will exploit legal rights is to be

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[17] This is a central theme of Richard Hofstadter's classic, if contentious, work on the Progressive Era. See Richard Hofstadter, The Age of Reform 6–7 (1955) ("One of the ironic problems confronting reformers around the turn of the century was that the very activities they pursued in attempting to defend or restore the individualistic values they admired brought them closer to the techniques of organization they feared.").

[18] The centrality of organizations to modern politics is explored in Samuel Issacharoff & Daniel Ortiz, Governing Through Intermediaries, 85 Va. L. Rev. 1627 (1999).

[19] 462 U.S. 725 (1983).

[20] See id. at 728.

[21] See id.

[22] For a discussion of the case, see Samuel Issacharoff, Pamela S. Karlan, & Richard H. Pildes, The Law of Democracy: Legal Structure of the Political Process 154–57 (1998). For a similar criticism of *Karcher* from those involved in recent redistrictings that labels *Karcher*'s "zero tolerance" policy for population deviations a "mindless quest," calls for a "more sensible approach," and catalogues other undesirable consequences of *Karcher*'s rule, see

expected, might not be avoidable (should the law inquire into the "real party in interest" in constitutional litigation?), and is not necessarily wrong. But judicial action in the name of individual rights that fails to consider structural effects of rules will be, at best, naive. In *Karcher*, there is every reason to believe that the Court, acting in ignorance of these organizational dynamics, inadvertently enabled more extreme gerrymandering by purporting to protect "individual rights" that no individual would likely value in the least.[23]

A second implication of the organizational form of modern politics is that legal doctrine ought to focus more directly on organizational behavior, particularly that of the central vehicles through which individual views are mobilized and given effective expression: the political parties. But legal scholarship on organizational behavior and on responses to legal rules has matured faster in private law than in public law, particularly because public law has been so focused on rights and equality. Of course, markets are justified by different aims than democratic elections, and these differences must be taken into account, but corporate-law scholars have identified some of the characteristic ways existing organizational managers seek to leverage their current power into rules that insulate them from the pressure of competing organizations they would otherwise face.[24] Further, courts specializing in corporate law have been more astute than their public-law counterparts at developing legal rules to resist this practice.[25] Finally, when classic political cases, long thought to involve only issues of equality or rights are reconsidered from this vantage point, the organizational stakes emerge so starkly that it becomes difficult to know whether ideological or partisan interests were the dominant motives for the legal rules. For example, the "White Primary Cases,"[26] which involved exclusion of blacks from participation in Southern political primaries, are often thought to be about unadorned racism and white supremacy pure and simple.[27] As the actual history shows, however, these exclusionary rules were also motivated by a desire to create and maintain a Democratic monopoly on political power in the South against incipient challenges from the Republican Party, third parties, and political coalitions of other sorts.[28]

Allan Gartner, New York Redistricting: A View from Inside, *in* Race and Redistricting in the 1990s, at 367, 370 n.10 (Bernard Grofman ed., 1998) [hereinafter Race & Redistricting].

[23] See Richard H. Pildes, Principled Limitations on Racial and Partisan Redistricting, 106 Yale L.J. 2505, 2552–53 (1997).

[24] For further discussion, see Issacharoff & Pildes, supra note 12, at 647–49.

[25] See id. at 648–49.

[26] Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Herndon, 273 U.S. 536 (1927).

[27] For this series of Supreme Court cases from Texas, see Issacharoff, Karlan, & Pildes, supra note 22, at 79–95.

[28] For historical discussion of the partisan dimension of issues of race in Virginia, see Winnett W. Hagens, The Politics of Race: The Virginia Redistricting Experience, 1991–1997, *in* Race & Redistricting, supra note 22, at 315, 317 (discussing postbellum politics: "In the end, the race issue in Virginia is and has always been a proxy issue propagated by a

Reflecting its organizational emphasis, private-law scholarship has argued that legal regulation is more effective if it shifts from trying to impose first-order duties on corporate managers, such as duties of loyalty, to ensuring that the effective conditions for interorganizational competition remain in place.[29] Organizations police each other—ambition counteracts ambition—more effectively than the law can directly police them, but for this very reason managers will seek to distort these background conditions to insulate themselves and their organizations from socially desirable competitive pressures. Historically, the same is true for political organizations. States with one dominant party have often adopted rules—justified in public-regarding terms, of course, like avoiding the dreaded prospect of political instability—that in purpose and effect enshrine or accentuate that party's dominance.[30] Even where two parties are actively competing, their shared interest in excluding nascent rivals sustains collusive laws that "artificially" reduce competition.[31] Not only does this history suggest the need for some external institution, like courts, to dismantle these anticompetitive practices, but as with private-law developments, the most effective way of enforcing concerns about rights and equality is, in many contexts, to ensure that the organizational environment of politics, particularly partisan politics, remains robustly competitive. Thus, rather than focusing directly on first-order concerns of rights and equality—while often missing the structural or organizational stakes involved—the law (and judicial oversight) might do better to ensure maintenance of the second-order conditions for effective, interorganizational competition. Political parties with discriminatory membership rules might not be a problem if competing parties can easily organize and form along other lines; but when a monopolistic, exclusionary party creates

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narrow ruling elite that knows well how to effectively defend its interests . . . . Carefully nurtured racial fear cast Virginia politics into the mold of one-party, elitist politics."). See generally Issacharoff & Pildes, supra note 12, at 660–68 (discussing interracial political coalitions that flourished in the Reconstruction and post-Reconstruction Era before Southern Democratic parties sought to eliminate them). I do not mean to assign relative weights to the causal roles of partisan and racist motivations, which were to some extent intertwined in any event (and I do not see how one could be precise about this), but the fact that partisan motivations were central is both undeniable and rarely noticed. The most extreme, and provocative, position on the general dominance of partisan motivations in race and politics is Morgan Kousser's argument that the Reconstruction Era civil rights movement failed and the modern civil rights movement succeeded, not because racial attitudes had changed in any significant way, but because the effect of black voting power on national partisan politics was dramatically different in the two eras. See J. Morgan Kousser, The Voting Rights Act and the Two Reconstructions, *in* Controversies in Minority Voting: The Voting Rights Act in Perspective 135, 160 (Bernard Grofman & Chandler Davidson eds., 1992) ("The first Reconstruction died, I am suggesting, from too much democracy [that is, because black votes mattered too much]; the second has thrived precisely because competition has shriveled.").

[29] See Issacharoff & Pildes, supra note 12, at 647.

[30] See id. at 670–74.

[31] See id.

substantial barriers to new entrants, exclusion has unacceptable systemic consequences.

We therefore offer a more structural and organizationally focused approach to the constitutional law of politics. Our principal aim is to provide a theoretical perspective on legal issues surrounding democratic politics, rather than to defend a specific role for courts or for constitutional law. Democratic systems are subject to certain characteristic manipulations; we seek to identify those dangers and suggest the need for some external institution or legal rule structures to counteract these tendencies. But those external institutions could be independent electoral commissions; or that external constraint could come through statutorily adopted regulatory frameworks (however unlikely in practice) rather than through courts applying constitutional law. Indeed, there are advantages to tools other than constitutional law, given the decreased flexibility entailed in constitutional decisions. But absent other institutions to play this role in the United States, courts will continue to be called upon to be the primary external agency for overseeing democratic politics. To the extent they continue to play this role, courts should become more aware of the need for external oversight of potentially anticompetitive practices that masquerade under the hoary labels of good order, stability, and similar homilies. When claims of rights are asserted, courts should attempt to recognize the structural and organizational implications of the resulting decisions. The way to sustain the constitutional values of American democracy is often through the more indirect strategy of ensuring appropriately competitive interorganizational conditions. It is in this way that central democratic values, such as responsiveness of policy to citizen values and effective citizen voice and participation, are best realized in mass democracies. This is more a suggestive approach than an analytical theory of necessary and sufficient conditions for appropriate levels of political competition. It is meant to shift perspective, to enable us to notice problems we are less likely to see from other perspectives, and to consider less conventional solutions once we recognize these problems.

II. Of Quixotic Quests and Absolute Fairness

Against this approach, Professor Cain suggests that the theory of political competition entails a dangerously quixotic quest because it necessarily requires a baseline conception of what constitutes an "absolutely fair"[32] electoral system—a hazard particularly not worth courting if this structural value is to be implemented through judicial doctrine. The confusion Cain reveals here is of great interest, worthy of a responsive article in itself, because it is characteristic of a certain kind of attack on legal rules and theories that can

[32] Cain, supra note 15, at 1604 ("It is quixotic to look for the absolutely fair system.").

be leveled against many, perhaps nearly all, reforms. While Albert Hirschman documents three recurring tropes characteristic of antireformist political discourse,[33] no one has undertaken a similar search for the characteristic structure of antireform legal discourse. Nevertheless, I suspect the style of argument Cain expresses here should adorn any such list.

In essence, Cain argues that any legal rule or theory that holds some practice to be impermissibly deviant cannot be intellectually coherent unless that condemnation simultaneously embeds within it a full, affirmative theory of what the "optimal" social practice would be instead.[34] Our theory is framed in the negative, not the positive; we seek to eliminate partisan-driven anticompetitive political practices, not to enshrine some ideal level of political competition. Nonetheless, Cain argues that the first cannot be conceptually severed from the second and that, because licensing courts—or perhaps any other institution—to ensure an "absolutely fair" political system is dangerous, this theory should be rejected.[35]

But this superficially powerful objection is in fact neither theoretically correct nor historically grounded in American constitutional practice. In theory and in doctrine, we can often identify what is troublingly unfair, unequal, or wrong without a precise standard of what is optimally fair, equal, or right. As Martin Shapiro observes in an incisive analysis of this point, "Individual and organizational decision makers often do, and indeed often must, move away from a wrong position without being able to specify precisely what ideal position they are moving toward."[36] The best can be the enemy of the good when it comes to legal doctrine as well as other policies, and we might be able to forge shared agreements on what practices constitute extreme manifestations of unfair treatment, and also recognize a wide range of "reasonably fair" practices to be acceptable, even without agreement on some maximal point of optimal fairness. Economists can identify states that are not Pareto-optimal without being able to define within the set of Pareto-efficient points which are optimally efficient. Improvements in welfare or efficiency are possible without any global understanding of what the optimal overall state is with respect to either welfare or efficiency.

Examples of this abound in the law of politics. The Court held justiciable the grotesque manipulation of local-government jurisdictional lines in *Gomillion v. Lightfoot*[37] without developing, then or later, any conception of the

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[33] See Albert O. Hirschman, The Rhetoric of Reaction: Perversity, Futility, and Jeopardy 3–8 (1991) (describing what he labels as the "perversity, futility, and jeopardy theses" as the historically characteristic forms of conservative political thought).

[34] See Cain, supra note 15, at 1601–02.

[35] Id. at 1603.

[36] Martin Shapiro, Gerrymandering, Unfairness, and the Supreme Court, 33 UCLA L. Rev. 227, 228 (1985).

[37] 364 U.S. 339 (1960).

ideal structure of local government boundaries.[38] To assert that the Court should have stayed its hand lest it embark on a "quixotic quest" for the "absolutely fair" municipal-boundary design would seem confused, if not pernicious. The Court could have struck down the grossly malapportioned legislatures of the 1960s without developing a clear conception of what an ideally apportioned legislature would look like; this indeed was precisely the approach of those Justices, such as Tom Clark and Potter Stewart, who agreed with the early cases but would have permitted any "rational" apportionment that reflected a genuine, contemporary policy.[39] That the Court quickly embraced one-vote, one-person,[40] which is indeed an optimal standard of proper districting, is a statement about the Court's subsequent choices, not about anything inherent in the nature of doctrines that would have been sufficient to strike down gross malapportionment.

A recent, law-of-politics decision from the Constitutional Court of the Czech Republic illustrates the application and feasibility of the approach Cain finds both incoherent and dangerously seductive. There, a minor political party challenged the constitutionality of a statutory five percent clause, similar to those in most other European proportional-representation systems,[41] which required a party to attain a threshold of five percent of the votes before it was entitled to any political representation in the Czech parliament. The minor party argued that the statutory threshold violated the 1993 Constitution's right to vote, right to stand for election, and right of direct election.[42]

In rejecting these claims, the Constitutional Court first appropriately concluded that political rights here were derivative of "the purpose and function of elections in a democratic society";[43] the Court then noted that, in theory, there were plausible justifications, based on the need to establish effective governing majorities, for establishing an electoral threshold, but also dangers that existing political actors would manipulate the threshold for normatively

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[38] See id. On remand, Judge Frank Johnson found the merits so straightforward that he held the gerrymandering unconstitutional on the basis of the written submissions, without further oral argument, and ordered the prior boundaries of Tuskegee restored. See Bernard Taper, Gomillion versus Lightfoot 116 (1962).

[39] This was a position Justices Clark and Stewart took throughout the reapportionment cases, starting with the seminal decision in Baker v. Carr, 369 U.S. 186 (1962) (Clark, J., concurring); id. (Stewart, J., concurring).

[40] See Reynolds v. Sims, 377 U.S. 533 (1964) (holding that the Fourteenth Amendment imposed a one-person/one-vote rule on state legislative apportionment schemes); Wesberry v. Sanders, 376 U.S. 1 (1964) (holding that Art. 1, § 2 of the U.S. Constitution imposed a one-person/one-vote rule on federal legislative apportionment schemes).

[41] Germany, for example, has a similar threshold of exclusion, as the opinion reports. See Pl Us 25/96-37, 5 East European Case Reporter of Constitutional Law 159, 171 (1998).

[42] See id. at 159.

[43] Id. at 169.

unacceptable reasons.[44] To adjudicate between legitimately integrative thresholds and inappropriately anticompetitive and hence rights-violating ones, the Court reached two conclusions: (1) Any limitation had to be conditional on the existence of actual grounds for concern about excessive fragmentation of the legislature, and (2) any increase beyond the five percent threshold once the first condition was met required "especially momentous reasons."[45] In a highly contextualized factual phase of its analysis, the Court found the first satisfied based on actual Czech elections and the degree of party splintering that had resulted; because of the common European practice of a five percent threshold and the specific facts of Czech partisan politics, the Court permitted the five percent threshold.[46] The guiding legal principle was that any "limitation of the equality of the voting right is the minimum measure necessary to ensure such a degree of integration of political representation as is necessary for the legislative body to form a majority (or majorities) required" to form a government and adopt decisions.[47]

The decision is much in the spirit of the functional, antitrust approach to political rights that we advocate. Skeptics in the Cain vein might ask, is seven percent too high? Six percent? How would a court fix an optimal threshold? But how can a court strike down any threshold without such a single right answer in mind? Yet notice how the Czech Court applied what is essentially the political-competition approach to resolve tensions between legitimate needs for effective governance structures and potentially anticompetitive manipulations: (1) The Court would not permit resort to abstract appeals alone about the need for stability and integration but rather required some basis in the facts of Czech politics for the threshold (and suggested the doctrine could change if those facts changed); (2) having found good reason for some threshold, the Court, in evaluating the specific threshold, was not bereft of all guidance apart from that which would be provided by a "perfect competition" model specified in full; instead, the Court found a permissible floor of five percent based on those facts and a baseline provided by comparative examples of electoral thresholds in similar democracies; (3) the Court signaled powerfully that political actors would have to prove exceptionally convincing reasons for raising that threshold. The doctrinal adoption of the political-competition approach itself might strongly discourage political manipulations of this threshold and thus obviate the need for further judicial oversight. And should more stringent thresholds be enacted, the Court has indicated the burdens of proof, kinds of evidence, and contextualized inquiries that it would employ. No more technically precise

[44] See id. at 170–71.
[45] Id. at 170.
[46] See id. at 170–72.
[47] Id. at 170.

definition of "optimal competition" than this is needed—or, for this problem, would be desirable—for judicial oversight.

Whether Cain's critique is meant to be analytical or psychological is a bit unclear. But if the concern is psychological—that judges licensed to overturn anticompetitive political practices will likely or inevitably gravitate toward seeking to impose judicial conceptions of optimally competitive practices—he offers no reason that judges are more likely to misuse this theoretical conception than any other. Cain's principal point, therefore, seems analytical: that the logical structure of a theory condemning anticompetitive political practices requires an affirmative account of optimally competitive practices. It is important to see that such an argument is, in its nature, essentially antireformist and status quo preserving—not just in the law of politics, but in any field of law. "[A]ll those called upon to make ethical decisions, are often in a position to identify *a* wrong without being able to define *the* right."[48] To require the latter before undertaking the former is to invite paralysis.

III. CONSTRAINTS ON THE POLITICAL COMPETITION APPROACH

If the objective of our approach were somehow to "maximize" partisan political competition, unconstrained by other values, it would undoubtedly create tension with deeply entrenched features of the American political landscape. After all, the American system of single-member territorial districts and winner-take-all elections, increasingly an aberration among democracies, has long been known to tend toward the production of a two-party system, rather than toward the multi-party systems of proportional-representation ("PR") regimes.[49] If eliminating all barriers to maximal partisan competition is the ideal, should not this ideal require replacing the basic structure of American democracy with PR—a change that, if judicially imposed, would be more revolutionary than the Court's invalidation, through the one-vote, one-person doctrine, of every state legislature in the country? Alternatively, if our theory does not touch "first-past-the-post" elections, does it only address essentially "unimportant barriers that do not really matter much," leading to the suggestion, evident in Professor Cain's critique, that our approach is either radical or banal.[50]

Most academics would rather be extreme than boring, but unsurprisingly, we think our approach is neither. The emphasis on political competition is both a theoretical perspective on politics and a foundation for judicial decision in cases that must be decided on the basis of some conception, implicit

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[48] Shapiro, supra note 36, at 228.

[49] For a discussion of Duverger's law and related social-scientific work on election structures and forms of party politics, see Issacharoff, Karlan, & Pildes, supra note 22, at 715–17.

[50] Cain, supra note 15, at 1602.

or explicit, of the aims of democracy. As a theoretical perspective, it might indeed cause us to reexamine longstanding political structures—often adopted before alternative possibilities were conceived, as is true of the winner-take-all versus PR "choice"—and ask today whether post-Founding Era alternatives would better realize the appropriate values of democracy. There is no reason why winner-take-all elections or any other traditional structure should be immune from this kind of intellectual scrutiny.[51] But as a principle for judicial decision, its scope will inevitably be limited, as with *any* single legal principle or value, by the other values or principles that law and political culture make relevant. Even if, as a matter of strict analytic logic, the elimination of winner-take-all elections were thought required for a consistent application of the theory of political competition, many countervailing values could be marshaled against judicial imposition of this result, as opposed to its popular adoption: 1) an original intent that recognized the winner-take-all structure even if not requiring it; 2) the longstanding historical fact of this structure's existence, which might carry weight in law even if not in ideal theory; 3) the importance of public acceptability and legitimacy to the soundness of judicial decisions, which can make revolutionary changes in democratic structures suspect when they emanate from courts; 4) the lack of any anticompetitive original purpose behind the winner-take-all system; and 5) the fact that important affirmative values can be offered for this electoral structure other than anticompetitive ones, such as the stronger ties between legislators and constituents that territorial districts arguably promote. Any legal principle, value, or theory, if carried to judicial extremes by being isolated from history, institutional constraint, and competing values, can be made to look similarly revolutionary. The theory of the Equal Protection Clause that makes it a guarantor against the existence of castes could be taken to require socialism as a way of avoiding class differentiation. This is indeed an interpretation of democratic equality that many twentieth century intellectuals and political actors have embraced,[52] but hardly one that the Supreme Court has imposed—or is ever likely to impose—despite arguments as to what the "logic" of democratic equality requires.

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[51] Our casebook devotes extensive analysis to different voting systems, including PR, cumulative voting, limited voting, single-transferable voting, lottery voting, and other possibilities. See Issacharoff, Karlan, & Pildes, supra note 22, at 713–85. One reviewer suggests that to devote such detailed attention to these alternative possibilities is, in and of itself, a serious undermining of American democratic structures. See R. Hewitt Pate, Destabilizing Democracy, 1 Green Bag 331 (1998).

[52] See, e.g., Francois Furet, The Passing of an Illusion: The Idea of Communism in the Twentieth Century 26 (1999) (mentioning the linkage between the French Revolutionary ideals of democratic equality with the twentieth century appeal of Communism); Eric Hobsbawm, The Age of Extremes 114–15 (1994) (noting similar linkages).

The more serious charge, therefore, would seem to be that, given all the features of American elections likely to be taken as fixed, at least by courts, any anticompetitive practices that would be judicially eliminated would be marginal at best. This depends, in part, on empirical questions about the effects of the kinds of practices most suspect under this approach. But the history of ballot access restrictions (which get elevated just as serious new parties or independent candidates emerge as threats), of bans on fusion candidacies (which emerged in the late nineteenth century and seem rather directly to have wiped out sustainable third-party challenges), and of malapportioned legislatures (which endured throughout the twentieth century until federal court intervention) suggest that legal changes do alter the character of American politics, even given the powerful background features that have remained fixed throughout.[53] This is all the more true in moments of widespread dissatisfaction with the existing parties, as exists today.

Election laws, for example, certainly played a major role in making possible Jesse Ventura's successful third-party candidacy for Governor of Minnesota. First, Minnesota is one of six states that permit same-day voter registration.[54] Minnesota's turnout on election day 1998 was 60.1%, a nationwide high, with one in six of those voters registering on election day.[55] Given the percentage of these new voters who appear to have voted for Ventura, analysts believe that Ventura would not have been elected absent same-day voter registration (which makes one wonder whether the two parties in any other state will permit same-day registration to be adopted anywhere else subsequent to Ventura's election).[56] Second, Minnesota has public financing of elections, which entitled Ventura to at least $330,000—a crucial contribution because Ventura raised little private money.[57] Because the Reform Party candidate for the U.S. Senate in Minnesota had received more

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[53] For the history, see Brief Amici Curiae of Twelve University Professors and Center for a New Democracy in Support of Respondent, Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) (No. 95-1608) (brief filed sub nom. McKenna v. Twin Cities Area New Party); Peter H. Argersinger, "A Place on the Ballot": Fusion Politics and the Antifusion Laws, 85 Am. Hist. Rev. 287 (1980); Issacharoff & Pildes, supra note 12, at 660–68.

[54] See Minn. Stat. Ann. § 201.061(3) (West Supp. 1999). The others are North Dakota, Idaho, Maine, New Hampshire, and Wisconsin. See Burt Neuborne, Making the Law Safe for Democracy, 97 Mich. L. Rev. 1578, 1589 n.53 (1999) (reviewing Issacharoff, Karlan, & Pildes, supra note 22).

[55] See Steven E. Schier, Jesse's Victory, Wash. Monthly, Jan. 1999, *available in* 1999 WL 11091021.

[56] See id.

[57] Minnesota's campaign finance laws offer public financing on the condition that gubernatorial candidates limit spending to approximately $1.5 million, and the laws subsidize independent and third-party candidates who receive at least 3% of the popular vote in the primary. See Minn. Stat. Ann. § 10A.25 (West 1997); Minn. Stat. Ann. § 10A.49 (West Supp. 1999); Jon Jeter, Campaign Reform Helped "The Body" Slam Rivals, Wash. Post, Nov. 5, 1998, at A41.

than five percent of the vote in the previous two Senate elections, Ventura was entitled as the Reform Party gubernatorial candidate to this public financing[58] (election law played yet another role in this dynamic, because Minnesota has relatively easy ballot access laws for new parties, which made it easier for the Reform Party to get on the ballot in the first place in these earlier elections[59]). The third structural factor was not a matter of election law itself, though in some places, election law would indeed have provided insurmountable obstacles to the practice: Ventura was permitted to participate in all ten candidate debates.[60] Had the more common and more anticompetitive rules and practices in other states been in place—regarding registration, financing, ballot access, and participation in candidate debates—Minnesota would likely be as rigidly a two-party state as most others. Election laws, combined with the right circumstances, can indeed matter.

Indeed, we think that the "revolution-or-banality" objection cuts the other way. It is precisely because certain longstanding structural features of electoral politics are likely to be taken as settled, at least by courts, that it becomes all the more important to be concerned about the anticompetitive practices that are piled upon those fixed structures. Absent revolutionary change, the territorial district and winner-take-all structure will continue to ensure that American politics is fundamentally a two-party affair. Most of the values purportedly associated with a two-party system, such as stability, coherent mandates, and effective governing bodies, will be realized through the continuation of this fundamental structure. Precisely for this reason, further regulatory overlays on this structure, purportedly justified in the name of those same values but potentially merely devices for freezing the political status quo, are less likely to be legitimately necessary. Just as there is an inherent quietism in the argument that wrongs cannot be rectified without full-blown theories of the right, so too conservatism is built into the structure of arguments that exclude reformism in principle by dichotomizing legal change into the revolutionary or the insubstantial.[61]

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[58] See Schier, supra note 55.

[59] Minnesota's ballot access law requires signatures from only 1% of the number of voters at the most recent election for the position sought. See Minn. Stat. Ann. § 204B.08 (West 1992).

[60] For reports of Ventura's extensive participation in the formal campaign debates, see Dane Smith & Dean Barkley, Diary of an Upset, Minneapolis Star-Trib., Nov. 8, 1998, at 1A; Christian Collett, Can Third Party Candidates Win?, San Diego Union-Trib., Nov. 6, 1998, at B-11.

[61] While the precise relationship between legal doctrine and social practice requires an empirical assessment in each context, it is possible that competition-preserving legal doctrines will have effects beyond the domain in which they apply formally. If courts regularly enforce constraints on anticompetitive practices, that could conceivably empower some political actors with greater rhetorical resources to resist such practices. Certainly the absence of such doctrines cannot aid in that resistance.

IV. AVOIDING COURT CENTRISM

The political-competition approach is meant to redistribute judicial concerns away from some contexts and toward others. Some critics notwithstanding, it is not an expansive invitation to more aggressive judicial action across the board as much as it is an effort to make the target of that action more focused and better justified.[62]

Central to this approach is the position that, when the background second-order conditions of effective partisan competition are met, there is less cause for judicial intervention on first-order issues of equality and liberty. For related reasons, we also believe judicial action to enforce rights or equality that occurs in an insufficiently competitive political environment is less likely to be effective than advocates hope. Unless structural conditions are addressed, these issues will often turn out to be epiphenomenal. These views will strike many as dangerous, even bizarre, but they are hardly a formula for rampant activism.

As an example, when the Voting Rights Act ("VRA")[63] was adopted in 1965 and importantly amended in 1982, the South, the principal focus of the original Act, was a one-party Democratic state. By the 1990s at most electoral levels, the South had become intensely fought-over partisan territory, with Republicans and Democrats battling for every inch of gain.[64] Yet virtually none of the voting-rights legal scholarship has taken note of these changed partisan circumstances to ask whether those changes ought, if at all, to affect public policy. Once the partisan competition perspective is adopted, however, it might make it easier to notice the interesting and important questions that these developments ought to provoke. Vote dilution, the central concept of the 1982 Amendments, is a relatively inexpensive way of indulging racist preferences in a context of partisan monopoly.[65] Where two major parties, however, are contesting every electoral seat—especially where "the black vote is the bedrock upon which the Statewide Democratic [Party power] is anchored"[66]—success in this struggle might discipline parties (or that party in which black voters are concentrated, if one exists) so that they cannot afford to draw election districts in ways that dilute black voting power. If competition forces partisan gain to be the overriding motivation, black voters will be distributed in ways that maximize that overall partisan

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[62] See Cain, supra note 15, at 1600.

[63] 42 U.S.C. § 1973 (1994).

[64] See, e.g., Hagens, supra note 28, at 321 ("Unquestionably, one of the most consequential changes in the redistricting battlefield in 1991 was the presence of century high levels of partisan competition within the Virginia General Assembly.").

[65] For a full discussion of the 1982 Amendments and the role of vote dilution in them, see Issacharoff, Karlan, & Pildes, supra note 22, at 410–41.

[66] Hagens, supra note 28, at 323.

goal. Thus, the goal of political equality, appropriately enforced in the 1970s through constitutional doctrine and in the 1980s through statutory implementation, might be better achieved in the South of the 1990s through processes of political competition, with less of a judicial role being required.

Lest we be misunderstood, we want to state clearly that we are not arguing that the 1982 Amendments to the VRA should be reversed or that the Act should be modified in any way. Whether the changing dynamics of partisan competition in the newly emergent two-party South should affect judicial doctrine or statutory policy with respect to vote dilution would depend on many considerations—some theoretical, some empirical. Theoretically, the discussion would have to consider the precise values that underlie current vote dilution policy; there are different ways of understanding the reasons that vote dilution is banned, and some of those reasons might not be affected at all by whether partisan competition is robust or absent. Empirically, the discussion would require much greater detail about the precise relationship between issues of race and partisan politics in the contemporary South. But the 1990s do present a new partisan context within which issues of race and politics need to be confronted, rather than assuming (implicitly or explicitly) that the problem of vote dilution has necessarily remained precisely the same in the 1970s, 1980s, and 1990s. In other areas of public law, courts look in part to the political process involved to help determine whether there is reason to be suspicious about whether discriminatory legislation has resulted.[67] By recalling that issues of vote dilution also ought to be thought about within the context of the relevant political process, the political-competition approach similarly seeks to prompt analysis of precisely how best to realize the values associated with vote-dilution doctrine in the partisan contexts of contemporary times. The failure to consider such issues in the context of the VRA would be particularly ironic, because the Act itself was supposed to be an acutely practical response to the structural dynamics of actual electoral politics.[68]

Similarly, today's cases that struggle with whether political parties ought to be seen as constitutionally autonomous organizations free to adopt their own membership rules, or as common-carrier-like entities required to accept all aspirants on a nondiscriminatory basis, try to take their guidance from the

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[67] In dormant commerce clause analysis, for example, the Supreme Court, at times, will consider whether in-state economic interests are burdened to a similar extent as out-of-state economic interests; where such parity exists, the Court will be less likely to find impermissibly protectionist legislation. See, e.g., West Lynn Creamery v. Healy, 512 U.S. 186, 200 (1994) ("However, when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy.").

[68] For further elaboration of the VRA and its history relevant to this point, see Issacharoff & Pildes, supra note 12, at 700–08.

White Primary cases of the 1920s through the 1940s.[69] These cases, however, arose in an era of poll taxes, literacy tests, and other devices that worked to ensure black disenfranchisement and to perpetuate the one-party Democratic South. The impetus for judicial action to protect equality is most justifiable in this context—although a good example of how ineffectual such action can be, because striking down white primaries in isolation without addressing the backdrop of legal rules that enabled one-party dominance is not likely to have significantly changed actual politics.[70] Not only were black voters still not able to get to the polls, but a monopoly power disinclined to be responsive for racial reasons would have had little incentive to respond. But the modern cases are so confused precisely because the constitutional issues involving political parties now arise in today's post-VRA world. Without the backdrop of discriminatory voting rules and with strong interparty competition, the common-carrier approach of the White Primary cases might be better replaced with the party-as-constitutionally-autonomous view. Again, this would reduce the need for judicial policing of party membership rules while placing more trust in the ability of robust interparty competition to ensure that any exclusionary rules one party adopts for ideological purposes will not work to the systematic exclusion of any group of voters—the concern that, arguably, ought to be the aim of constitutional scrutiny. In both examples—the concept of vote dilution and the constitutional status of political parties—the political competition approach suggests less, not more, judicial intervention than the status quo.

Indeed, from those who would have judges strike down ballot notations as unconstitutional, the charge of activism against the political-competition approach seems particularly misplaced. Ballot-notation provisions are voter-initiated amendments to state constitutions.[71] Thus, they are unconstitutional only if they violate the Constitution of the United States. Neither Professor Garrett, who concludes that such measures are undesirable but does not address their constitutionality, nor Professor Cain, who believes that these measures are both bad policy and unconstitutional, discuss the basis upon which courts actually hold ballot notations unconstitutional. Attention to the actual analysis in the decisions is revealing. Typical of the constitutional stretching required to strike down ballot initiatives is the recent reasoning of the California Supreme Court, which held term-limit ballot notations unconstitutional because they purportedly violated the Article V amendment proc-

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[69] See Issacharoff, Karlan, & Pildes, supra note 22, at 79–95.

[70] For a study on how insurmountable the barriers to black political participation remained even after the White Primary cases, see John Dittmer, Local People (1994).

[71] See Garrett, supra note 2, at 1537 (discussing the nine of fourteen states where ballot-notation measures were submitted to the voters and passed).

ess.[72] According to that court, Article V requires that the Constitution only be amended through deliberative bodies, such as the Congress, state legislatures, or state constitutional conventions.[73] Because the California ballot-notation initiative instructed elected officials to support a term limit amendment and required that the ballot indicate whether particular candidates supported or opposed this amendment, the ballot-notation measure—even though it did not "pose a formal *direct* conflict or interference with the" Article V amendment process—nonetheless "coerced" elected officials into supporting the term limit amendment by making voters aware on the ballot of those officials' positions.[74] For those concerned with aggressive judicialism, the notion that the deliberative capacities of elected officials ought to be seen as coerced when ballots note the positions they have taken should surely seem, to say the least, forced.

Moreover, this reasoning is necessarily limited to ballot notations involving U.S. Constitutional amendments. Any more general constitutional condemnation of ballot notations requires a more general constitutional principle. Professor Cain would find it in the concept of candidate's rights,[75] a concept for which he offers no supporting legal authority and which I find, for reasons shortly explained, hard to make sense of. The partisan-political competition viewpoint would not provide a reason to hold these provisions unconstitutional; there is no reason to believe that, in purpose or effect, these ballot notations entrench the dominant parties against potential competition. If anything, ballot notations arise only because the dominant political parties are not dealing with an issue that the initiative-voters want addressed. If ballot notations are unconstitutional, it would have to be for some other reason (that enhancement of political competition would result is *one* reason in favor of such measures, within our approach, but there can still be overriding countervailing reasons).

The principal defects with ballot notations, in my view, are that they potentially clutter the ballot, present voters with misleading information, and degrade the ballot by turning it into billboard-like advertising. But if these are constitutional concerns, they are surely difficult to express as conventional violations of individual rights. Only through structural understandings of the foundations for the constitutional law of politics—the general type of approach we endorse—can such measures be found unconstitutional, if indeed they ought to be.

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[72] See Bramberg v. Jones, 978 P.2d 1240, 1241–42 (Cal. 1999).
[73] See id. at 1241.
[74] Id. at 1242.
[75] See Cain, supra note 15, at 1597.

V. "CANDIDATE RIGHTS?"

Rather than adopt the structural approach, Professor Cain would strike down ballot notations as violations of a candidate's "basic rights" and "basic freedoms."[76] But what Cain calls "the rights argument" shows precisely why such approaches have too little intrinsic content to do meaningful analytic work in the realm of politics. Unlike the speaker's corner in Hyde Park, elections are a distinct kind of public forum, one that is highly regulated for specific purposes that derive from judgments about the appropriate systemic aims of elections in a democracy.[77] Just as elected officials are public officers whose rights and duties are defined by conceptions of appropriate role responsibility, candidates are best seen as quasi-public officials, with rights that derive from, and are constrained by, judgments about the roles candidates ought to play to realize specific structural goals. Perhaps this is too boldly put, but I would venture to say that electoral candidates have few if any intrinsic rights; at times they have broader privileges than private individuals engaged in politics, at other times narrower ones. But the scope of their freedom and constraints derives from judgments about which candidate roles best help realize the appropriate systemic aims of elections. This much might seem clear, but that as sophisticated a political scientist as Cain would decide cases on the basis of candidate "rights" suggests a need for some elaboration.

Candidates have more freedom than private individuals in several ways. For example, they can make promises that the law will not treat as legally binding, even though the ordinarily sufficient elements of offer, acceptance, and consideration or reliance are otherwise present.[78] (That there is little public expectation that such promises will be honored itself reflects this legal treatment, rather than justifying it.) At the same time, candidates also have lesser rights than actors in other contexts who might otherwise be considered similarly situated. One example of this is the requirement that campaign organizations disclose lists of financial contributors in ways other organizations are constitutionally insulated from having to do.[79] The whole regime of cam-

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[76] See id.

[77] For elaboration on this view, see Richard Briffault, Issue Advocacy: Redrawing the Elections/Politics Line, 77 Tex. L. Rev. 1751 (1999), and Frederick Schauer & Richard H. Pildes, Electoral Exceptionalism and the First Amendment, 77 Tex. L. Rev. 1803 (1999).

[78] See Brown v. Hartlage, 456 U.S. 45, 54–55 (1982); Stephen D. Sencer, Read My Lips: Examining the Legal Implications of Knowingly False Campaign Promises, 90 Mich. L. Rev. 428, 445–57 (1991). Recently, the Republican Party of Massachusetts suggested that it might sue to enforce the term limits pledge of Democratic Congressman Martin Meehan. Meehan had not just pledged to serve no more than four terms, but had filed a letter with the Secretary of the House purporting to resign should he be elected to a fifth term. B. Drummond Ayers Jr., That Resignation? Just Call it Premature, N.Y. Times, May 12, 1999, at A18.

[79] Compare Buckley v. Valeo, 424 U.S. 1 (1976) (upholding mandatory disclosure of campaign contributors), with NAACP v. Alabama, 357 U.S. 449 (1958) (holding member-

paign financing heavily intrudes on candidate "freedoms" to take money from whom, when, and in what form candidates might otherwise choose.

To sort through the maze of distinct permissions and prohibitions that constitute the legal role of a political candidate, it is of no avail to appeal to "intrinsic" rights and "basic freedoms" of candidates, and certainly not to the rights other speakers have in nonelectoral domains, like the public forum of a park.[80] Judicial decisions that speak in this conventional rights language, or academic commentary that invokes it, will inevitably rely instead on unstated, implicit assumptions about what we call the structural or systemic issues about the role candidates ought to play to achieve a particular kind of electoral politics. Mandatory ballot-notations might be a bad way of structuring elections for policy reasons, as I believe they are, but not because they interfere with candidate's "rights" any more than financing regulations or rules about access to the ballot interfere with those rights. It is precisely the aim of our approach to make the structural decisions and objectives, which must inevitably inform any judgment about proper candidate roles, the focal point of inquiry. Cain's endorsement of a "rights argument" instead as a more effective alternative suffers from the incoherence of being unable to provide any content to these rights that is not derivative of the very structural considerations that our approach indeed seeks to make central. One might disagree on what those structural aims ought to be, but that the debate must be in structural terms, not rights, seems hard to deny.

Just as Cain makes the typical mistake on the rights side of these cases by suggesting intrinsic rights analysis can do the important analytical work, he also repeats the conventional framework in which some abstracted "State" stands on the other side, asserting competing interests.[81] But it is a central point of our approach that in cases of political rights the State must be seen—at least potentially—as a constellation of existing political forces that might be seeking to leverage existing dominance into more enduring forms. To speak of "states' rights" and "states' roles" in regulating politics, as Cain does throughout, might be linguistically difficult to avoid, but this language should never be invoked in cases involving politics without questioning who is speaking and acting as the "State" and what political, particularly partisan, stakes might be in play. Lapsing too easily and unself-consciously into language like the "States should be free"[82] to do as they choose might incline us too quickly to accept at face value asserted State interests in stability, orderly elections, avoiding electoral fraud, and similar encomiums. Although these

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ship lists of organization protected by the First Amendment from mandatory state-required disclosure).

[80] For the argument that the First Amendment ought always to be understood as domain specific, see Schauer & Pildes, Electoral Exceptionalism, supra note 77.

[81] See Cain, supra note 15, at 1603.

[82] Id.

interests might be sufficient in some contexts genuinely to explain and justify particular electoral regulations, these claims are also precisely the masks behind which partisan politics hide their public face. By focusing on the structural risks that electoral law can pose to desirable political competition, we seek to encourage a skepticism that subjects these claims to the serious evaluation required to sort out the justified from the self-interested.

VI. CONCLUSION

The theory of political competition offers a perspective on the dynamics of organizational interaction that drive electoral politics in modern mass societies with universal suffrage. Reformist discourse about politics, as well as constitutional oversight of it, often invokes nostalgic imaginings of the individual citizen whose political participation is direct and unmediated. In a post-Warren Court constitutionalist discourse that is already framed largely around issues of individual rights and equality, this only facilitates legal oversight that misses the crucial structural and systemic dimensions of the effects of law on politics. Rather than viewing the political rights claimed in many contemporary contexts as matters of intrinsic individual liberty, we would do better to recognize that their content is best derived from reasoning about the structural aims of the system of electoral politics as a whole.

Critics of process-oriented approaches to normative evaluation, including the norms of constitutional law, often note that process and substance cannot be readily detached. This is no less true of an approach to the law of politics that would emphasize the process-oriented concerns of ensuring robust partisan political competition: Such an approach ultimately requires defending the substantive values (such as democratic responsiveness) that this competition would realize, as well as giving more precise substantive content to the boundaries between permissible and impermissible structuring of political competition. I have not done either at this stage. Instead, I have tried to open a window on an often-ignored truth, that if process depends on substance, the inverse also contains crucial insight of its own: To realize various substantive values through law, the most effective means is not always direct, command-and-control imposition of first-order rules of substantive conduct, but rather proper design of the processes and structures whose maintenance will help realize those values. Properly designed procedural structures can be self-sustaining vehicles for realizing particular substantive ends, while direct mandate of those ends instead requires constant judicial or other external supervision.[83] Recognizing the inevitable interplay between process and

[83] For this point on the relationship of structures and individual rights in the context of a critique of the post-Civil War Amendments for trying to protect rights without creating appropriate institutions to do so, see Roderick M. Hills, Jr., Back to the Future? How the

substance, the theory of political competition offers an approach to judicial oversight of the law of politics that puts organizations and their interplay at the focal point of law, as they are of actual electoral politics itself.

Bill of Rights Might Be About Structure After All, 93 Nw. U. L. Rev. 977 (1999) (reviewing Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction (1998)).

A long line of Democrats stood, one after the other, to welcome and thank some of the constituents who had come to Madison to protest the bill. The public galleries high above them were packed with union supporters, and the shouts of the much greater crowd in the rotunda could be heard. The Democrats had solicited notes with the names of demonstrators who had arrived from Republican districts and handed those out to GOP lawmakers. Not all of them were read from the floor, but in all there were 854 entries of visitors that day in the official Assembly Journal, often with more than one name per entry.

The length of the introductions gave a sense of the coming day. Democrats took their time with them; they were in no hurry to move on toward a vote on the bill that they would certainly lose. Even though three Republicans had left the Assembly to take appointments in the Walker administration, the majority party still had fifty-seven members, easily outnumbering the thirty-eight Democrats. The lone independent lawmaker, Bob Ziegelbauer of Manitowoc, typically voted with Republicans, meaning that the majority could afford to lose nine of its members and still pass the bill. In practical terms, the most that Democrats could do was slow the bill down and perhaps amend it in some small way. Republicans knew that all they needed was the patience to outlast the Democrats, so they mostly sat silent. Finally, Speaker Jeff Fitzgerald stood. "First, thank you guys, Assembly Democrats, for showing up to work. That is one thing we're very bipartisan on—we work harder than the Senate," Fitzgerald said, getting the first cheers of the day for a Republican. "I would ask for a recess for the purpose of a Republican caucus."

Less than an hour after they began, the representatives headed to the caucus meetings, a tradition that could last hours even when they debated routine business. Both sides spent the rest of the day behind closed doors, although the Assembly Democrats did emerge for one errand. In a made-for-television moment, they tramped down a flight of stairs and a couple of Capitol hallways from their caucus room to Walker's office to ask for a meeting and deliver a letter. Walker's spokesman, Cullen Werwie, emerged to say that the governor wasn't available and that he would accept the letter on Walker's behalf. In the letter, the Democrats called on Walker to drop a range of provisions that had been found by the Legislature's nonpartisan budget office to be policy items without a clear financial impact. "As governor, you are the leader of this state. Now is the time for you to show some leadership and end this chaos," the letter stated.

The Democratic lawmakers weren't the only ones making an offer. Later that day, the leaders of the biggest public-sector unions in the state said they

dataset2.csv

	countyname	v1940	d1940	r1940	v1944	d1944
1	Adams	3730	1883	1818	3072	1579
2	Ashland	9309	5586	3592	7839	3183
3	Barron	14227	6183	7806	12823	7137
4	Bayfield	7342	4387	2829	5890	2475
5	Brown	36040	19526	16379	35426	17762
6	Buffalo	6675	2516	4056	5406	3416
7	Burnett	5105	2513	2510	4019	2119
8	Calumet	7725	2324	5327	7626	5611
9	Chippewa	16171	7250	8781	14351	7691
10	Clark	14420	4683	9501	12657	7948
11	Columbia	15387	7021	8260	13924	7867
12	Crawford	8293	3595	4667	7351	4199
13	Dane	62787	40331	21845	60651	23021
14	Dodge	23859	8948	14651	21883	14102
15	Door	8260	2750	5461	8305	5668
16	Douglas	23515	15548	7695	20263	7132
17	Dunn	11639	4545	6968	9905	5980
18	Eau Claire	19832	10129	9595	18520	9470
19	Florence	2011	980	1008	1678	765
20	Fond du Lac	27342	10323	16804	26306	16785
21	Forest	4639	2951	1672	3840	1391
22	Grant	18759	7458	11143	16345	10226
23	Green	10364	4565	5711	9699	5556
24	Green Lake	7314	2357	4919	6784	4571
25	Iowa	9140	4025	4978	8228	4608
26	Iron	5269	3525	1672	4268	1345
27	Jackson	7780	3975	3741	6256	3182
28	Jefferson	18169	7842	10178	17317	10245
29	Juneau	8706	3354	5268	7637	4733
30	Kenosha	29777	17174	12182	31121	12436
31	Kewaunee	7272	3389	3862	6780	4153
32	La Crosse	26924	13079	13711	25103	12784
33	Lafayette	9419	4315	5059	8147	4421
34	Langlade	9814	5190	4523	8369	4036
35	Lincoln	9984	3951	5812	8598	5564
36	Manitowoc	26126	13142	12616	26247	14047
37	Marathon	29469	13724	15264	29477	15782
38	Marinette	15483	7703	7688	13712	7159
39	Marquette	4312	1195	3086	3883	2853
40	Menominee	0	0	0	0	0
41	Milwaukee	351197	209861	131120	354830	142448
42	Monroe	12863	4673	8042	11354	7277

dataset2.csv

	countyname	v1940	d1940	r1940	v1944	d1944
43	Oconto	11577	5273	6238	10322	5923
44	Oneida	9146	5375	3694	7383	3253
45	Outagamie	30067	12168	17733	28389	18294
46	Ozaukee	8723	3662	4913	9323	5655
47	Pepin	3522	1194	2272	2959	1902
48	Pierce	9999	3259	6624	8233	5137
49	Polk	11248	4979	6031	9945	5329
50	Portage	15912	10148	5670	14125	5405
51	Price	8093	4042	3879	6819	3258
52	Racine	42978	23532	18753	44325	18220
53	Richland	9139	3524	5527	8226	5088
54	Rock	37898	17543	20141	35376	18477
55	Rusk	7160	3578	3484	6388	3092
56	St. Croix	11876	4898	6857	10678	5660
57	Sauk	15707	6106	9363	15546	9751
58	Sawyer	5233	2439	2745	4400	2421
59	Shawano	11774	5241	6377	12811	8732
60	Sheboygan	31747	15800	15305	30938	15291
61	Taylor	7678	3771	3668	6621	3194
62	Trempealeau	10579	5175	5319	9242	4719
63	Vernon	12492	5776	6614	11121	5676
64	Vilas	4798	2470	2251	4132	2021
65	Walworth	17154	5449	11594	16683	10901
66	Washburn	5762	2901	2805	4533	2441
67	Washington	13380	4683	8501	12847	8921
68	Waukesha	29943	12859	16726	31326	17995
69	Waupaca	15866	4616	11099	15442	11495
70	Waushara	6685	1747	4872	6189	4675
71	Winnebago	34535	15570	18697	32420	19310
72	Wood	18402	8574	9654	16520	9569

dataset2.csv

	countyname	r1944	v1948	d1948	r1948	v1952
1	Adams	1478	2761	1419	1259	3457
2	Ashland	4609	7509	4110	3135	8320
3	Barron	5585	12016	6148	5516	14981
4	Bayfield	3362	5835	3081	2338	6107
5	Brown	17576	36558	18449	17729	44836
6	Buffalo	1948	4993	2563	2350	6232
7	Burnett	1868	3899	2177	1590	4440
8	Calumet	1966	6909	2662	4185	8615
9	Chippewa	6567	14102	7702	6146	17854
10	Clark	4612	11175	4840	5885	13116
11	Columbia	5997	12169	5615	6406	16425
12	Crawford	3130	7185	3639	3465	7588
13	Dane	37076	60664	35486	22934	76927
14	Dodge	7667	19288	8212	10831	26336
15	Door	2599	7459	2440	4911	9430
16	Douglas	12985	19248	12278	6252	21313
17	Dunn	3853	9382	4894	4319	11094
18	Eau Claire	8962	18042	9971	7825	23658
19	Florence	897	1758	885	756	1963
20	Fond du Lac	9378	23083	8904	13760	30625
21	Forest	2436	3563	2208	1251	3793
22	Grant	6091	15089	6575	8299	18556
23	Green	4101	8398	3881	4403	11281
24	Green Lake	2190	5729	1722	3939	7717
25	Iowa	3585	7794	3917	3745	8952
26	Iron	2894	4209	2665	1281	4416
27	Jackson	3040	5563	2921	2553	7071
28	Jefferson	6988	15728	7256	8244	20743
29	Juneau	2857	6809	2889	3793	8164
30	Kenosha	18325	32109	17987	12780	38827
31	Kewaunee	2611	6478	2746	3646	8482
32	La Crosse	12247	23260	12345	10525	31132
33	Lafayette	3696	7104	3740	3288	8653
34	Langlade	4310	8081	4346	3441	9269
35	Lincoln	2938	7894	3368	4339	10007
36	Manitowoc	11949	24863	13401	10947	30901
37	Marathon	13192	28079	15898	11494	35373
38	Marinette	6483	12565	6468	5869	15087
39	Marquette	1016	3166	1095	2033	4218
40	Menominee	0	0	0	0	0
41	Milwaukee	205282	342910	187637	138672	426006
42	Monroe	4013	10490	4970	5347	12495

dataset2.csv

	countyname	r1944	v1948	d1948	r1948	v1952
43	Oconto	4348	9247	4269	4865	11220
44	Oneida	4076	8015	4081	3729	10062
45	Outagamie	9955	27672	11233	16161	36020
46	Ozaukee	3579	9208	4159	4866	12939
47	Pepin	1029	2764	1381	1333	3255
48	Pierce	3033	8306	4395	3753	10021
49	Polk	4489	9572	5330	3974	11282
50	Portage	8678	13791	8154	5424	16087
51	Price	3515	6785	3373	2952	7491
52	Racine	25697	43797	23266	19029	56049
53	Richland	3109	6906	2990	3836	8875
54	Rock	16766	33692	16150	17068	43065
55	Rusk	3238	6239	3401	2623	6964
56	St. Croix	4930	10701	6173	4326	12726
57	Sauk	5690	13307	5831	7140	17666
58	Sawyer	1947	4559	2177	2257	4694
59	Shawano	4015	10659	4192	6286	14501
60	Sheboygan	15062	28942	15339	12459	37432
61	Taylor	3215	6124	3184	2579	7710
62	Trempealeau	4496	8463	4711	3650	10548
63	Vernon	5409	9470	5226	4139	11663
64	Vilas	2079	4571	1688	2665	5204
65	Walworth	5696	16151	5377	10509	22372
66	Washburn	2059	4925	2708	2059	5237
67	Washington	3840	11565	4495	6876	17100
68	Waukesha	13038	31950	13952	17324	46111
69	Waupaca	3879	12982	4020	8764	16826
70	Waushara	1485	5164	1430	3594	6713
71	Winnebago	12841	31110	13116	17165	41328
72	Wood	6861	16247	7999	8073	21749

dataset2.csv

	countyname	d1952	r1952	v1956	d1956	r1956
1	Adams	1180	2259	3117	1244	1854
2	Ashland	3828	4451	7819	3677	4121
3	Barron	4902	10013	14126	5419	8634
4	Bayfield	2616	3419	5806	2691	3096
5	Brown	14342	30400	46808	13642	32878
6	Buffalo	1988	4233	5661	2266	3387
7	Burnett	1741	2683	4198	1986	2198
8	Calumet	1970	6640	8308	2099	6166
9	Chippewa	6380	11429	16461	6617	9781
10	Clark	3652	9406	12754	4765	7941
11	Columbia	5272	11133	15330	5158	10120
12	Crawford	2256	5323	6681	2522	4123
13	Dane	37987	38724	76213	36891	38955
14	Dodge	7001	19298	24366	6704	17569
15	Door	1790	7621	8622	1859	6722
16	Douglas	11538	9677	20502	11276	9183
17	Dunn	3593	7475	10604	4189	6401
18	Eau Claire	9554	14069	22439	9276	13122
19	Florence	809	1147	1731	723	1003
20	Fond du Lac	7724	22794	29666	7940	21496
21	Forest	1791	1990	3575	1527	2039
22	Grant	4197	14327	16958	5208	11648
23	Green	3326	7949	10779	3614	7114
24	Green Lake	1590	6117	7113	1643	5441
25	Iowa	2722	6211	8417	3176	5201
26	Iron	2662	1733	4176	2226	1930
27	Jackson	2819	4235	6378	2755	3614
28	Jefferson	6827	13884	19931	6452	13357
29	Juneau	2163	5978	7598	2428	5135
30	Kenosha	19768	18917	38796	17094	21367
31	Kewaunee	1972	6482	7509	2364	5106
32	La Crosse	11808	19271	29622	11258	18264
33	Lafayette	2905	5731	7978	3212	4733
34	Langlade	3371	5841	7841	2804	5004
35	Lincoln	3092	6877	9343	2880	6329
36	Manitowoc	11879	18950	29199	10800	18078
37	Marathon	14541	20702	38051	15301	22586
38	Marinette	5727	9313	14060	5113	8874
39	Marquette	835	3379	3785	975	2796
40	Menominee	0	0	0	0	0
41	Milwaukee	204474	219477	407318	177286	227253
42	Monroe	3717	8744	11811	4311	7460

dataset2.csv

	countyname	d1952	r1952	v1956	d1956	r1956
43	Oconto	3382	7807	10525	3632	6836
44	Oneida	3808	6224	9648	3328	6261
45	Outagamie	9373	26603	34077	7725	26090
46	Ozaukee	4241	8665	14086	4139	9808
47	Pepin	896	2348	3015	1040	1975
48	Pierce	3241	6763	9458	3644	5782
49	Polk	4274	6966	10906	4985	5894
50	Portage	7537	8499	15386	7010	8320
51	Price	3048	4376	6848	2778	4028
52	Racine	25241	30628	54919	22646	31968
53	Richland	2260	6605	7874	2783	5062
54	Rock	15183	27837	42987	13834	28980
55	Rusk	2777	4134	6395	2929	3433
56	St. Croix	5094	7607	12484	5499	6956
57	Sauk	5267	12347	16016	5292	10644
58	Sawyer	1527	3146	4374	1520	2823
59	Shawano	3334	11131	13122	3675	9388
60	Sheboygan	15136	22084	36852	14540	22077
61	Taylor	2768	4892	6654	2759	3843
62	Trempealeau	4021	6501	10094	4602	5476
63	Vernon	4032	7619	11140	4923	6200
64	Vilas	1497	3687	4972	1267	3683
65	Walworth	5417	16906	21790	4922	16696
66	Washburn	2039	3184	4752	1935	2798
67	Washington	4440	12626	16683	4447	12167
68	Waukesha	15756	30238	51084	15496	35212
69	Waupaca	3105	13693	15003	3133	11798
70	Waushara	1242	5447	6127	1387	4717
71	Winnebago	13016	28172	40254	11115	28759
72	Wood	6914	14707	21583	6412	15091

dataset2.csv

	countyname	v1960	d1960	r1960	v1964	d1964
1	Adams	3674	1551	2109	3489	2262
2	Ashland	8127	4644	3470	7591	5383
3	Barron	15145	6464	8640	14056	8332
4	Bayfield	6060	3196	2841	5777	3875
5	Brown	52952	26577	26329	52064	30851
6	Buffalo	6256	2790	3464	5759	3663
7	Burnett	4596	2095	2483	4463	2921
8	Calumet	9486	4312	5166	9274	5356
9	Chippewa	18511	9793	8690	17214	10911
10	Clark	13343	5934	7368	12704	7781
11	Columbia	16873	6576	10282	16370	10093
12	Crawford	7071	3342	3719	6663	3930
13	Dane	90502	47045	43245	95426	68118
14	Dodge	27295	10113	17152	26308	15497
15	Door	9414	3610	5790	8714	4416
16	Douglas	21270	12910	8307	19839	15237
17	Dunn	11239	4487	6723	10458	6475
18	Eau Claire	25704	11240	14427	24521	15775
19	Florence	1791	858	928	1627	1029
20	Fond du Lac	32688	13132	19498	30778	18040
21	Forest	3514	1851	1653	3552	2479
22	Grant	19258	7678	11564	17211	9309
23	Green	11711	3766	7939	10929	5548
24	Green Lake	7893	2776	5110	7768	3893
25	Iowa	8694	3547	5143	7907	4620
26	Iron	4170	2873	1290	3480	2514
27	Jackson	6813	2849	3950	6357	3818
28	Jefferson	22929	8757	14133	22084	13295
29	Juneau	8246	3238	4997	7567	4583
30	Kenosha	43011	22956	19969	45356	30522
31	Kewaunee	8213	4256	3950	7780	4792
32	La Crosse	32665	14310	18319	29803	16625
33	Lafayette	8330	3607	4715	7671	4471
34	Langlade	8655	4025	4614	8081	5077
35	Lincoln	10089	3909	6147	9796	5883
36	Manitowoc	32080	17423	14622	31815	21927
37	Marathon	40025	18145	21880	37426	24603
38	Marinette	15630	7408	8205	15013	9657
39	Marquette	4203	1249	2947	3816	1927
40	Menominee	0	0	0	726	647
41	Milwaukee	445807	257707	187067	439459	288577
42	Monroe	12587	5161	7410	11524	6385

dataset2.csv

	countyname	v1960	d1960	r1960	v1964	d1964
43	Oconto	11283	5045	6223	10795	6360
44	Oneida	10666	4974	5676	10355	6431
45	Outagamie	41522	17287	24146	40198	21556
46	Ozaukee	17657	7228	10401	18123	9517
47	Pepin	3380	1763	1612	3229	2154
48	Pierce	9958	4317	5632	9666	6351
49	Polk	11565	5148	6387	11003	7215
50	Portage	16972	10516	6436	16498	11887
51	Price	6957	3382	3555	6705	4289
52	Racine	60294	30596	29562	59306	37785
53	Richland	8229	2965	5253	7548	4315
54	Rock	48945	19194	29675	48684	28257
55	Rusk	6803	3692	3094	6405	4176
56	St. Croix	13478	6341	7113	13458	8864
57	Sauk	16867	6441	10403	15656	9288
58	Sawyer	5036	2325	2699	4613	2591
59	Shawano	14489	4734	9734	13105	6560
60	Sheboygan	40221	18425	21676	39445	26410
61	Taylor	7237	3768	3447	6898	4624
62	Trempealeau	10781	5223	5539	9589	6320
63	Vernon	11760	4836	6909	10898	6242
64	Vilas	5460	1942	3508	5679	2841
65	Walworth	24401	7986	16395	24009	11746
66	Washburn	5261	2398	2848	5062	3181
67	Washington	19991	8523	11452	20791	11563
68	Waukesha	68419	28963	39380	75429	39796
69	Waupaca	16867	4606	12247	15389	6990
70	Waushara	6799	1888	4906	6441	3004
71	Winnebago	46334	17656	28598	44835	23636
72	Wood	24930	10483	14414	23787	15378

dataset2.csv

	countyname	r1964	v1968	d1968	r1968	v1972
1	Adams	1219	3774	1614	1691	4137
2	Ashland	2198	7155	4147	2557	7411
3	Barron	5701	13589	5183	7526	14045
4	Bayfield	1886	5702	3036	2333	5865
5	Brown	21134	56143	21615	30133	65675
6	Buffalo	2091	5519	2112	2992	5660
7	Burnett	1536	4488	2010	2056	5466
8	Calumet	3905	10203	3609	5792	11542
9	Chippewa	6277	16403	7335	7772	17123
10	Clark	4897	12354	4601	6325	12641
11	Columbia	6253	16414	6698	8633	17447
12	Crawford	2726	6130	2391	3316	6315
13	Dane	27124	104061	59951	39917	137026
14	Dodge	10772	25758	8948	14909	27737
15	Door	4289	8916	2728	5647	10121
16	Douglas	4579	19115	12506	5656	19771
17	Dunn	3964	10526	4392	5415	12556
18	Eau Claire	8700	25287	12302	11799	30943
19	Florence	596	1699	718	821	1796
20	Fond du Lac	12708	32709	12563	18184	34443
21	Forest	1069	3149	1470	1264	3729
22	Grant	7872	17264	5414	10789	19061
23	Green	5364	10654	3501	6502	11222
24	Green Lake	3871	7683	2299	4893	7457
25	Iowa	3275	7413	2897	4005	7626
26	Iron	963	3315	1913	1137	3451
27	Jackson	2532	5999	2293	3172	6476
28	Jefferson	8741	22698	8716	12478	24587
29	Juneau	2976	7142	2595	3828	8030
30	Kenosha	14764	42126	21427	17089	44576
31	Kewaunee	2980	7802	2622	4467	8403
32	La Crosse	13135	31267	11570	17433	34746
33	Lafayette	3194	7412	2853	4084	7786
34	Langlade	2994	7508	3064	3712	7629
35	Lincoln	3894	9330	3858	4793	10840
36	Manitowoc	9849	30661	15298	13562	34220
37	Marathon	12766	38081	18063	16907	41839
38	Marinette	5332	14790	6415	7134	15238
39	Marquette	1881	3882	1228	2374	4284
40	Menominee	78	740	531	179	976
41	Milwaukee	149962	401936	206027	160022	416677
42	Monroe	5126	12015	4012	6938	11436

dataset2.csv

	countyname	r1964	v1968	d1968	r1968	v1972
43	Oconto	4420	10569	3737	5680	10965
44	Oneida	3909	10458	4435	5077	11577
45	Outagamie	18595	42301	14224	25080	46008
46	Ozaukee	8581	20919	7246	12155	25466
47	Pepin	1069	2987	1263	1493	2960
48	Pierce	3291	10234	4783	4990	11716
49	Polk	3754	11433	5179	5583	12533
50	Portage	4579	17121	10014	6180	23341
51	Price	2406	6526	2794	3096	6792
52	Racine	21434	62586	27045	28028	68236
53	Richland	3224	6922	2288	4141	7654
54	Rock	20372	49493	20567	25229	52319
55	Rusk	2214	5959	2559	2666	6279
56	St. Croix	4565	14148	6807	6595	16291
57	Sauk	6345	16048	6406	8608	17493
58	Sawyer	2012	4744	1830	2475	4928
59	Shawano	6519	13245	3602	8444	13142
60	Sheboygan	12968	39602	20170	17764	43519
61	Taylor	2261	6922	2910	3043	7383
62	Trempealeau	3264	9589	3971	4861	10095
63	Vernon	4640	10555	3666	5824	10385
64	Vilas	2827	5745	1798	3339	6708
65	Walworth	12225	24315	7505	15040	26967
66	Washburn	1865	5091	2273	2425	5665
67	Washington	9191	22631	8104	12439	27001
68	Waukesha	35502	86504	31947	47557	97622
69	Waupaca	8381	15799	3978	10606	15742
70	Waushara	3437	6407	1652	4187	6739
71	Winnebago	21084	47104	18605	25361	51482
72	Wood	8388	24427	10921	11795	26980

dataset2.csv

	countyname	d1972	r1972	v1976	d1976	r1976
1	Adams	1833	2200	5588	3089	2377
2	Ashland	3771	3478	7961	4688	3045
3	Barron	5376	8418	16382	8678	7393
4	Bayfield	2736	3045	6693	3885	2624
5	Brown	26511	37101	72243	33572	36571
6	Buffalo	2461	3079	6427	3448	2844
7	Burnett	2389	2972	6443	3720	2573
8	Calumet	4804	6446	13132	6241	6589
9	Chippewa	8210	8451	20093	11538	8137
10	Clark	4617	7138	13742	7238	6095
11	Columbia	7083	10122	19900	9457	10075
12	Crawford	2487	3705	7202	3629	3393
13	Dane	79567	56020	152552	82321	63466
14	Dodge	9898	17068	31641	13643	17335
15	Door	3430	6503	11417	4553	6557
16	Douglas	11054	8419	20956	13478	6999
17	Dunn	5681	6660	15004	7882	6751
18	Eau Claire	14300	15883	35353	18263	16388
19	Florence	757	971	1921	965	922
20	Fond du Lac	12050	21007	39841	16571	22226
21	Forest	1678	1856	4239	2574	1604
22	Grant	6915	11873	22207	9639	12016
23	Green	3634	7422	13046	5632	7085
24	Green Lake	2174	5046	8595	3411	5020
25	Iowa	3131	4387	8678	4252	4195
26	Iron	1648	1723	3800	2399	1340
27	Jackson	2445	3937	7264	3735	3406
28	Jefferson	9303	14621	28812	12577	15528
29	Juneau	2943	4833	9077	4512	4242
30	Kenosha	19441	24041	51250	27585	22349
31	Kewaunee	3360	4802	9279	4607	4447
32	La Crosse	12152	21992	41659	16674	24188
33	Lafayette	2804	4898	8183	3839	4131
34	Langlade	3011	4368	8930	4134	4630
35	Lincoln	4175	6206	11723	5800	5672
36	Manitowoc	16489	16599	36771	19819	16039
37	Marathon	18500	21454	48001	24934	21898
38	Marinette	5900	8740	17425	8482	8591
39	Marquette	1537	2682	5209	2516	2607
40	Menominee	608	355	1122	766	324
41	Milwaukee	210802	191874	456160	249739	192008
42	Monroe	3640	7625	13968	6465	7242

dataset2.csv

	countyname	d1972	r1972	v1976	d1976	r1976
43	Oconto	4041	6511	13027	6541	6232
44	Oneida	4262	6811	14916	7216	7347
45	Outagamie	17447	27533	52507	23079	28363
46	Ozaukee	8503	15759	31877	11271	19817
47	Pepin	1409	1458	3334	1955	1312
48	Pierce	5611	5899	14064	8039	5676
49	Polk	5738	6567	14924	8485	6159
50	Portage	13564	9346	26237	15912	9520
51	Price	2831	3694	7399	4028	3204
52	Racine	27778	38490	75686	36740	37088
53	Richland	2492	5062	8251	3634	4466
54	Rock	21033	30361	57762	28048	28325
55	Rusk	3075	3007	6957	4050	2724
56	St. Croix	7488	8553	18672	10601	7685
57	Sauk	6980	10285	19192	9204	9577
58	Sawyer	1765	3081	5905	3055	2720
59	Shawano	3940	8807	15566	6751	8505
60	Sheboygan	21114	21500	47383	24226	22332
61	Taylor	2934	4125	7901	4101	3591
62	Trempealeau	4232	5723	11722	6218	5341
63	Vernon	3407	6836	11892	5534	6132
64	Vilas	1907	4422	8312	3209	4929
65	Walworth	8598	17823	31307	12418	18091
66	Washburn	2336	3220	6451	3503	2787
67	Washington	10434	15338	34070	14422	18798
68	Waukesha	34573	59399	120953	47487	70418
69	Waupaca	4418	11040	18043	6857	10849
70	Waushara	2094	4466	8098	3485	4449
71	Winnebago	20450	29488	58082	24485	32149
72	Wood	10415	14806	30957	14728	15479

dataset2.csv

	countyname	v1980	d1980	r1980	v1984	d1984
1	Adams	6518	2773	3304	6411	2714
2	Ashland	8685	4469	3262	8268	4680
3	Barron	18685	8654	8791	17772	8061
4	Bayfield	7789	3705	3278	7567	4034
5	Brown	82977	29796	47067	82003	30218
6	Buffalo	7418	3276	3569	6304	2921
7	Burnett	6755	3200	3027	6916	3331
8	Calumet	14293	5036	7885	13892	4736
9	Chippewa	21912	9836	10531	21351	10202
10	Clark	15023	6091	7921	13906	5647
11	Columbia	20996	8715	10478	19927	8125
12	Crawford	7856	3392	3934	7897	3436
13	Dane	168405	85609	57545	170685	94659
14	Dodge	33682	11966	19435	31761	11052
15	Door	12982	4961	7170	12271	3916
16	Douglas	21199	11703	7258	21464	14291
17	Dunn	17088	7743	7428	16358	7712
18	Eau Claire	38922	17602	17304	39929	19347
19	Florence	2260	943	1187	2115	870
20	Fond du Lac	42470	15293	24196	40346	13983
21	Forest	4674	2402	2070	4544	2214
22	Grant	23824	8406	13298	21460	7892
23	Green	14277	5336	7714	12296	4367
24	Green Lake	9252	2851	5868	8716	2441
25	Iowa	8992	4154	4068	8897	3843
26	Iron	4021	1941	1811	3653	1967
27	Jackson	8517	3629	4327	7859	3427
28	Jefferson	30000	11335	16174	28784	10788
29	Juneau	10140	3884	5591	8848	3152
30	Kenosha	55863	26738	24481	55695	29233
31	Kewaunee	9775	3706	5577	9210	3444
32	La Crosse	45285	17304	23427	43769	17787
33	Lafayette	8591	3598	4421	7586	2961
34	Langlade	9871	4498	4866	9572	3675
35	Lincoln	12755	5438	6473	12132	5353
36	Manitowoc	38732	17330	18591	37376	17250
37	Marathon	53514	23281	25868	48670	20128
38	Marinette	19167	7718	10444	18353	6798
39	Marquette	5779	2180	3166	5512	2032
40	Menominee	936	544	302	1231	832
41	Milwaukee	464008	240174	183450	458017	259144
42	Monroe	15684	6521	8136	13884	5567

dataset2.csv

	countyname	v1980	d1980	r1980	v1984	d1984
43	Oconto	14293	5352	8292	14124	5289
44	Oneida	16805	7008	8602	16369	6417
45	Outagamie	59441	21284	31500	56979	19790
46	Ozaukee	35033	10779	21371	34896	10765
47	Pepin	3471	1673	1541	3202	1629
48	Pierce	15646	7312	6209	15003	7289
49	Polk	16296	7607	7207	16269	8034
50	Portage	30702	16443	10465	28179	14399
51	Price	8171	3595	4028	7852	3479
52	Racine	79742	33565	39683	79663	36955
53	Richland	8588	3413	4601	7753	2844
54	Rock	61182	24740	30960	59334	26433
55	Rusk	7795	3584	3704	7979	3843
56	St. Croix	21767	10203	9265	21635	10127
57	Sauk	20195	8456	9992	18313	7158
58	Sawyer	7086	3065	3548	6970	2982
59	Shawano	16276	5410	9922	16225	5469
60	Sheboygan	48575	20974	23036	47853	21112
61	Taylor	8958	3739	4596	8269	3271
62	Trempealeau	12101	5390	5992	11500	5407
63	Vernon	12773	5501	6528	11603	5051
64	Vilas	9924	3293	6034	9026	2940
65	Walworth	33730	11344	19194	30710	9877
66	Washburn	6880	3172	3193	7076	3188
67	Washington	39471	12944	23213	38573	12966
68	Waukesha	139148	46612	81059	140660	47313
69	Waupaca	20366	6401	12568	19167	5895
70	Waushara	9077	2987	5576	8637	2782
71	Winnebago	64353	24203	34286	62183	22791
72	Wood	34467	13804	17987	32882	12118

dataset2.csv

	countyname	r1984	v1988	d1988	r1988	v1992
1	Adams	3645	6883	3598	3258	8048
2	Ashland	3517	7482	4526	2926	8393
3	Barron	9587	17570	8951	8527	20230
4	Bayfield	3474	7458	4323	3095	8112
5	Brown	51202	85953	41788	43625	102701
6	Buffalo	3325	6313	3481	2783	6950
7	Burnett	3528	6465	3537	2884	7436
8	Calumet	8970	14708	6481	8107	18401
9	Chippewa	10986	21354	11447	9757	25230
10	Clark	8099	13036	6642	6296	14885
11	Columbia	11662	19730	9132	10475	23984
12	Crawford	4412	6893	3608	3238	7812
13	Dane	74823	175934	105414	69143	210122
14	Dodge	20458	29927	12663	17003	35709
15	Door	8264	12422	5425	6907	13777
16	Douglas	7066	20449	13907	6440	22253
17	Dunn	8473	16594	9205	7273	18218
18	Eau Claire	20401	39023	21150	17664	47076
19	Florence	1227	2142	1018	1106	2646
20	Fond du Lac	26069	38175	15887	21985	44506
21	Forest	2296	4009	2142	1845	4368
22	Grant	13430	19580	9421	10049	23157
23	Green	7827	11908	5153	6636	14183
24	Green Lake	6198	8299	3033	5205	9540
25	Iowa	4983	8548	4268	4240	10151
26	Iron	1667	3715	2090	1599	3891
27	Jackson	4386	7517	3924	3555	8418
28	Jefferson	17780	26342	11816	14309	32802
29	Juneau	5629	8662	3734	4869	10993
30	Kenosha	26118	52129	30089	21661	61837
31	Kewaunee	5705	9179	4786	4330	10377
32	La Crosse	25721	44066	22204	21548	52273
33	Lafayette	4584	7230	3521	3665	7859
34	Langlade	5830	9186	4254	4884	10042
35	Lincoln	6682	11178	5819	5257	13304
36	Manitowoc	19639	35987	19680	16020	41268
37	Marathon	27080	49521	24658	24482	57378
38	Marinette	11444	17764	8030	9637	21093
39	Marquette	3406	5567	2463	3059	6720
40	Menominee	392	1417	1028	381	1160
41	Milwaukee	196290	439545	268287	168363	465496
42	Monroe	8227	13585	6437	7073	16805

dataset2.csv

	countyname	r1984	v1988	d1988	r1988	v1992
43	Oconto	8714	13716	6549	7084	16073
44	Oneida	9787	15670	7414	8130	18714
45	Outagamie	36773	61278	27771	33113	72911
46	Ozaukee	23898	35812	12661	22899	42910
47	Pepin	1555	3248	1906	1311	3572
48	Pierce	7612	14789	8659	6045	17272
49	Polk	8106	15975	8981	6866	18071
50	Portage	13605	28535	16317	12057	33716
51	Price	4289	7497	3987	3450	8550
52	Racine	42092	76631	39631	36342	87819
53	Richland	4858	7708	3643	4026	8540
54	Rock	32491	58188	29576	28178	69025
55	Rusk	4061	7004	3888	3063	7967
56	St. Croix	11367	21533	11392	9960	25676
57	Sauk	11069	18687	8324	10225	23422
58	Sawyer	3913	6536	3231	3260	7365
59	Shawano	10635	15047	6587	8362	17952
60	Sheboygan	26345	47177	23429	23471	54559
61	Taylor	4918	8100	3785	4254	9359
62	Trempealeau	6008	11175	6212	4902	13012
63	Vernon	6469	11078	5754	5226	12716
64	Vilas	5965	9722	3781	5842	11262
65	Walworth	20595	30685	12203	18259	36796
66	Washburn	3848	6506	3393	3074	7686
67	Washington	25279	40539	15907	24328	50073
68	Waukesha	92426	148893	57598	90467	179182
69	Waupaca	13097	18757	7078	11559	23159
70	Waushara	5769	8553	3535	4953	10329
71	Winnebago	39014	64003	28508	35085	77386
72	Wood	20525	32848	16074	16549	36436

dataset2.csv

	countyname	d1992	r1992	v1996	d1996	r1996
1	Adams	3539	2465	7824	4119	2450
2	Ashland	4213	2372	6798	3808	1863
3	Barron	8063	6572	17191	8025	6158
4	Bayfield	3873	2393	7340	3895	2250
5	Brown	37513	42352	90837	42823	38563
6	Buffalo	2996	2029	5557	2681	1800
7	Burnett	3172	2340	7169	3625	2452
8	Calumet	5701	7541	16299	6940	7049
9	Chippewa	10487	8215	21131	9647	7520
10	Clark	5540	4977	12861	5540	4622
11	Columbia	9348	9099	21521	10336	8377
12	Crawford	3540	2390	7060	3658	2149
13	Dane	114724	61957	192302	109347	59487
14	Dodge	11438	14971	29422	12625	12890
15	Door	4735	5468	12251	5590	4948
16	Douglas	12319	5679	18591	10976	5167
17	Dunn	7965	5283	15415	7536	4917
18	Eau Claire	21221	15915	40390	20298	13900
19	Florence	978	942	2142	869	927
20	Fond du Lac	13757	19785	36931	15542	16488
21	Forest	1904	1393	3965	2092	1166
22	Grant	8914	7678	19215	9203	7021
23	Green	5467	4887	12616	6136	4697
24	Green Lake	2772	3897	7882	3152	3565
25	Iowa	4467	3288	8916	4690	2866
26	Iron	1762	1273	3531	1725	1260
27	Jackson	3681	2644	7279	3705	2262
28	Jefferson	11593	13072	29774	13188	12681
29	Juneau	4177	4051	9182	4331	3226
30	Kenosha	27341	19854	53717	27964	18296
31	Kewaunee	4050	3570	9046	4311	3431
32	La Crosse	22838	18891	46001	23647	16482
33	Lafayette	3143	2582	6460	3261	2172
34	Langlade	3630	3890	8631	4074	3206
35	Lincoln	5297	4321	12246	6166	4076
36	Manitowoc	15903	14008	34444	16750	13239
37	Marathon	21482	20948	51449	24012	19874
38	Marinette	7626	7984	18216	8413	7231
39	Marquette	2533	2322	6119	2859	2208
40	Menominee	691	244	1350	992	230
41	Milwaukee	235521	151314	371380	216620	119407
42	Monroe	6427	6118	14600	6924	5299

dataset2.csv

	countyname	d1992	r1992	v1996	d1996	r1996
43	Oconto	5898	5720	13885	6723	5389
44	Oneida	7160	6725	16917	7619	6339
45	Outagamie	23735	30370	64889	28815	27758
46	Ozaukee	11879	22805	38961	13269	22078
47	Pepin	1673	1098	3093	1585	1007
48	Pierce	7824	4844	15000	7970	4599
49	Polk	7746	5446	16413	8334	5387
50	Portage	15553	10914	29928	15901	9631
51	Price	3575	2654	7390	3523	2545
52	Racine	34875	32310	77568	38567	30107
53	Richland	3458	3144	7222	3502	2642
54	Rock	31154	21942	60320	32450	20096
55	Rusk	3376	2430	6643	2941	2219
56	St. Croix	10281	8114	23213	11384	8253
57	Sauk	9128	8886	20285	9889	7448
58	Sawyer	2796	2658	6475	2773	2603
59	Shawano	6062	7253	15500	6850	6396
60	Sheboygan	20568	22526	47003	22022	20067
61	Taylor	3305	3415	7932	3253	3108
62	Trempealeau	6218	3577	10794	5848	3035
63	Vernon	5673	4072	11226	5572	3796
64	Vilas	3764	4616	10445	4226	4496
65	Walworth	11825	15727	32961	13283	15099
66	Washburn	3080	2586	6996	3231	2703
67	Washington	13339	22739	48767	17154	25829
68	Waukesha	50270	91461	165472	57354	91729
69	Waupaca	6666	10252	19243	7800	8679
70	Waushara	3402	4045	8830	3824	3573
71	Winnebago	27234	33709	65247	29564	27880
72	Wood	13208	13843	32500	14650	12666

dataset2.csv

	countyname	v2000	d2000	r2000	v2004	d2004
1	Adams	9116	4826	3920	10456	5447
2	Ashland	7890	4356	3038	9199	5805
3	Barron	19904	8928	9848	23937	11696
4	Bayfield	8259	4427	3266	9699	5845
5	Brown	107769	49096	54258	123294	54935
6	Buffalo	6641	3237	3038	7591	3998
7	Burnett	8151	3626	3967	9321	4499
8	Calumet	19947	8202	10837	25276	10290
9	Chippewa	26173	12102	12835	30524	14751
10	Clark	14149	5931	7461	15125	6966
11	Columbia	25587	12636	11987	29555	14300
12	Crawford	7394	4005	3024	8459	4656
13	Dane	232739	142317	75790	274249	181052
14	Dodge	37701	14580	21684	44336	16690
15	Door	15220	6560	7810	17491	8367
16	Douglas	21706	13593	6930	25187	16537
17	Dunn	19330	9172	8911	23172	12039
18	Eau Claire	47875	24078	20921	55437	30068
19	Florence	2405	816	1528	2724	993
20	Fond du Lac	46589	18181	26548	53036	19216
21	Forest	4716	2158	2404	5153	2509
22	Grant	21956	10691	10240	25264	12864
23	Green	15276	7863	6790	18248	9575
24	Green Lake	9107	3301	5451	10178	3605
25	Iowa	10541	5842	4221	12542	7122
26	Iron	3507	1620	1734	3879	1956
27	Jackson	8417	4380	3670	9726	5249
28	Jefferson	36099	15203	19204	42115	17925
29	Juneau	10218	4813	4910	12379	5734
30	Kenosha	63709	32429	28891	76428	40107
31	Kewaunee	10084	4670	4883	11273	5175
32	La Crosse	55559	28455	24327	62136	33170
33	Lafayette	7263	3710	3336	8388	4402
34	Langlade	9721	4199	5125	11074	4751
35	Lincoln	14239	6664	6727	15700	7484
36	Manitowoc	38824	17667	19358	44160	20652
37	Marathon	58374	26546	28883	68059	30899
38	Marinette	19921	8676	10535	22270	10190
39	Marquette	7194	3437	3522	8477	3785
40	Menominee	1233	949	225	1710	1412
41	Milwaukee	433537	252329	163491	482236	297653
42	Monroe	16335	7460	8217	19554	8973

dataset2.csv

	countyname	v2000	d2000	r2000	v2004	d2004
43	Oconto	16596	7260	8706	19794	8534
44	Oneida	18891	8339	9512	22039	10464
45	Outagamie	75742	32735	39460	90050	40169
46	Ozaukee	47751	15030	31155	53032	17714
47	Pepin	3664	1854	1631	4066	2181
48	Pierce	17962	8559	8169	21876	11176
49	Polk	19762	8961	9557	23503	11173
50	Portage	33760	17942	13214	38961	21861
51	Price	7930	3413	4136	8763	4349
52	Racine	88865	41563	44014	101569	48229
53	Richland	8293	3837	3994	9420	4501
54	Rock	70404	40472	27467	80479	46598
55	Rusk	7366	3161	3758	7927	3820
56	St. Croix	25653	13035	11586	30417	15708
57	Sauk	7767	3333	3972	9453	4411
58	Sawyer	17603	7335	9548	20999	8657
59	Shawano	55201	23569	29648	62625	27608
60	Sheboygan	29954	13077	15240	41835	18784
61	Taylor	8992	3254	5278	9543	3829
62	Trempealeau	12168	6678	5002	14062	8075
63	Vernon	13044	6577	5684	14845	7924
64	Vilas	12322	4706	6958	14002	5713
65	Walworth	40458	15492	22982	48446	19177
66	Washburn	8045	3695	3912	9567	4705
67	Washington	61412	18115	41162	72467	21234
68	Waukesha	203734	64319	133105	230363	73626
69	Waupaca	22804	8787	12980	26974	10792
70	Waushara	10248	4239	5571	12246	5257
71	Winnebago	76080	33983	38330	88596	40943
72	Wood	35761	15936	17803	40071	18950

dataset2.csv

	countyname	r2004	v2008	d2008	r2008	v2012
1	Adams	4890	9986	5806	3974	10287
2	Ashland	3313	8574	5818	2634	8372
3	Barron	12030	22886	12078	10457	22692
4	Bayfield	3754	9468	5972	3365	9788
5	Brown	67173	124754	67269	55854	128928
6	Buffalo	3502	7000	3949	2923	7039
7	Burnett	4743	8688	4337	4200	8677
8	Calumet	14721	26474	13295	12722	26420
9	Chippewa	15450	30231	16239	13492	30932
10	Clark	7966	14187	7454	6383	13801
11	Columbia	14956	29272	16661	12193	30546
12	Crawford	3680	7981	4987	2830	7817
13	Dane	90369	282939	205984	73065	304181
14	Dodge	27201	42823	19183	23015	44488
15	Door	8910	17481	10142	7112	17671
16	Douglas	8448	24066	15830	7835	22894
17	Dunn	10879	22989	13002	9566	21992
18	Eau Claire	24653	55010	33146	20959	54806
19	Florence	1703	2685	1134	1512	2625
20	Fond du Lac	33291	52323	23463	28164	53402
21	Forest	2608	4683	2673	1963	4648
22	Grant	12208	24320	14875	9068	24248
23	Green	8497	18534	11502	6730	19322
24	Green Lake	6472	9536	4000	5393	9675
25	Iowa	5348	11969	7987	3829	12534
26	Iron	1884	3432	1914	1464	3632
27	Jackson	4387	9251	5572	3552	9313
28	Jefferson	23776	43166	21448	21096	44281
29	Juneau	6473	11530	6186	5148	11827
30	Kenosha	35587	78789	45836	31609	80897
31	Kewaunee	5970	10787	5902	4711	11037
32	La Crosse	28289	63218	38524	23701	63462
33	Lafayette	3929	7831	4732	2984	7952
34	Langlade	6235	10402	5182	5081	10519
35	Lincoln	8024	15268	8424	6519	15216
36	Manitowoc	23027	42414	22428	19234	42617
37	Marathon	36394	67940	36367	30345	69862
38	Marinette	11866	21255	11195	9726	20777
39	Marquette	4604	7846	4068	3654	8105
40	Menominee	288	1448	1257	185	1377
41	Milwaukee	180287	475192	319819	149445	492576
42	Monroe	10375	19152	10198	8666	19485

dataset2.csv

	countyname	r2004	v2008	d2008	r2008	v2012
43	Oconto	11043	18968	9927	8755	19859
44	Oneida	11351	21927	11907	9630	21652
45	Outagamie	48903	91563	50294	39677	94596
46	Ozaukee	34904	53365	20579	32172	55817
47	Pepin	1853	3771	2102	1616	3699
48	Pierce	10437	22107	11803	9812	21020
49	Polk	12095	22643	10876	11282	22573
50	Portage	16546	39422	24817	13810	39337
51	Price	4312	8194	4559	3461	7901
52	Racine	52456	100642	53408	45954	103364
53	Richland	4836	8450	5041	3298	8655
54	Rock	33151	79169	50529	27364	80690
55	Rusk	3985	7272	3855	3253	7191
56	St. Croix	14415	30626	18617	11562	31927
57	Sauk	4951	9085	4765	4199	9025
58	Sawyer	12150	20089	10259	9538	20279
59	Shawano	34458	62107	30395	30801	62651
60	Sheboygan	22679	44821	21177	22837	46225
61	Taylor	5582	9346	4563	4586	9512
62	Trempealeau	5878	13314	8321	4808	13481
63	Vernon	6774	14075	8463	5367	14269
64	Vilas	8155	13750	6491	7055	13842
65	Walworth	28754	50422	24177	25485	52303
66	Washburn	4762	9112	4693	4303	9287
67	Washington	50641	74411	25719	47729	78742
68	Waukesha	154926	232897	85339	145152	243856
69	Waupaca	15941	25511	12952	12232	25840
70	Waushara	6888	11849	5868	5770	12048
71	Winnebago	46542	87677	48167	37946	89173
72	Wood	20592	39052	21710	16581	38900

dataset2.csv

	countyname	d2012	r2012	pvi1940	pvi1944	pvi1948
1	Adams	5542	4644	0.04122362	-0.0212525	-0.0061994
2	Ashland	5399	2820	-0.0586243	-0.1292761	-0.0436141
3	Barron	10890	11443	0.10801489	0.02322474	-0.0034183
4	Bayfield	6033	3603	-0.0579495	-0.1137528	-0.0448814
5	Brown	62526	64836	0.00618105	-0.0351402	0.01372284
6	Buffalo	3570	3364	0.16716875	0.09906622	0.00199646
7	Burnett	3986	4550	0.0497064	-0.0062947	-0.0542398
8	Calumet	11489	14539	0.24625388	0.2027586	0.13489023
9	Chippewa	15237	15322	0.09775626	0.00164451	-0.0325078
10	Clark	6172	7412	0.21984428	0.09503059	0.07239159
11	Columbia	17175	13026	0.09054557	0.0296689	0.0565744
12	Crawford	4629	3067	0.11488036	0.0351575	0.01142702
13	Dane	216071	83644	-0.0986536	-0.1547079	-0.0837553
14	Dodge	18762	25211	0.17083642	0.11002996	0.09243907
15	Door	9357	8121	0.21508845	0.14784556	0.19174601
16	Douglas	14863	7705	-0.1189276	-0.1832459	-0.1389275
17	Dunn	11316	10224	0.1552339	0.07038425	-0.0075323
18	Eau Claire	30666	23256	0.03646822	-0.0239916	-0.0366208
19	Florence	953	1645	0.05704728	-0.0774831	-0.0156317
20	Fond du Lac	22379	30355	0.16946166	0.10378291	0.13080389
21	Forest	2425	2172	-0.0883251	-0.1743019	-0.1146611
22	Grant	13594	10255	0.14905884	0.08893638	0.08162712
23	Green	11206	7857	0.10576602	0.037562	0.05518016
24	Green Lake	3793	5782	0.2260633	0.13831146	0.2194871
25	Iowa	8105	4287	0.10293183	0.02465939	0.01244942
26	Iron	1784	1790	-0.1282709	-0.2204801	-0.1516938
27	Jackson	5298	3900	0.03484173	-0.0263608	-0.0099398
28	Jefferson	20158	23517	0.1148219	0.05672697	0.05554461
29	Juneau	6242	5411	0.16100015	0.08581171	0.09131806
30	Kenosha	44867	34977	-0.0350202	-0.1334938	-0.0609462
31	Kewaunee	5153	5747	0.08262122	0.07621385	0.09407414
32	La Crosse	36693	25751	0.06180047	-0.0270453	-0.0161165
33	Lafayette	4536	3314	0.08968926	0.0068874	-0.0084834
34	Langlade	4573	5816	0.0156696	-0.054187	-0.034436
35	Lincoln	7563	7455	0.14531385	0.11666229	0.08666832
36	Manitowoc	20403	21604	0.03979461	0.0025804	-0.0267206
37	Marathon	32363	36617	0.07656774	0.00692329	-0.0567148
38	Marinette	9882	10619	0.04951773	-0.0129955	-0.0006029
39	Marquette	4014	3992	0.27086464	0.19962789	0.1736097
40	Menominee	1191	179	NA	NA	NA
41	Milwaukee	332438	154924	-0.0654574	-0.1281208	-0.0513549
42	Monroe	9515	9675	0.18248635	0.10678074	0.04194446

dataset2.csv

	countyname	d2012	r2012	pvi1940	pvi1944	pvi1948
43	Oconto	8865	10741	0.09192145	0.03890023	0.056299
44	Oneida	10452	10917	-0.0426733	-0.0939188	0.00113843
45	Outagamie	45659	47372	0.14306211	0.10982619	0.11362035
46	Ozaukee	19159	36077	0.12294963	0.0746387	0.06284262
47	Pepin	1876	1794	0.2055157	0.11115332	0.01483061
48	Pierce	10235	10397	0.22024686	0.09099181	-0.0157225
49	Polk	10073	12094	0.09777978	0.00500661	-0.0491982
50	Portage	22075	16615	-0.0915426	-0.1539759	-0.0768566
51	Price	3887	3884	0.03971592	-0.0567443	-0.009607
52	Racine	53008	49347	-0.0065044	-0.1228984	-0.026415
53	Richland	4969	3573	0.16065578	0.08294294	0.08564258
54	Rock	49219	30517	0.08447589	-0.0134976	0.03749145
55	Rusk	3397	3676	0.04334969	-0.0493043	-0.0409014
56	St. Croix	18736	12838	0.13333127	-0.0033055	-0.0642871
57	Sauk	4486	4442	0.15528009	0.09372859	0.07413236
58	Sawyer	9000	11022	0.07951892	0.01648628	0.03269484
59	Shawano	27918	34072	0.09889468	0.14725197	0.12359729
60	Sheboygan	19910	25503	0.04204811	-0.0339997	-0.0281286
61	Taylor	3763	5601	0.04308205	-0.0394103	-0.0288164
62	Trempealeau	7605	5707	0.05686609	-0.0256721	-0.0397757
63	Vernon	8044	5942	0.08382262	-0.0257287	-0.0343616
64	Vilas	5951	7749	0.02681079	-0.0448451	0.1358951
65	Walworth	22552	29006	0.23028432	0.11903349	0.18519951
66	Washburn	4447	4699	0.04159283	0.00467249	-0.0443985
67	Washington	23166	54765	0.19480175	0.16131119	0.1283698
68	Waukesha	78779	162798	0.11535909	0.04209464	0.07758079
69	Waupaca	11578	14002	0.25627292	0.20991895	0.20921807
70	Waushara	5335	6562	0.28606788	0.22115661	0.23903988
71	Winnebago	45449	42122	0.09563201	0.06283145	0.09053075
72	Wood	18581	19704	0.07962978	0.04463827	0.02597578

dataset2.csv

	countyname	pvi1952	pvi1956	pvi1960	pvi1964	pvi1968
1	Adams	0.10235987	0.02093904	0.07708576	-0.0363687	0.00758586
2	Ashland	-0.0168918	-0.0490427	-0.0714878	-0.0966201	-0.1226491
3	Barron	0.11682045	0.03687681	0.07289015	0.01970121	0.08811562
4	Bayfield	0.01201145	-0.0425194	-0.0285458	-0.0591817	-0.0695316
5	Brown	0.12493394	0.12923821	-0.0014875	0.01998488	0.07823955
6	Buffalo	0.1259201	0.02163932	0.05474176	-0.0231561	0.08214374
7	Burnett	0.0519476	-0.052177	0.04323283	-0.041929	0.00159351
8	Calumet	0.21667915	0.16852593	0.04590795	0.03510526	0.11204152
9	Chippewa	0.08723704	0.0189636	-0.028982	-0.0213588	0.01040034
10	Clark	0.16580757	0.04746875	0.05475792	-0.0002958	0.07483123
11	Columbia	0.12411743	0.08487879	0.11077439	-0.0040154	0.05904428
12	Crawford	0.14781827	0.04295494	0.02755219	0.02299982	0.07697767
13	Dane	-0.0497134	-0.0639051	-0.0201871	-0.1017651	-0.1043656
14	Dodge	0.17927503	0.14629677	0.12994116	0.02350963	0.12086873
15	Door	0.25527991	0.20584701	0.1168137	0.10614988	0.1702055
16	Douglas	-0.0983776	-0.1286627	-0.1076181	-0.1554796	-0.1926437
17	Dunn	0.1208533	0.02692657	0.10058863	-0.0068256	0.04809347
18	Eau Claire	0.04104651	0.0083443	0.06293986	-0.0310907	-0.0144984
19	Florence	0.03188368	0.00360082	0.02045312	-0.0197862	0.02940014
20	Fond du Lac	0.19238633	0.15275069	0.09840452	0.02673971	0.08734414
21	Forest	-0.0282013	-0.0057225	-0.0273972	-0.085259	-0.0417369
22	Grant	0.21891193	0.11351832	0.10183328	0.07162508	0.16180119
23	Green	0.15049395	0.08561296	0.17911341	0.10501345	0.14594185
24	Green Lake	0.23917691	0.19055731	0.14884002	0.11202774	0.17627611
25	Iowa	0.14077	0.04335508	0.09268594	0.02826404	0.07620344
26	Iron	-0.1602054	-0.1131227	-0.1892711	-0.1095926	-0.1312763
27	Jackson	0.04585145	-0.0100756	0.08182404	0.01218469	0.07635771
28	Jefferson	0.11585127	0.09677789	0.11828744	0.01011362	0.08468838
29	Juneau	0.17979069	0.1014518	0.10765649	0.00714741	0.09192003
30	Kenosha	-0.0655162	-0.0219618	-0.033937	-0.0605386	-0.0603774
31	Kewaunee	0.21222051	0.10602256	-0.0177886	-0.0031278	0.12606804
32	La Crosse	0.06554786	0.0411457	0.06228933	0.05480878	0.0970126
33	Lafayette	0.10910028	0.018209	0.06742679	0.03014382	0.08466396
34	Langlade	0.07954713	0.06336957	0.03494584	-0.0155977	0.04375267
35	Lincoln	0.13532137	0.10975088	0.1121331	0.01172622	0.04997684
36	Manitowoc	0.06016385	0.04850131	-0.0428479	-0.0766046	-0.0341394
37	Marathon	0.03289029	0.01862958	0.04751459	-0.0449354	-0.0205916
38	Marinette	0.06469829	0.0569347	0.02637985	-0.0308279	0.02247017
39	Marquette	0.24733384	0.16393632	0.20319181	0.10740462	0.15501514
40	Menominee	NA	NA	NA	-0.2789693	-0.2519505
41	Milwaukee	-0.0368229	-0.0157536	-0.0785549	-0.0445973	-0.0669031
42	Monroe	0.1471922	0.05624936	0.09030816	0.05875771	0.12954415

dataset2.csv

	countyname	pvi1952	pvi1956	pvi1960	pvi1964	pvi1968
43	Oconto	0.14322172	0.07552625	0.05312817	0.02346309	0.09910134
44	Oneida	0.06589754	0.07542408	0.033814	-0.008509	0.02968369
45	Outagamie	0.18494807	0.19403951	0.08362844	0.07657123	0.13403984
46	Ozaukee	0.11687602	0.12572209	0.09085001	0.08758532	0.12245094
47	Pepin	0.16928065	0.07754647	-0.0215141	-0.0548769	0.03766399
48	Pierce	0.12151245	0.03589814	0.0669433	-0.0452362	0.00652725
49	Polk	0.06523376	-0.0357338	0.05456236	-0.0443183	0.01470659
50	Portage	-0.0245221	-0.0347849	-0.1194835	-0.1084673	-0.1224403
51	Price	0.03492252	0.01431916	0.01332562	-0.0271828	0.02157352
52	Racine	-0.0063061	0.00783284	-0.0077378	-0.0246108	0.00486137
53	Richland	0.19054773	0.06774018	0.14006287	0.04108746	0.14004946
54	Rock	0.092554	0.09936982	0.10809192	0.03237151	0.04683649
55	Rusk	0.04365969	-0.0379014	-0.0432051	-0.0400766	0.00617608
56	St. Croix	0.04441208	-0.019021	0.0295466	-0.0466195	-0.0119724
57	Sauk	0.14645936	0.09041011	0.1184649	0.01931673	0.0692684
58	Sawyer	0.11871206	0.07249994	0.03807759	0.05055077	0.07084974
59	Shawano	0.21499548	0.14115948	0.17365139	0.11187714	0.19691643
60	Sheboygan	0.03881978	0.0254051	0.0413914	-0.0572345	-0.0357761
61	Taylor	0.08412516	0.00458476	-0.0213891	-0.0581604	0.00710769
62	Trempealeau	0.06333118	-0.0341498	0.01553754	-0.0459879	0.04632181
63	Vernon	0.09941815	-0.020108	0.08910657	0.03983674	0.10963548
64	Vilas	0.15670972	0.16652883	0.14452598	0.11220953	0.14592711
65	Walworth	0.20281835	0.19480779	0.17330611	0.12343577	0.16304707
66	Washburn	0.0550942	0.01365682	0.04374607	-0.0169558	0.01211394
67	Washington	0.18531645	0.1548226	0.0741729	0.05629892	0.10144724
68	Waukesha	0.10291644	0.11689562	0.07706742	0.08493116	0.09410801
69	Waupaca	0.26063943	0.21265653	0.22755179	0.15869208	0.22317217
70	Waushara	0.25980489	0.19526038	0.22296399	0.14705733	0.21301169
71	Winnebago	0.12946849	0.14373535	0.11913791	0.08491144	0.07276895
72	Wood	0.12570117	0.12429747	0.07980151	-0.0336143	0.01517439

dataset2.csv

	countyname	pvi1972	pvi1976	pvi1980	pvi1984	pvi1988
1	Adams	-0.0723841	-0.0545784	-0.0093839	-0.0184608	-0.0637778
2	Ashland	-0.1380934	-0.0956815	-0.1311356	-0.1626047	-0.1463358
3	Barron	-0.0076184	-0.0294273	-0.0491466	-0.0484298	-0.0511116
4	Bayfield	-0.0911582	-0.0863143	-0.0836475	-0.1289577	-0.1217537
5	Brown	-0.0346447	0.03192929	0.05927601	0.03719854	-0.0282284
6	Buffalo	-0.0621075	-0.0374459	-0.0316708	-0.0593235	-0.0946972
7	Burnett	-0.0635095	-0.0805815	-0.0669644	-0.0773035	-0.0898308
8	Calumet	-0.0449059	0.0241135	0.05717365	0.06279375	0.01674871
9	Chippewa	-0.1106512	-0.0758779	-0.0360113	-0.0731631	-0.078833
10	Clark	-0.0106527	-0.032312	0.01222794	-0.0024746	-0.0523535
11	Columbia	-0.0295663	0.02637173	-0.007145	-0.0022873	-0.0047341
12	Crawford	-0.019531	-0.0062528	-0.0160817	-0.0294827	-0.0660051
13	Dane	-0.2047172	-0.0541147	-0.1510935	-0.1501836	-0.1428765
14	Dodge	0.0150615	0.07014221	0.0658561	0.05759006	0.03416569
15	Door	0.0368027	0.10074055	0.03797449	0.08682518	0.02110555
16	Douglas	-0.1855415	-0.1476504	-0.1702875	-0.2608124	-0.2224734
17	Dunn	-0.0782192	-0.028094	-0.0634549	-0.0681547	-0.0976056
18	Eau Claire	-0.0916603	-0.016504	-0.0573418	-0.0784056	-0.0838885
19	Florence	-0.0559624	-0.0008422	0.00420376	-0.0065425	-0.0182664
20	Fond du Lac	0.01759442	0.08343088	0.05965436	0.05921471	0.041526
21	Forest	-0.0926998	-0.1055327	-0.0901931	-0.0825732	-0.0762281
22	Grant	0.01406223	0.06543493	0.05962489	0.03820172	-0.0228546
23	Green	0.053426	0.06767979	0.03803788	0.0502089	0.02391559
24	Green Lake	0.08100827	0.10597319	0.11993973	0.12578	0.09284609
25	Iowa	-0.0343508	0.00717756	-0.0583031	-0.0270822	-0.0406275
26	Iron	-0.1067594	-0.1310639	-0.0703973	-0.132941	-0.1055312
27	Jackson	-0.0009924	-0.0124845	-0.009207	-0.0302921	-0.0636511
28	Jefferson	-0.0067401	0.06305109	0.0348798	0.03071054	0.0087309
29	Juneau	0.00364408	-0.00487	0.03700592	0.04937901	0.02698334
30	Kenosha	-0.0649882	-0.0418777	-0.0751061	-0.1198028	-0.120412
31	Kewaunee	-0.0295475	0.00171566	0.04770238	0.03190127	-0.063993
32	La Crosse	0.0262119	0.10249515	0.02209065	-0.0004855	-0.0464788
33	Lafayette	0.01805502	0.02887023	-0.0017576	0.01589052	-0.0289625
34	Langlade	-0.0259336	0.03884912	-0.0334235	0.02169724	-0.0045106
35	Lincoln	-0.0200607	0.00497273	-0.009626	-0.0364502	-0.0643522
36	Manitowoc	-0.1162215	-0.0421564	-0.0355208	-0.0592832	-0.0902425
37	Marathon	-0.0809162	-0.0218622	-0.0267553	-0.0180326	-0.0407728
38	Marinette	-0.0208892	0.01374371	0.02197357	0.03567934	0.00649825
39	Marquette	0.01781197	0.01943305	0.03914525	0.03466906	0.01498393
40	Menominee	-0.249244	-0.1922008	-0.1960992	-0.2714027	-0.2685775
41	Milwaukee	-0.1413865	-0.0547924	-0.1200241	-0.1606687	-0.1534032
42	Monroe	0.05899158	0.03889472	0.0020199	0.00475458	-0.0154439

dataset2.csv

	countyname	pvi1972	pvi1976	pvi1980	pvi1984	pvi1988
43	Oconto	-0.0008443	-0.0015443	0.05466643	0.03063107	-0.0193605
44	Oneida	-0.0027839	0.01504923	-0.0020162	0.01232252	-0.0159506
45	Outagamie	-0.0057672	0.06191035	0.04369851	0.05846049	0.00488829
46	Ozaukee	0.03165056	0.14800007	0.1116546	0.09777416	0.10497186
47	Pepin	-0.1093382	-0.0878568	-0.0736084	-0.1032848	-0.1314595
48	Pierce	-0.1053728	-0.075595	-0.0938616	-0.080826	-0.1278694
49	Polk	-0.0841982	-0.0688667	-0.066574	-0.0894337	-0.1057139
50	Portage	-0.2099396	-0.1151169	-0.1641554	-0.1058407	-0.1140507
51	Price	-0.0517534	-0.0464175	-0.0246723	-0.0395272	-0.0750853
52	Racine	-0.0370604	0.01290836	-0.011311	-0.0591708	-0.0606279
53	Richland	0.05222486	0.06190956	0.02104706	0.03908111	-0.0140114
54	Rock	-0.0271338	0.01300838	0.0027616	-0.040259	-0.0510851
55	Rusk	-0.123474	-0.0873227	-0.0448405	-0.0778737	-0.098326
56	St. Croix	-0.0846875	-0.0691816	-0.0771641	-0.0628189	-0.0725152
57	Sauk	-0.0221698	0.02048178	-0.0114427	0.01562175	0.01226063
58	Sawyer	0.01789839	-0.0184528	-0.0165543	-0.0241515	-0.0367482
59	Shawano	0.07302397	0.06803711	0.09407	0.06873078	0.0203865
60	Sheboygan	-0.1133547	-0.0097887	-0.0296467	-0.03653	-0.0385343
61	Taylor	-0.0335233	-0.0225998	-0.0016635	0.00889758	-0.0098117
62	Trempealeau	-0.0429967	-0.0273843	-0.026628	-0.0653391	-0.0979167
63	Vernon	0.04949891	0.03618157	-0.0103847	-0.030119	-0.0630257
64	Vilas	0.08080488	0.11622861	0.09386576	0.07818425	0.06810516
65	Walworth	0.05669335	0.1035241	0.07545516	0.08420222	0.06042051
66	Washburn	-0.0383301	-0.0463642	-0.0514236	-0.0447625	-0.0636457
67	Washington	-0.0227417	0.07641547	0.08893246	0.06931114	0.06566567
68	Waukesha	0.01420884	0.10779508	0.08183211	0.06975464	0.07201315
69	Waupaca	0.0963096	0.12328168	0.10948146	0.097942	0.08123582
70	Waushara	0.06290899	0.07130273	0.09810042	0.08299379	0.04454767
71	Winnebago	-0.0273915	0.07821407	0.03312246	0.03957928	0.01272964
72	Wood	-0.0308332	0.02298243	0.01271583	0.03710772	-0.0317019